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
B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF FINANCE

Applicant

and

THEGUARANTEE COMPANY OF NORTH AMERICA

Respondent

AWARD

Scott W. Densem – Arbitrator

Heard: March 24, 2011

Counsel:

John Friendly for the Applicant

Joel Timmerman for the Respondent

Award

Introduction

The parties appointed me pursuant to the *Arbitration Act, 1991,* and Section 7 of Regulation 283/95 of the *Insurance Act*, to arbitrate a dispute as to whether the Motor Vehicle Accident Claims Fund ("MVACF") is entitled to reimbursement of administrative costs, particularly field adjusting expenses paid to adjust the SABS claim of Mr. Behroozi.

The arbitration was conducted pursuant to the terms of an Agreed Statement of Facts signed by the applicant, February 24, 2011 and by the respondent, March 1, 2011. The arbitration was also conducted pursuant to an

August 24, 2010 letter from Densem ADR Solutions Inc. to counsel for the parties.

Factual Background to the Issues

As indicated this matter proceeded on an Agreed Statement of Facts. I have summarized here some of the important facts agreed to by the parties for the purpose of the issue to be decided.

On October 2, 2008, Mr. Carman Behroozi was a pedestrian when struck by a vehicle insured by the Guarantee Company of North America ("Guarantee").

On October 27, 2008, Mr. Behroozi applied to MVACF for Statutory Accident Benefits ("SABS").

On November 14, 2008, MVACF retained SCM Adjusters Canada Limited ("SCM") to adjust Mr. Behroozi's SABS Claim.

On January 13, 2009, MVACF served Guarantee with a Notice Dispute Between Insurers.

On February 18, 2009, adjusters representing Guarantee advised MVACF that they could not respond to the Notice of Dispute since Mr. Behroozi was out of the country and they wanted to meet him face to face.

Mr. Behroozi returned to Canada July 10, 2009.

On December 18, 2009 MVACF served Guarantee with a Notice of Commencement of Arbitration.

On January 14, 2010 Guarantee accepted priority from MVACF for the payment of SABS to Mr. Behroozi. Guarantee agreed to assume adjusting of the file as of January 15, 2009.

On April 23, 2010 Guarantee reimbursed MVACF for SABS in the amount of $26,933.30. Guarantee declined to pay $14,962.84 in adjusting expenses paid by MVACF to SCM prior to Guarantee accepting priority.

For the purposes of the issue decided herein it has been agreed that MVACF's adjusting expenses were for field adjusting services provided by SCM, and that they were reasonably required by MVACF to adjust Mr. Behroozi's SABS claim. The parties further agree that the adjusting services invoiced by SCM or equivalent services of a similar nature would have been obtained by Guarantee either through in house or independent adjusters had Guarantee received Mr. Behroozi's SABS application first.

The Issues

The matter proceeded before me on the preliminary issue of whether MVACF is entitled to be reimbursed for the adjusting expenses as described under the previous heading. The parties agree that should I conclude that MVACF is entitled to reimbursement for the adjusting expenses, then Guarantee, if so advised, may challenge the quantum of the expenses in a subsequent arbitration hearing seeking a determination of the appropriate amount of expenses to be reimbursed, plus interest, if any.

The Evidence

The following exhibits were introduced into evidence at the arbitration hearing:

Exhibit 1 - Agreed Statement of Facts signed by the applicant on February 24, 2011, and by the respondent on March 1, 2011.

Exhibit 2 – Productions of her Majesty the Queen in Right of Ontario as represented by the Minister of Finance (consisting of tabs 1 to 12 - A to I).

No *viva voce* evidence was called. Counsel submitted *facta,* and the matter proceeded by way of oral argument before me on March 24, 2011.

Analysis

MVACF submits that the law with respect to the recovery of administrative costs such as adjusting fees in priority dispute cases has evolved and is now as stated in *Ontario (Minister Finance) v. Lombard Insurance Co. of Canada*[1]

MVACF argues that the reasoning set out by Justice Perell in that case is now the current statement of law with respect to the recovery of administrative expenses in priority disputes and as such is binding upon private arbitrators.

MVACF argues that *HMQ v. Lombard* makes it clear that there is no longer any basis for arbitrators to deny recovery for administrative expenses in priority disputes provided they fall within the *ratio* of the *HMQ v. Lombard* insurance decision.

