

**CITATION NO.:** Old Republic Insurance Company of Canada v. Jerry Van Dyke Travel, 2023  
ONSC 6424

**COURT FILE NO.:** CV-20-73968

**DATE:** November 14, 2023

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Old Republic Insurance Company of Canada, Plaintiff/Moving Party

**AND:**

Jerry Van Dyke Travel Service Ltd., Defendant/Responding Party

**BEFORE:** MacNeil J.

**COUNSEL:** *M. Edward Key* – Lawyer for the Plaintiff

*David W. Powrie* – Lawyer for the Defendant

**HEARD:** August 1, 2023

**REASONS FOR DECISION**

**INTRODUCTION**

[1] The Plaintiff, Old Republic Insurance Company of Canada (“ORIC”), is an insurance company that issued travel insurance policies to customers who purchased trips from the Defendant, Jerry Van Dyke Travel Service Ltd. (“JVD”), but whose trips were cancelled due to the COVID-19 pandemic. Various of those travellers submitted claims to ORIC under a trip cancellation policy. ORIC and JVD were unable to agree on certain issues relating to the allocation of refunds and credits that ORIC believes JVD received from third party suppliers after the trips were cancelled. As a result, ORIC commenced the within action seeking various declarations and damages.

[2] ORIC makes this motion seeking production of a further and better affidavit of documents from JVD in order for a proper determination to be made as to ORIC’s obligations under the issued policies.

[3] JVD opposes the motion and argues that ORIC already has all the documentation it needs to reimburse the travellers who submitted trip cancellation claims (“the ORIC Insureds/JVD Customers”).

- [4] Cassandra Timms, Vice President of Accident and Sickness for ORIC, was cross-examined on her affidavits filed in support of ORIC’s position; and Dan Chetrit, Co-President of JVD, was cross-examined on his supporting affidavits filed on behalf of JVD. Transcripts of both cross-examinations were filed.

## **BACKGROUND**

- [5] JVD carries on business as a wholesaler of pre-packaged international trips and tours. It arranges and funds the complete trips prior to selling packages to the public. JVD enters into agreements with third party suppliers, who all have their own terms and conditions about travel, including cancellation policies and fees.
- [6] JVD is registered with the Travel Industry Council of Ontario (“TICO”) under the *Travel Industry Act, 2002*, S.O. 2002, c. 30, Sched. D (“the *Travel Industry Act*” or “the Act”).
- [7] While all JVD trip packages include a uniform set of terms and conditions associated with trip cancellations, customers can purchase separate trip cancellation insurance to protect against trip cancellations that do not fall under the JVD terms and conditions. ORIC is one of the insurance companies that offers such additional trip cancellation insurance.
- [8] On September 29, 2020, ORIC issued a Statement of Claim against JVD. On June 28, 2021, JVD delivered its statement of defence. The parties have not yet attended examinations for discovery.
- [9] By its original Notice of Motion, dated March 25, 2022, ORIC sought:
1. An Order requiring JVD to produce a sworn affidavit of documents within 30 days of this Order, which shall include documentation relating to travellers who were insured under ORIC’s policies for 2020 trips cancelled for COVID-related reasons, including the following:
    - (a) details of any refunds, credits, vouchers, or any compensation issued to JVD travellers by third parties including, but not limited to, governments and travel suppliers;
    - (b) details of any refunds, credits, vouchers, or any compensation received by JVD from third parties, including, but not limited to, governments and travel suppliers, and not passed on to travellers;

- (c) documents pertaining to vendors that were contracted by JVD to provide the goods and services for 2020 travel at issue, including their formal and informal agreements concerning all refunds, credits, vouchers, or compensation to JVD for cancelled travel;
- (d) correspondence between JVD and the travellers regarding 2020 travel cancelled for COVID-related reasons;
- (e) confirmation, as of the date of travel cancellation in 2020 for COVID-related reasons, of whether JVD:
  - (i) delivered all or part of travellers' payments to its third party vendors; and
  - (ii) retained payments received from travellers;

After receiving JVD's affidavit of documents and supplemental affidavit of documents, which included documents requested by ORIC's Notice of Motion at paragraphs 1(a) through 1(e)(i), ORIC amended its Notice of Motion to remove the satisfied items and to include an additional category of documents, namely:

- (f) correspondence between JVD and TICO regarding 2020 trips cancelled for COVID-related reasons.

