Appeal P07-00028

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALEXANDER MAZIN

Appellant

and

PERSONAL INSURANCE COMPANY OF CANADA and ROMAN LUSKIN

Respondents

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Owen Elliot for Mr. Alexander Mazin Ms. Heather L. Kawaguchi and Ms. Marni Miller for Personal Insurance Company of Canada No one appearing for Mr. Roman Luskin
HEARING DATE:	September 3, 2008

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Arbitrator's decisions dated May 25 and October 1, 2007 are confirmed and the appeal herein is dismissed.

2. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2007).

Lawrence Blackman
Director's Delegate

September 8, 2008
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Roman Luskin was born on May 15, 1988. On July 13, 2005 he was injured in a motor vehicle accident and applied to the Personal Insurance Company of Canada ("Personal) for benefits pursuant to the *Schedule*.[1] A dispute arose as to Mr. Luskin's entitlement to benefits. Mr. Luskin's Application for Arbitration was received by the Commission on June 7, 2006.

A pre-hearing discussion was held on February 27, 2007 before Arbitrator Slotnick. Mr. Luskin did not attend, but was represented by Ms. D. Verma of the office of Mr. Mazin (the "Appellant"), the latter being counsel of record for Mr. Luskin. In his March 2, 2007 letter, Arbitrator Slotnick wrote that the "parties agreed to reschedule the pre-hearing discussion to a time when Mr. Luskin is able to attend."

The pre-hearing resumed April 23, 2007 before Arbitrator Wilson (the "Arbitrator"). Mr. Luskin did not attend. Mr. A. Ezer, a student-at-law with the Appellant's office attended as Mr. Luskin's representative. Mr. Ezer was unable to reach Mr. Luskin by telephone as the telephone number he had for him was not Mr. Luskin's. By letter dated April 23, 2007, the Arbitrator set a further pre-hearing for May 4, 2007, ordering that Mr. Luskin attend personally. The Arbitrator indicated he would be asking the Appellant "to explain his apparent failure to ensure the attendance of client as agreed." The Arbitrator continued:

> … ***I am advising Mr. Alexander Mazin that, as solicitor of record, it is possible that he may be found liable for any award of costs arising from the two abortive pre-hearings to date and the failure to produce Mr. Luskin***. [emphasis in the original]

Mr. Luskin did not attend the May 4, 2007 pre-hearing discussion. Ms. S. Ahmad, a student-at-law with the Appellant's office, attended as Mr. Luskin's legal representative.

[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

The Arbitrator's May 25, 2007 decision letter confirmed his order that Mr. Luskin and the Appellant were jointly and severally liable for the costs thrown away by Mr. Luskin's non-attendance at the first two pre-hearings. Legal expenses were fixed at $800, payable forthwith, in any event of the cause. The Arbitrator found that:

- s. 279(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 and Rules 9.2 and 9.3 and Practice Note 3 of the *Dispute Resolution Practice Code* (Fourth Edition, Updated – October 2003) (the "*Code*") mandate the attendance of persons with authority to bind the parties;
- Ms. Ahmad conceded that Arbitrator Slotnick's statement that the parties agreed to resume the pre-hearing at a time when Mr. Luskin could attend could and should be interpreted as an undertaking. Rule 4.01(7) of the *Rules of Professional Conduct* provides that an undertaking is a serious matter requiring scrupulous adherence. There is a legal obligation to use all reasonable efforts to perform one's undertaking;
- There was no evidence that the Appellant or his employees "took sufficient positive action to ensure that the undertaking was satisfied, nor that they took the necessary and appropriate steps when they learned that Mr. Luskin would not appear as undertaken;"
- As counsel of record and in accordance with the principle of *respondeat superior*, it was appropriate that the Appellant bear responsibility for the consequences of his carriage of the application rather than his juniors or articling students;
- The Appellant's unexplained conduct "could easily be interpreted as an indifference or recklessness to his obligation to this tribunal and the arbitration process." Subsection 23(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 (the "*SPPA*"), provides that a tribunal may make such orders it considers proper to prevent abuse of its process. The Divisional Court in *Royal & SunAlliance Insurance Company of Canada v. Volfson*, 2005 CanLII 38902, held that "limiting tribunals in the face of abuse cannot have been the intention of the legislature when it gave tribunals the powers in s. 23(1) to control process;"
- Rule 75.2(d) of the *Code* provides as a criterion in awarding legal expenses "the conduct of a party or a party's representative that tended to prolong, obstruct or hinder the proceeding, including a failure to comply with undertakings and orders;" and,
- Subsection 282(11.2) of the *Insurance Act* allows for the liability of representatives for legal costs. Noting *Young v. Young*, [1993] S.C.R. 3, the Arbitrator held that this was not