In the event that I were to find that *HMQ v. Lombard* Insurance is not a definitive statement of law permitting recovery of adjusting expenses in priority

[1] [2010] O.J. No. 1210

disputes, counsel for MVACF advanced additional arguments to support its entitlement to reimbursement. These arguments were essentially based on cases addressing the issue of whether other administrative expenses such as the costs of IMEs, DACs, surveillance, and expenses for legal fees were recoverable in a priority dispute situation.

Counsel directed me to the decisions of Arbitrator Jones in *Wawanesa Mutual Insurance Company v. Kingsway General Insurance Company*[2] and *Zurich Insurance Company* v. *Co-operators Insurance*[3]

I was also directed to the decisions of Arbitrator Novick in *MVACF v. Kingsway and Royal & Sun Alliance*[4] *and HMQ v. Lombard Insurance* [5]

I was also referred to a number of decisions that arose in the context of loss transfer indemnity claims pursuant to Section 275 of the *Insurance Act.* The main purpose for which I was referred to these decisions by counsel for MVACF was to note the different wording of Section 275 of the *Insurance Act* with respect to loss transfer, and Section 268 of the *Insurance Act* and Regulation 283/95 dealing with priority disputes.

The wording is sufficiently different that one cannot readily apply the approach taken to claims for reimbursement of administrative expenses in loss transfer indemnity claims to priority disputes. The wording of Section 275 (1) of the insurance act is arguably more specific regarding the claims that can be advanced by the insurer seeking indemnity. It states, "*the insurer responsible*

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[2] April 5, 2005,
[3] January, 2007
[4] January, 2010
[5] Arbitrator Novick's decision was appealed resulting in Justice Perell's Superior Court decision previously cited

under subsection 268 (2) for the payment of statutory accident benefits ... is entitled ... to indemnification ***in relation to such benefits paid by it ...*** *" (arbitrator's emphasis).*

There is no such wording in the priority dispute regulation or in Section 268 of the Insurance Act that can be interpreted as restricting claims in a priority dispute solely to statutory accidents paid.[6]

The arbitration decisions mentioned, and Arbitrator Bruce Robinson's decision in *HMQ v. Lombard Insurance and Kent & Essex Mutual Insurance Company* [7] advanced the law of the recovery of administrative expenses in priority disputes. They held that private arbitrators had authority to grant equitable remedies based on the principle of unjust enrichment. In *Zurich v. Co-operators*, Arbitrator Jones cites Section 31 of the Arbitration Act as the authority allowing arbitrators to grant equitable remedies.[8]

I think it is fair to say however, that the arbitral priority dispute administrative expense claim cases have applied a fairly restrictive interpretation of when and what type of administrative expenses should be allowed.

This brings me to the argument advanced by counsel for Guarantee. He points out that in the *Wawanesa v. Kingsway* case, although Arbitrator Jones was satisfied that expenses for IMEs, DACs and surveillance should be reimbursed, he suggested that he would have concluded otherwise had he been required to deal with the issue of reimbursement for adjusting expenses.

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[6] Arbitrator Jones offers a thorough analysis of this point in *Wawanesa v. Kingsway* under his heading "Amounts Recoverable"
[7] August 14, 2009
[8] At page 7

Arbitrator Jones states,

> *" The question of whether the cost of the adjuster handling the file should be recoverable was not before me and while I think there are valid reasons for not being able to recover such amounts, I make no findings in this regard."*

Although Arbitrator Jones did not elaborate on his reasons for suggesting that adjusting expenses should not be recoverable, one might infer those reasons from his decision in *Zurich v. Co-operators* which came two years later. In that case the issue before Arbitrator Jones was whether Zurich could recover its legal expenses, as distinct from adjusting expenses.

In *Zurich v. Co-operators*, Arbitrator Jones states,

> *It is, in my view one thing to compensate a company for expending monies to determine if the person is medically entitled to the benefits by having an IME or DAC. It is still another matter to extend this principle to legal costs associated with a hearing. I accept that an Arbitrator does have the equitable jurisdiction to order legal costs in the appropriate case, whether it is by way of the doctrine of unjust enrichment or restitution. It is, in my view, however, only to be used in the most extreme of cases ... The intent of the legislature was to create a quick, efficient and predictable dispute resolution scheme. To allow for legal costs incurred in first party disputes to be recovered regularly in priority disputes could lead to an almost endless examination of accounts and their reasonableness. While this may seem unfair, as one insurer has incurred the cost of handling a case that the other insurer was ultimately*

responsible for, it should be remembered that in the next case the same insurer may be the beneficiary. "

Although Arbitrator Jones does not specifically say so, one could conclude that his reasoning would be the same for adjusting expenses as they might well require an "endless" examination of accounts and their reasonableness.