[10] Accordingly, by this motion, the two categories of documents left to be considered for production purposes are: 1(e)(ii) regarding retained payments, and 1(f) regarding TICO correspondence.

## THE LAW

[11] Rule 30.02(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that every document "relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed ... whether or not privilege is claimed in respect of the document".

[12] Relevance is determined by reference to the pleadings; a document is "relevant" if it is logically connected to and tending to prove or disprove a matter in issue: see *Sycor Technology Incorporated v. Kiaer*, 2012 ONSC 5285 (Ont. S.C.J.), at para. 23.

[13] Rule 30.06(b) provides that, where a court is "satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly

made”, the court may, among other things, order service of “a further and better affidavit of documents”. Rule 29.2.03(1) provides that proportionality is a factor to be considered by the court when determining whether a party or other person should be required to produce documents.

[14] In *Oz Optics Ltd. v. Jing Ru Zhang*, 2017 ONSC 4263 (Ont. S.C.J.), at paras. 7-8, Bell J. summarized the factors for determining whether an order under Rule 30.06(b) should be made, as follows:

7 ... The level of proof required should take into account the fact that one party has access to the documents, while the other party does not. (*RCP Inc. v. Wilding*, [2002] O.J. No. 2752 at para. 9.) While there must be evidence that documents have been withheld before an order under Rule 30.06 will be made, commencing discovery and moving for further production after obtaining admissions is not the only appropriate procedure to be followed. I agree with Master MacLeod (as he then was), that the court should be cautious about endorsing a process “which results in successive rounds of discovery, productions and motions.” (*RCP Inc. v. Wilding* at paras. 9 and 10.)

8 In making a determination as to whether a party is required to produce a document, the principle of proportionality requires that I consider whether, the time required to produce the document would be unreasonable; the expense associated with producing the document would be unjustified; production of the document would cause undue prejudice; production of the document would unduly interfere with the action’s orderly progress; and the document is readily available from another source: Rule 29.2.03(1). The overall volume of documents is also a factor to be considered: Rule 29.2.03(2).

## ISSUES

[15] The following issues to be determined by this motion then are:

- (a) Should JVD be required to produce confirmation, as of the date of travel cancellation in 2020 for COVID-related reasons, of whether JVD has retained payments received from the ORIC Insureds/JVD Customers?
- (b) Should JVD be required to produce correspondence between JVD and TICO regarding 2020 trips cancelled for COVID-related reasons?



## ANALYSIS

- (a) *Should JVD be required to produce confirmation, as of the date of travel cancellation in 2020 for COVID-related reasons, of whether JVD has retained payments received from the ORIC Insureds/JVD Customers?*

### Position of ORIC

[16] ORIC takes the position that JVD has a statutory obligation pursuant to s. 46(1) of O. Reg. 26/05 - General made under the *Travel Industry Act* (“Regulation 26/05”), to make customers whole where the supplier of travel services fails to provide travel services. In such circumstances, there would be no claim payable under the ORIC policy. Section 46(1) reads:

46. (1) If a registrant acquires rights to travel services for resale to other registrants or to customers, and the supplier fails to provide the travel services paid for by a customer, the registrant who acquired the rights for resale shall,

- (a) reimburse the customer;
- (b) provide comparable alternate travel services that are acceptable to the customer; or
- (c) provide the customer with a voucher, certificate, coupon or similar document that is acceptable to the customer, for future redemption towards travel services.

[17] Where s. 46(1) does not apply, ORIC argues that its policy provides coverage for trip payments less any refunds or credits received and, as stipulated in the coordination of benefits clause of the policy, secondary to any other sources of coverage, except for certain coverages inapplicable to the issues in the within action.

[18] The coverage granted under ORIC’s policies relating to trip cancellations for prepaid travel packages provides, in part:

#### **What We Pay – Trip Cancellation**

You are covered up to the lesser of the maximum amount shown on the Schedule of Maximum Benefits or the amount as otherwise specified in the benefit, when a covered event listed on pages 15 to 22 causes you to cancel your covered trip, for any of the following applicable expenses incurred by you:

1. For trip cost payments and deposits you made before your covered trip was cancelled, less any refunds or credits you are entitled to receive;

[19] The provision relating to coordination of benefits reads as follows:

**Coordination of benefits:** The benefits in this **policy** are secondary to those available under any other coverage **you** may have including but not limited to government health insurance, group or personal accident and sickness insurance, extended health or medical care coverage, any automobile insurance or benefits plan, homeowner tenant or other multi-peril insurance, credit card benefit insurance, other travel insurance and replacement travel options offered by airlines, tour operators, cruise lines and other travel suppliers.

