

CITATION: *Zurich Insurance Company Ltd. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 3902
COURT FILE NO.: CV-10-408030
DATE: 20110622

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **Zurich Insurance Company Ltd. et al.**, Applicant

AND:

Ison T.H. Auto Sales Inc., Respondent

BEFORE: G.R. Strathy J.

COUNSEL: *Hillel David*, for the Applicants

Theodore Charney, for the Respondent

HEARD: By written submissions

COSTS ENDORSEMENT

[1] I have received the costs submissions of counsel for the parties and this is my decision on costs.

[2] The respondent asks for costs on a full indemnity basis of \$73,902.27 or, alternatively, on a partial indemnity basis in the amount of \$41,936.90.

[3] The ultimate objective, having regard to the factors set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, is to make an award that is fair and reasonable in the circumstances, including the reasonable expectation of the parties: *Boucher. v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634.

[4] In this case, the circumstances justify a substantial award of costs, but they do not justify an award on a substantial indemnity basis.

[5] *Result of the Proceeding:* The respondent was successful. The application was dismissed. I do not accept the submission of the applicant that neither party was successful. Costs should ordinarily follow the result.

[6] *Offer to Settle:* There was an offer made by the respondent to communicate with the insurer and to keep it apprised of the progress of the litigation. Mr. Charney acknowledges that it was not a rule 49 offer, although to some extent it reflects the outcome of the application. It was not, however, an offer to settle the application and it is not reflective of any particular compromise of the motion. I attach little weight to it.

[7] *The Principle of Indemnity*: The principle of indemnity is an important consideration, but it is not an over-riding one. The award of costs is not merely a mathematical exercise of multiplying hours by hourly rates. It must be balanced against the other factors.

[8] In this case, the respondent's docket shows about 80 hours of Mr. Charney's time. This is very consistent with the time spent by Mr. David, counsel for the applicant and could be described to be within the *reasonable expectations* of the applicant. The balance of the time (about 40 hours) was spent by a relatively junior lawyer, who was clearly in a secondary role, and by law clerks (15 hours).

[9] Mr. Charney claims a partial indemnity rate of \$350 per hour for himself and \$150 per hour for his associate.

[10] On a partial indemnity basis, it would be appropriate to award something in the range of \$25,000 for fees, recognizing that the heavy lifting was unquestionably done by Mr. Charney and there was likely some duplication and inefficiency in the work of the associate and clerks.

[11] *The complexity of the proceeding*: The issue was reasonably complex, although the legal authorities were well-settled.

[12] *The importance of the issues*: The issue of carriage of the proceedings was important to the parties.

[13] *Conduct of the parties*: I do not find anything in the conduct of either party that would warrant either reducing or increasing the costs awarded. The motion was hard-fought and contentious, but there was no exceptional conduct, one way or the other, that would warrant special consideration.

[14] I do not accept the submission, made by the respondent, that there were allegations of bad faith on the part of the insured or that those allegations, if made, would be sufficient to support an enhanced award of costs. I agree with the submissions of Mr. David that the breach of the duty of good faith is not the same as bad faith. The fact that the applicant had requested full indemnity costs is not necessarily indicative of an allegation of bad faith but, even if it was, I would not take it into account in fixing the respondent's costs.

[15] The failure of the parties to reach an agreement, either at the time the insurance claim was settled or subsequently, is unfortunate, but it would not be a reason to penalize one party or the other.

[16] *The claim for full indemnity costs*: The respondent, insured, advances a claim for full indemnity costs, based on the language of the policy that provides that the "costs of recovery" should be deducted from the amount ultimately payable to the insurers and based on alleged allegations of bad faith. I have already dealt with the latter claim. The subrogation clause is referring to the "costs of recovery of the claim against the third party", not the costs of a dispute between the insurer and the insured. I do not agree that the case is similar to those in which an insurer has wrongfully refused to defend its insured: see *Hanis v. Teevan*, 2008 ONCA 793 at para. 1.

[17] Standing back and considering what is fair and reasonable, it is my view that the full indemnity claim is not only unwarranted, it is entirely out of proportion to what would be fair and reasonable for a claim of this kind. In my view, this dispute (and indeed the submissions on costs) became unnecessarily over-heated. I did not allocate responsibility for this in my reasons, and I do not propose to do so now, except to say that there was some degree of responsibility on both sides.

[18] In my view, it would not be unreasonable, considering all the factors discussed above, to make an award in favour of the respondent in the rounded sum of \$30,000, inclusive of taxes and disbursements. The applicant shall have 30 days within which to pay these costs.

G.R. Strathy J.

Date: June 22, 2011