The focus in these priority dispute administrative expense cases was on determining whether there was evidence of an attempt on the part of the insurer from whom these expenses were being sought to either evade responsibility for taking over the SABS claim when it ought to have done so, or to delay taking the claim over to defer or avoid the payment of expenses. Arbitrators in the priority dispute administrative expense cases appear not to have been prepared to permit recovery for expenses such as legal fees, and perhaps adjusting fees in the absence of behaviour by the resisting insurer that would amount to either a less than good faith handling of the priority dispute, or unreasonable indifference in dealing with the priority claim. This is the sum and substance of the argument advanced by counsel on behalf of Guarantee.

Counsel for MVACF submits that if it is still necessary to find either intentional or indifferent behaviour on the part of the priority dispute insurer from whom reimbursement of administrative expenses is being sought, there is evidence of such behaviour here. MVACF's counsel argues that Guarantee's reason for not being prepared to deal with MVACF's priority notice that the claimant, Mr. Behroozi, was out of the country, and they wanted to meet with him face to face, was not a sufficient reason to delay accepting priority. Guarantee

knew that its insured had struck Mr. Behroozi with his vehicle and that it had a valid policy of insurance in force for its insured at the time of the accident. That ought to have been sufficient for Guarantee to acknowledge responsibility to take priority for the claim from MVACF and then they could adjust it how they saw fit.

MVACF's counsel argues further that Mr. Behroozi returned to Canada on July 10, 2009 but, without explanation, Guarantee did not accept priority for the claim until six months later in January, 2010, and only after being served with a Notice of Commencement of Arbitration in December, 2009.

MVACF's counsel submits that these facts, coupled with Guarantee's agreement that it would have incurred the same or an equivalent kind of adjusting expenses that MVACF did to adjust the claim, reinforces that Guarantee's conduct was such that the adjusting expenses claimed by MVACF should be recoverable.

This brings me to Justice Perell's decision in *HMQ v. Lombard Insurance*. Counsel for MVACF argues that Justice Perell's decision is binding on me and stands for the proposition that adjusting expenses should be awarded on the basis of the application of the unjust enrichment principle as described by Justice Perell. MVACF's counsel submits that Justice Perell's statement of the law does not require evidence of deliberate or indifferent conduct on the part of the insurer from whom the expenses are sought before administrative expenses can be awarded applying the unjust enrichment principle. Recovery of these expenses should be awarded provided the insurer seeking the expenses can show they were incurred for the ultimate benefit of the responding insurer.

Counsel for Guarantee argues that Justice Perell's comments with respect to how the principle of unjust enrichment should apply to the recovery of administrative expenses like those under consideration here are *obiter dicta,* in which case they would not be binding on me. Counsel for Guarantee's argument is that since Arbitrator Novick at first instance did not make any finding on her jurisdiction to order reimbursement for administrative costs, the legal effect of Justice Perell's decision (because he reversed Arbitrator Novick on other grounds) was only to require that the matter be resubmitted to Arbitrator Novick to address the question of whether the administrative expenses were recoverable in accordance with the unjust enrichment principle.

To decide this point a careful analysis of Justice Perell's decision is required.

His analysis starts at paragraph 68 of the judgment. The first issue that he addresses is the question of whether an Arbitrator on a priority dispute has jurisdiction to award reimbursement beyond repayment of SABS only. He notes that up until then there had been "*no judicial pronouncement*" confirming such jurisdiction. Justice Perell makes reference to the previously cited decision of Arbitrator Bruce Robertson, *HMQ v. Lombard Insurance and Kent & Essex Mutual Insurance Company.* He approves of Arbitrator Robinson's conclusion that an Arbitrator has the jurisdiction to order reimbursement of expenses beyond repayment of statutory accident benefits. Justice Perell agreed as well that this jurisdiction is "*... tied to the idea of unjust enrichment...*"

I pause to note here that Arbitrator Robinson's decision in *HMQ v. Lombard Insurance and Kent & Essex Mutual Insurance* appears to me to be very similar in approach to the aforementioned decisions of Arbitrator Jones and Arbitrator Novick cited at page 4. Arbitrator Robinson confirms the views of those Arbitrators that an arbitrator has the jurisdiction to order the reimbursement of administrative expenses using the equitable remedy of unjust enrichment. He gives some fairly specific reasons however, for why he allows recovery in the case before him. His reasons in this regard are quoted below:

> *The original Arbitration in this matter was a very complex one...On the Appeal Mr. Justice Pitt confirmed the arbitration decision and stated at page 2: 'Notwithstanding that the Fund has been involved in these proceedings throughout, I find as a fact that it has been clear for some considerable period that the Fund has no ultimate exposure, although it has been unclear for some time which of Lombard or K & E is liable to pay.*
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> *Since at least October, 2004 K & E and Lombard were either aware or ought to have been aware of the accident and the Fund's stop gap Intervention. The failure of both companies to act on their obvious knowledge that the Fund has no ultimate exposure has serious implications for the administration of the public finances of the province. It is a circumstance that obtains all too often, and for which insurers must be held account.'*
>
> ***I find that this case has that unique set of facts, and special circumstances, that warrant my allowing these expenses based on the equitable principle of unjust enrichment and the Fund's legal right to***

> ***restitution. It also recognizes the public policy issues that arise where public funds are being expended. I find that allowing the specific expenses in this particular case, conforms to the guidelines setout in the cases cited and is in keeping with the comments of Mr. Justice Pitt. The facts and findings in the original decision and in the Appeal decision constitute this as an "extreme case"*** (Arbitrator's emphasis).

The preceding excerpt illustrates that Arbitrator Robinson's decision in *HMQ v. Lombard Insurance and Kent & Essex Mutual Insurance* is similar to the other arbitration cases mentioned in that he found "extraordinary and special circumstances", or an "extreme case", before allowing recovery for administrative expenses such as legal fees, adjusting expenses, and overhead costs on the unjust enrichment principle.

Although Justice Perell adopts Arbitrator Robinson's conclusion that an arbitrator has jurisdiction to award adjusting expenses on the basis of the unjust enrichment principle, Justice Perell does not discuss in any detail how that principle has been applied in the arbitration case law. His comments appear to address only the jurisdiction question. He says, "*...there is divergence in the arbitration case law and no judicial pronouncement about whether an arbitrator on a priority dispute has jurisdiction to award a reimbursement beyond the repayment of statutory benefits.*

Nevertheless, Justice Perell clearly references the fact that Arbitrator Robinson's decision, "*...reviewed several arbitration decisions...*", so I think that it must be concluded that Justice Perell was clearly aware of the relevant case

law when he made his comments about how the principle of unjust enrichment should be applied to claims for reimbursement beyond statutory benefits.

These comments are found at paragraph 74 of his judgment. Justice Perell describes the unjust enrichment principle as it applies to reimbursement beyond statutory benefits in priority dispute cases as follows:

> *... the idea of unjust enrichment ... entails that the costs for which reimbursement is being sought are costs that were incurred for the ultimate benefit of the insurer that will assume responsibility for the statutory benefits. In the case at bar, the connection to unjust enrichment entails that the Fund would not necessarily be held harmless for all expenses and costs it paid to date. Rather, it would be entitled to recover only those costs that unjustly enriched Lombard because Lombard is saved having to incur these expenses.*

Counsel for Guarantee may be correct in that technically speaking, Justice Perell's comments regarding the application of the principle of unjust enrichment to reimbursement beyond statutory benefits in priority disputes could be *obiter dicta*. The comments were not strictly necessary to the result in the case. The arbitration decision was reversed on other grounds. Therefore, they would not be binding on me as an arbitrator.

Given the conclusion that I have reached, I do not have to decide that issue. I agree with Justice Perell's reasoning, and I find that his approach to applying the unjust enrichment principle to reimbursement beyond statutory benefits in priority dispute cases makes both legal and practical sense.

Justice Perell's decision, and the weight of the arbitration authorities confirm that an arbitrator has jurisdiction to award reimbursement beyond statutory benefits in priority dispute cases on the basis of the equitable remedy of unjust enrichment. As Arbitrator Jones noted in *Zurich v. Cooperators*[9], section 31 of the *Arbitration Act* requires an arbitrator to decide a dispute, *"... in accordance with law, including equity..."*, and an arbitrator may order, *"...equitable remedies."*

On the issue of how the unjust enrichment principle should be applied to reimbursement beyond statutory benefits in priority dispute cases, I favour the approach of Justice Perell.

That approach involves determining whether a particular expense for which reimbursement is sought ultimately benefited the insurer who is the proper payor of statutory benefits as determined by the priority rules ("the priority insurer"). If an expense is one that reasonably would have been incurred by the priority insurer and it has been saved that expense because the first insurer paid it, then the first insurer should be able to recover that expense from the priority insurer. If an expense is one that would not reasonably have been incurred by the priority insurer and it derives no benefit from it, then the first insurer should not be able to recover that expense from the priority insurer.