The **company** will coordinate benefits payable under this **policy** with benefits available to **you** under any other policy or plan, so that payments made under this **policy** and from all other sources will not exceed 100% of the eligible expenses incurred.

[20] ORIC contends that, in the event that JVD has received credits, travel vouchers or refunds from travel suppliers, JVD holds those credits, travel vouchers and refunds *in trust* for the traveller. Failure to apply the benefit of those credits, travel vouchers and refunds to the traveller's trip payment results in JVD being unjustly enriched and is a breach of its statutory obligation under the *Travel Industry Act*.

[21] ORIC submits that, in order to determine the claims in accordance with the terms of its policy, ORIC needs production of the documents it seeks by this motion. Since ORIC is a secondary payor, there must be a coordination of benefits provided by the different insurance coverages. This is pleaded in ORIC's statement of claim. ORIC pays second to any other credits, vouchers and source of funds received. ORIC is not required to over-pay and there is money sitting un-dispersed in JVD's bank account that may be deemed to be held in trust for the customers. If s. 46 of Regulation 26/05 applies, then JVD should pay the customers and not ORIC. If ORIC must pay, monies held in trust by JVD for the customers must be accounted for and factored into the equation. The statement of claim puts those monies squarely in issue.

[22] At the hearing, ORIC clarified that it does not seek production of JVD's entire general ledger. In its request for relief in paragraph 1(e)(ii), ORIC used the term "confirmation" but this is only a short form for whatever documents exist in JVD's computer database that show JVD's trust amounts as of the trip cancellation dates. JVD has confirmed that not all costs are disbursed before customers leave on a trip. ORIC does not know JVD's

accounting system or what reports it can run. But JVD's system should be able to produce a document showing the ORIC Insureds/JVD Customers' trip costs and the amounts held in JVD's account relating to those travellers, as of the date the trips were cancelled.

- [23] Given that some amounts are not paid until after a trip and since here the ORIC Insureds/JVD Customers have not departed, the logical conclusion is that at least some money has been left in JVD's account. While ORIC as the moving party bears the onus on this motion, JVD is the party possessing better information. It is implausible that JVD can claim that it has no documents identifying the monies that remain in its account as of the date the ORIC Insureds/JVD Customers' trips were cancelled.

### Position of JVD

- [24] It is JVD's position that a "confirmation" is not a production request. It is a question to be asked at an examination for discovery. Accordingly, ORIC's inquiry is premature and production of any documents pertaining to the "confirmation" should be denied. Further, JVD submits that it has produced all relevant documents, including all invoices, itineraries, correspondence with travellers, and documentation with trip suppliers and tour companies. JVD contends that every bit of information the plaintiff requires to adjust the claims of the ORIC Insureds/JVD Customers is contained in the affidavits of documents.
- [25] Counsel for JVD submits that there is no document that currently exists showing a breakdown of individual customers and their retained payments. At his cross-examination, Dan Chetrit's evidence was that JVD's general ledger would show money received from JVD customers and money going out from JVD to various service providers/vendors, but there are no journal entries for each individual guest. JVD cannot produce a document that does not exist and JVD is not obligated to create a new document. Therefore, ORIC must ascertain the amount of monies not yet dispensed to the service providers from an analysis of the documents produced showing what was invoiced and paid by JVD and what was refunded or credited (to the extent that refunds or credits were received by JVD). This is sufficient information to gather data regarding funds retained by JVD, if any. At her cross-examination, Ms. Timms testified that, although she reviewed JVD's produced documents, she did not make any notes about the documents and while she saw invoices to travellers for the purchase of the trips, she testified that no work has been done by ORIC to calculate what was paid and what was refunded.

### Discussion

- [26] In paragraphs 32 through 34, 41, 45, and 58 of the statement of claim, ORIC alleges that JVD received funds from the ORIC Insureds/JVD Customers that were designated for

payment to service providers for prepaid trips but which funds were not delivered to those providers because of the trip cancellations. ORIC argues that the funds were received in trust and remain in trust pursuant to the *Travel Industry Act* and its regulations and, therefore, to the extent JVD has retained any such funds, it has been unjustly enriched and is in breach of its statutory obligations. ORIC seeks records showing the amounts received by JVD from the ORIC Insureds/JVD Customers, and how much remained in JVD's account for each traveller when their trip was cancelled.

