

CITATION: *Zurich Insurance Company Ltd. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 2511
COURT FILE NO.: CV-10-408030
DATE: 20110421

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ZURICH INSURANCE COMPANY LTD. et al

Applicant

- and -

ISON T.H. AUTO SALES INC.

Respondent

SUPPLEMENTARY REASONS

G.R. Strathy J.

April 21 2011

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

SUPPLEMENTARY REASONS

[1] My reasons in this matter were released on March 25, 2011: *Zurich Insurance Company Ltd. v. Ison T.H. Auto Sales Inc.*, 2011 ONSC 1870. I dismissed the insurers' application for a declaration that they were entitled to carriage of an action commenced by their insured against a third party, in which the insured's uninsured claim, as well as the insurers' subrogated claim, was being asserted. The insurers had also asked, in the alternative, for an order that they were entitled to have "full and meaningful participation" in the conduct of the action and control of the subrogated claim advanced in the action.

[2] In the final paragraph of my reasons, para. 81, I stated:

For these reasons, the application is dismissed. I see no reason to disturb the current arrangement. Toronto Honda will remain in control of the litigation and Falconer Charney and Sutts Strosberg will remain as counsel. If the parties, exercising common sense and good faith, are unable to agree on appropriate procedures for the protection of the insurers' interests, written submissions on the issue may be made to me. I will then issue supplementary reasons dealing with the matter.

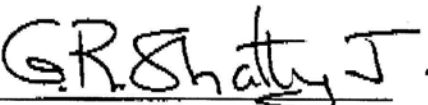
[3] It is apparent that the parties, or their lawyers, have been unable to resolve the problem, as they are at an impasse. I have now received written submissions from counsel.

[4] Counsel for the insured submits that it would be dangerous to devise guidelines without knowing the precise factual circumstances in which those guidelines are to be applied. He

submits that the parties should be left to their common law rights. He undertakes that, in that event, as long as Falconer Charney and Sutts Strosberg are counsel of record, they will keep the insurers informed of the status of the litigation, including major issues in the litigation, and will consult with the insurers on the prosecution of the litigation, including any settlement offers. They have also offered, and I take as included in this undertaking, to provide the insurers with Schedule A productions (at the insurers' cost) and to consent to the insurers' attendance at discovery as observers.

[5] Counsel for the insurers is not content with these undertakings. It is his position that the insurers are entitled to participate directly in the action for the purpose of controlling the subrogated claim and that they are to be treated as clients of counsel of record, including having a right to instruct counsel with respect to the subrogated claim (except as regards the issue of liability, which is common to the insurers and the insured).

[6] Having considered those submissions, I have concluded that – in spite of my initial enthusiasm – it would be inappropriate for the court to micro-manage the ongoing relationship between the insurer and the insured and that, subject to the undertaking, they are best left to their common law obligations, however they may interpret them, and to their common law remedies. For these reasons, I have decided to make no further order.


G.R. Strathy J.

Date: April 21, 2011