Justice Perell put no "gloss" on the application of the unjust enrichment principle to reimbursement beyond statutory benefits in priority disputes. In other words, he did not suggest that it was necessary to have "special circumstances", an "extreme case", or evidence of deliberate or unreasonably indifferent

[9] *Supra*, note 8.

behaviour on the part of the priority insurer before expenses beyond statutory benefits could be reimbursed on the basis of the unjust enrichment principle. Generally speaking, as a matter of law, I do not understand the application of the equitable remedy of unjust enrichment to require evidence of such conditions or behaviour.

Justice Perell was clearly familiar enough with the case law that if he thought such additional conditions were appropriate he would have said so. I am of a similar view. I see no valid reason either in law or in practice to deny recovery from a priority insurer of administrative expenses incurred by a first insurer, **provided** the first insurer can establish on a balance of probabilities that those expenses were reasonable both in the fact that they were incurred, and in their quantum, and that they inured to the benefit of the priority insurer with respect to the statutory benefits claim it is taking over.

Without intending this list to be exhaustive, I would apply this approach to administrative expenses such as adjusting fees, legal expenses, IME's, surveillance, overhead costs, and other similar expenses commonly incurred by insurers in handling statutory benefits claims.

The only argument I have seen in the arbitration decisions to support limiting when such expenses should be recoverable or allowing some of them but not others, is that it could prove complicated and time consuming to deal with such claims for reimbursement. Although I accept that this may be true, I do not view it as having a sufficient legal basis to deny recovery of those expenses to a

first insurer from the priority insurer who has the ultimate responsibility in law to administer and pay the statutory benefits claim.

Those arbitrators who have expressed what might be characterized as a "floodgates" concern if expense recovery is not more limited are widely recognized as experts who are extremely knowledgeable and proficient in dealing with priority, and loss transfer disputes. They must routinely deal with very similar issues in deciding the merits of these disputes. Many cases already involve examining issues of whether certain amounts paid are both appropriate, and reasonable with respect to quantum. In addition, for every case that goes to decision, unless the parties otherwise agree, the arbitrator must address costs issues that require an examination of legal fees and disbursements. I do not think that the potential for more or longer arbitrations of dispute proceedings outweighs the unfairness of requiring the first insurer to absorb what often are considerable file handling expenses for a claim that the priority insurer has the ultimate legal obligation to handle.

I would suggest as well that it is better from an insurance industry standpoint in the arbitration of these cases to conduct an assessment of whether expenses claimed for reimbursement are reasonable, and whether they have benefited the priority insurer. This is preferable to making the focus of the inquiry, and hence the arbitrator's award, whether there has been some kind of misconduct or indifference on the part of the priority insurer.

Finally, I would observe that if priority insurers are aware that they are exposed to paying back the first insurer for all expenses satisfying the unjust

enrichment principle as enunciated by Justice Perell in *HMQ.* v. *Lombard*, it would remove any temptation for the priority insurer to sit back and let the first insurer continue to adjust the claim. Thus this approach encourages more prompt assumption of claims by priority insurers.

Conclusion

In their Agreed Statement of Facts the parties have stipulated that the adjusting expenses for which reimbursement is claimed by MVACF in this arbitration were reasonably required to adjust the SABS claim of Mr. Behroozi. It is also agreed that adjusting services of the same or a similar nature would have been engaged by Guarantee had the SABS claim been presented to it first. In my opinion then, subject to quantum issues, the requirements for reimbursement in accordance with the unjust enrichment principle have been satisfied in this case.

MVACF has claimed reimbursement for $14,962.84 in field adjusting expenses, plus interest. The parties agreed before me that, depending on my decision with respect to the entitlement of MVACF to be reimbursed for adjusting expenses, Guarantee reserved its rights to dispute the reasonableness of the quantum of the adjusting expenses claimed.

For the reasons that I have detailed in this Award, I find that MVACF is entitled to reimbursement for the adjusting expenses incurred in handling the SABS claim of Mr. Behroozi. If the parties are unable to agree on quantum with respect to the adjusting expenses, the parties should contact my Coordinator to

arrange a post-arbitration conference to discuss scheduling further arbitration proceedings on this issue.

MVACF is entitled to its costs of these arbitration proceedings to date, including indemnity for the fees and disbursements of the Arbitrator. If the parties are unable to agree on the quantum of costs they should contact my Coordinator to arrange a post-arbitration conference to discuss scheduling of submissions with respect to costs.

Dated at Toronto, this 25th day of July, 2012

Arbitrator Scott Densem