- [27] Given ORIC's claims of unjust enrichment, breach of trust and damages for intentional interference with contractual relations, I am satisfied that the amount of retained payments is relevant. I agree with ORIC that it can be reasonably assumed that JVD, through its accounting software program or otherwise, can generate reports showing the amount of monies remaining in its account as paid to it by the ORIC Insureds/JVD Customers. Just as the amount of the refunds/credits is relevant to the claims, so too is the amount of the retained payments. Disclosure of the retained payments also avoids the potential for double recovery and overlap of damages. The information is relevant as it will tend to prove or disprove amounts that will factor in to determining how much ORIC may be obligated to pay under the trip cancellation insurance policy, and to the damages claimed. ORIC will be at a disadvantage at the discoveries without this information. All relevant documentation should be produced in advance of discovery so that examinations are productive and efficient.
- [28] I do agree with JVD in a general sense that a party is not required by Rule 30.02(1) to create a new document. However, courts have held that, in appropriate circumstances, a party can be required to pull information stored on a computer database even if this results in the "creation" of a printed document that did not exist prior. This is because the term "document" is defined in Rule 1.03(1) as including "data and information in electronic form"; and, in turn, "electronic" is defined as including "created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and 'electronically' has a corresponding meaning".
- [29] On cross-examination, Mr. Chetrit testified: "In none of the trips in the company's ordinary course of operation, are a hundred percent of the vendors paid for all services to be rendered at a future date prior to the date of departure." He conceded that JVD's general ledger, which has not been produced, will show the money received and the money sent out on certain dates to service providers, as evidenced by the invoices produced. But he testified that the accounting system does not produce how much money has not been paid out and the general ledger cannot produce the money that has been paid to the service providers/vendors on a per traveller basis. Mr. Chetrit explained that JVD

has a “reservation system” that has customer information and transactions relating to those customers are “pushed to the accounting system”. But Mr. Chetrit stated that he would “be surprised” if the accounting system itself has each customer’s name next to “that upload”.

- [30] JVD has not taken the position that the retained payments information is irrelevant. Rather, it has told ORIC to do the math on its own from a review of the produced invoices. However, given the staggered disbursements, I agree with ORIC that it is not a matter of simply looking at the invoices and then being able to determine with certainty the amount that remains undisbursed from JVD’s account.
- [31] I accept that in the ordinary course of its business, JVD would keep records relating to each of its customers’ trips and what has been paid so far and what funds remain in JVD’s account, pending disbursement. So, it is reasonable to assume that those records exist. In reaching this conclusion, I rely on the comment of Bell J. in *Oz Optics*, at para. 7, that “[t]he level of proof required [to demonstrate that documents exist] should take into account the fact that one party has access to the documents, while the other party does not.” In cross-examination, Mr. Chetrit agreed that there were some funds received from the ORIC Insureds/JVD Customers that have not been paid out to the service providers as of the date of the trip cancellations. As well, Mr. Chetrit’s evidence was that JVD has a reservation system that has customer information and transactions information which is pushed to the accounting system; the same system shows payments to service providers/vendors.
- [32] In my view, to require JVD to review and produce a document(s) – whether accessible through its reservation system or its accounting system – showing how much money has been paid in and out for each of the ORIC Insureds/JVD Customers is appropriate in the circumstances. By deduction, the parties could then figure out how much money has *not* been sent and so is being retained by JVD. While this information may also be evidenced by the invoices and the payments that were produced in JVD’s affidavits of documents, I am satisfied that information stored in JVD’s accounting system also constitutes a “document” as defined in Rule 1.03(1) as “data and information in electronic form” which is relevant and which has not yet been produced.
- [33] On a Rule 30.06 motion, the plaintiff must provide some evidence that the defendant has relevant documents in its possession or control that have not been disclosed. I am satisfied that ORIC has satisfied the burden to be met. I concur with ORIC that there is a basis for concluding that there are additional records containing information that is relevant to ORIC’s case that have not been disclosed by JVD. In arriving at my decision, I have also considered the issue of proportionality and that production of a printout of the relevant

financial or general ledger information will not require undue effort or expense or unduly increase the volume of productions or prolong examinations for discovery for no justifiable reason.

- [34] Accordingly, I order that JVD produce a further and better affidavit of documents that includes all documents relating to and disclosing retained payments received from the ORIC Insureds/JVD Customers who still have open claims against ORIC, as of the date of travel cancellation in 2020 for COVID-related reasons. If JVD is producing content from its general ledger, it may redact those portions of the ledger that JVD asserts are not relevant. If JVD does redact, then it shall identify the specific basis for redaction and provide general information regarding what has been redacted to allow ORIC to consider its own position on relevance. Retained payments information regarding travellers who have withdrawn their claims against ORIC need not be produced since, in my view, it is no longer relevant for the purposes of this litigation because ORIC is no longer potentially liable to pay those travellers anything under the trip cancellation policy.

***(b) Should JVD be required to produce correspondence between JVD and TICO regarding 2020 trips cancelled for COVID-related reasons?***

Position of ORIC

- [35] ORIC made its position on s. 46 of Regulation 26/05 known to JVD early on. JVD then sought the advice of TICO on the issue and, by way of correspondence from McCarthy Tétrault dated July 24, 2020, informed ORIC’s counsel of TICO’s response that s. 46 does not apply in the circumstances (“the McCarthy Letter”). JVD also included in its affidavit of documents a single email chain between JVD and TICO, dated in June 2020, under the category called “Communications with TICO”. However, JVD has refused to disclose other of its communications with TICO.
- [36] ORIC filed complaints with TICO against JVD concerning twenty of the ORIC Insureds/JVD Customers and asked TICO whether the cancellation of their trips triggered JVD’s obligations under s. 46. TICO made a decision on those complaints and JVD was directed to reimburse seven of the travellers. However, ORIC was not informed about the terms of those reimbursements or TICO’s interpretation of s. 46. TICO’s decisions in this regard is different than its original response as set out in the McCarthy Letter.
- [37] ORIC submits that the correspondence between JVD and TICO relating to compliance under s. 46 is relevant to the issues pleaded in the within action. ORIC relies on Arrell J.’s decision in *Old Republic Insurance v. Explorica Canada*, 2021 ONSC 4315 (Ont. S.C.J.) in this regard wherein information relating to a TICO audit regarding the payment of refunds was held to be relevant. In that decision, Arrell J. was deciding two motions

brought by Explorica: (i) a Rule 21.01(1)(a) motion for a determination of a question of law, and (ii) a motion to quash a summons issued by the plaintiffs to examine a representative of Explorica under Rule 39.03. Explorica took the position that the terms and conditions in its contracts with its customers regarding refunds were clear, that the contracts did not involve the plaintiffs, and that its customers had no right to any amount a third party supplier may have refunded Explorica for cancelled trips. In that case, the plaintiffs argued that summary judgment was not appropriate since there were facts in dispute and the court needed information concerning refunds received by Explorica from third party suppliers for customers who had made a claim on the plaintiffs' policies, to decide the motion on its merits. The plaintiffs argued that Explorica would receive a windfall of funds from third party suppliers if the cancellations of trips were not within the scope of the terms and conditions of the trip contract between Explorica and its customers, which would be grossly unfair to the plaintiffs. Arrell J. agreed with the plaintiffs that there were a number of claims that would continue, such as the intentional interference with economic relations/unlawful means, common law trust obligations and unjust enrichment, and so granting the Rule 21.01 motion would not significantly shorten the trial. The court concluded that the plaintiffs' policies were in excess of all other sources of coverage or indemnity, and there was a potential for Explorica to receive a windfall. Arrell J. held, at paras. 31-32:

- 31 Based on the position taken by Explorica, this court would be unaware of what funds were paid back to Explorica based on whatever arrangements it made with its airline travel and overseas partners on behalf of its customers for cancelled trips. These funds were not reimbursed to those customers because the cancellations fell outside the terms and conditions of the contracts. Those would be windfall funds paid to Explorica which may have kept its individual customers funds as well if the cancellations did not fall within the terms of the customers' contracts. In reality, in those cases, Explorica is seeking to be paid twice for a cancelled trip. This is a result, this court finds, would be inequitable and unfair both to the individual customers who may not have purchased other trip cancellation insurance and would receive nothing, or to the plaintiffs which may be obligated to pay out on its policies while Explorica is paid twice.
- 32 The Travel Industry Council of Ontario ("TICO") conducted an "audit" on some cancelled trips and ordered Explorica to pay out refunds in addition to its terms and conditions for a number of travellers. It is unknown to this court what audits were conducted or what funds were returned to customers or why. Nor does the court know what evidence

was presented to TICO as Explorica takes the position that the plaintiffs are not entitled to this disclosure. It would seem to this court that this is relevant information that should be before it for a complete record to this R. 21 motion and clearly this is information Explorica possesses.

- [38] Arrell J. dismissed Explorica's motion to quash a summons and ordered that the examination of the Explorica representative proceed. He also dismissed the Rule 21 motion on a without prejudice basis.
- [39] ORIC disputes JVD's argument that ORIC is not entitled to any TICO communications regarding claims that JVD was ordered to pay because those travellers no longer have a claim against ORIC. ORIC submits that this makes no sense given that JVD also refuses to produce communications with TICO for claims TICO did not order JVD to pay, meaning that withdrawal of the claim against ORIC is not what truly underpins JVD's refusal.
- [40] While it is true that ORIC is not bound by TICO's decisions, it is not fair to say that the information is irrelevant. Input from TICO, the regulator, and its investigation of the complaints, is clearly relevant to the parties and to the trial judge in making a determination on the interpretation and application of s. 46.
- [41] JVD concedes that there are TICO communications relating to the ORIC Insureds/JVD Customers. As the regulator, TICO can and has directed JVD to reimburse travellers pursuant to s. 46. ORIC does not know why only some of the ORIC Insureds/JVD Customers were reimbursed, when many of them were going to the same destination. Communications between the regulator and JVD regarding the application of the legislation is clearly relevant to those claims that are still unpaid.

#### Position of JVD

- [42] JVD submits that the requested TICO communications only exist because ORIC complained to TICO about JVD, and that such records are not relevant to the issues in the action. The request for TICO communications is incredibly broad. It originally included customers who are not part of the action but, at the hearing of the motion, ORIC limited its request to the ORIC Insureds/JVD Customers.
- [43] In June 2020, JVD sought general advice from TICO regarding the steps to take for its travellers whose trips were cancelled due to the COVID-19 pandemic. It referred to those communications in the McCarthy Letter which was produced and was relevant because it was contemporaneous to JVD trying to figure out what to do with its customers. What

ORIC is now seeking is something different. Since June 21, 2022, ORIC's lawyers have followed up a number of times with TICO asking for an investigation into JVD. It seems to be an attempt to further ORIC's interests in the action against JVD by using the regulator against JVD. This is not proper. Counsel for JVD gave the example that, if there was a claim against a lawyer, who was also reported to the Law Society of Ontario, and then the plaintiff asked for production of the LSO's file in the action, it would be considered irrelevant and otherwise prejudicial. Further, communications between JVD and TICO are not relevant since any finding or direction by TICO to JVD is not in any way relevant or binding on ORIC. So it means nothing to an analysis of the claims made by ORIC.

- [44] At least 7 of the ORIC Insureds/JVD Customers have withdrawn their claim against ORIC because TICO ordered that those 7 were to be reimbursed by JVD. TICO's communications regarding those travellers who withdrew their claims are no longer relevant to this action because ORIC will not be required to pay out to them. Counsel for JVD argues that the TICO investigation will not move forward or prove or disprove any fact or issue raised in the within action.
- [45] JVD argues that the decision in *Explorica* is distinguishable. That was a Rule 21 motion brought by Explorica. The TICO documents were relevant in that case. Here, JVD's position is that TICO's correspondence is not relevant because ORIC says TICO's direction is not binding on ORIC in this action. ORIC is engaged in a "fishing expedition". There is little to be gained by requiring JVD to produce documents that are no longer relevant to the action and to do so would result in additional time and expense being incurred by JVD. ORIC has failed to pursue a motion for production of non-party records from TICO itself.

### Discussion

- [46] The application of s. 46 of Regulation 26/05 is clearly an issue in the action. In my view, any decision or direction made by TICO regarding JVD's obligations under s. 46 is relevant to the litigation and any judicial determination to be made. There is a sufficiently close connection between the issues raised in this litigation and those raised in the complaints made to TICO concerning the ORIC Insureds/JVD Customers' trip cancellations claims. TICO's interpretation may not be binding on the court but that does not mean it is irrelevant.
- [47] In my view, the McCarthy Letter and JVD's production of the June 2020 TICO email chain indicates that JVD itself felt such communications with TICO regarding the

application and interpretation of s. 46 were relevant to the issues raised in the within action.

- [48] In his cross-examination, Mr. Chetrit confirmed that there exist additional communications between JVD and TICO about s. 46 concerning ORIC Insureds/JVD Customers.
- [49] I disagree with the contention of JVD's counsel that information concerning an investigation by a party's regulatory body is irrelevant to a civil action grounded on the same facts or events. Indeed, there are many cases where the disclosure of such records is ordered.
- [50] In my view, the communications between TICO and JVD regarding reimbursement of the ORIC Insureds/JVD Customers under s. 46 of Regulation 26/05 are relevant for ORIC to understand the criteria used in applying s. 46 and to know the facts TICO relied upon in making its determinations. In *Explorica*, Arrell J. also held that TICO's reasons for ordering Explorica to pay out refunds was relevant information that should be before the court for a complete record.
- [51] To the extent JVD is in possession of communications from and with TICO regarding TICO's investigation and review of the ORIC Insureds/JVD Customers' complaints, those records are relevant. This is not a fishing expedition as was found by the courts to be the situation in *Warman v. National Post Company*, 2010 ONSC 3670 (Ont. S.C.J.) and in *Mattson et al. v. Tom Quiggin et al.*, 2017 ONSC 984 (Ont. Master), cases relied on by JVD. I further find that the decision in *White v. Winfair Management Ltd.*, 2005 CanLII 13037 (ON SC), also cited by JVD, is distinguishable since there the documents were found to be irrelevant and the request for a further and better affidavit of documents was made after the plaintiff had filed a trial record. That is not the case before me.
- [52] Accordingly, I find that it is appropriate to order disclosure to ORIC of the communications between TICO and JVD concerning the complaints made by all of the ORIC Insureds/JVD Customers, whether their claim against ORIC has been withdrawn or not, since such communications are relevant to JVD's position with respect to its obligation under s. 46 to make payments. There is a direct relationship between the ORIC Insureds/JVD Customers' complaints to TICO against JVD and its effect on those travellers' claims against ORIC under the trip cancellation policies. They are interconnected. They arise from the same circumstances. The facts that are relevant in the complaints before TICO are substantially the same facts in the action. Evidence of remedial conduct during the course of the litigation is also relevant at the discovery stage (although it may ultimately be ruled inadmissible for trial). In my view, the fact that the

reimbursed TICO complainants were required to withdraw their claims against ORIC as a condition of settling with JVD cements the connection. Fairness dictates that ORIC have the same relevant information as JVD in this proceeding in order that it may use that information to advance its own case or to counter JVD's case. There was no evidence led by JVD that convinces me that undue time or expense would be associated with producing these documents or that said production would cause prejudice or unduly interfere with the action's orderly progress.

[53] To the extent privilege is claimed with respect to any of the TICO communications relating to the ORIC Insureds/JVD Customers, they can be listed by JVD in Schedule B.

[54] Accordingly, I order that JVD is to provide a further and better affidavit of documents that includes all documents relating to and disclosing correspondence between JVD and TICO regarding the 2020 trips cancelled for COVID-related reasons concerning all of the ORIC Insureds/JVD Customers.

#### **DISPOSITION**

[55] For the above reasons, I order that JVD is to provide, within 30 days, a further and better affidavit of documents that includes all documents relating to and disclosing:

- (i) Retained payments received from the ORIC Insureds/JVD Customers who still have open claims against ORIC, as of the date of travel cancellation in 2020 for COVID-related reasons. If JVD redacts any portions of the printouts of financial or general ledger information, then it shall identify the specific basis for redaction and provide general information regarding what has been redacted with delivery of the further and better affidavit of documents; and
- (ii) Correspondence between JVD and TICO regarding the 2020 trips cancelled for COVID-related reasons concerning all of the ORIC Insureds/JVD Customers.

#### **COSTS**

[56] As ORIC was the more successful party on this motion, it is presumptively entitled to costs. I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

- (a) By December 5th, 2023, ORIC shall serve and file its written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and

- (b) JVD shall serve and file its responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by December 19th, 2023; and
- (c) ORIC's reply submissions, if any, are to be served and filed by December 29th, 2023 and are not to exceed two pages.
- (d) If no submissions are received by December 29th, 2023, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

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**MacNEIL J.**

**Released: November 14, 2023**