a routine sanction for representatives whose practices offend an adjudicator or a standard sanction for a losing party. Rather, it applied to "serious cases where the conduct of a representative, if unchecked, could bring the arbitration system and the administration of justice into disrepute, or where there was an abuse of the process."

The Arbitrator determined that this was such a case, that the Appellant, using the words of clause 282(11.2)(c) of the *Insurance Act*, had "caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default."

On May 15, 2007, the Personal brought a motion returnable June 1, 2007 to dismiss the arbitration, specifically seeking its legal expenses against both Mr. Luskin and counsel. Mr. Luskin did not attend the motion. Ms. Ahmad again attended, but did not call any witnesses or file any affidavit evidence. The Arbitrator's October 1, 2007 decision notes that Mr. Luskin apparently left messages with the Commission on May 31, 2007 that he would not be attending and that he had hurt his foot. The Arbitrator notes that Mr. Luskin did not apparently inform either his counsel or the Personal of his projected non-attendance.

Ms. Ahmad wrote the Commission on May 31, 2007 requesting a date to bring a motion for her firm to be removed as solicitors of record. At the June 1, 2007 motion, the Arbitrator found that no further action had been taken in this regard and that the Appellant remained solicitor of record. The Arbitrator's October 1, 2007 decision confirmed his dismissal of the arbitration and that Mr. Luskin and the Appellant were jointly and severally liable for a further expense order of $1,751.83, payable forthwith. The Arbitrator held that:

- In light of the ongoing refusal to obey arbitral orders and participate in the arbitration process, it would be an abuse of process and would bring the administration of justice into dispute to allow this matter to proceed. The proceeding had "become vexatious as the law knows that term." Based on the Personal's unchallenged affidavit evidence, Mr. Luskin had "demonstrated his contempt for this process by his actions."
- As previously, there was no evidence that the Appellant or his employees had taken sufficient positive action to ensure their undertaking was satisfied or had taken necessary and appropriate steps to address their client's failure to appear. The Appellant's "cavalier

attitude" to his obligations arising from his undertaking and its subsequent breach constituted an affront to the arbitration system and an abuse of the tribunal's process;

- Based on the uncontradicted affidavits filed by the Personal, the Appellant was involved in this claim from its inception. The Arbitrator outlined "some of the litany of failures by Mr. Luskin and his solicitor;"
- The Appellant's "unexplained and unjustified conduct in this matter was relevant to the dismissal of the arbitration and that, as such, 'caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person' in accordance with section 282(11.2) of the *Insurance Act*;"
- The Appellant's "actions in the conduct of this matter are unusual. His apparent view that he need not justify his actions to this tribunal takes him outside the usual protections and deference granted to a solicitor in the pursuance of his client's claim. There may well be good answers to the questions raised about [the Appellant's] conduct in this matter. However, he has not expressed any."

II. THE APPELLANT'S SUBMISSIONS

The Appellant requests that the Arbitrator's orders awarding legal expenses against him personally be set aside. The Appellant does not appeal the Arbitrator's orders dismissing the Application for Arbitration or awarding legal expenses against Mr. Luskin.

In his submissions, the Appellant argued that the Arbitrator erred in law:

1. in finding that the Appellant gave an undertaking at the February 27, 2007 pre-hearing, there being insufficient evidence to support same.

2. in finding that the Appellant had breached the alleged undertaking which was "not within the power of a solicitor to fulfill." The Appellant relies on *Ontario (Public Guardian and Trustee) v. Kasstan*, [2000] O.J. No. 5481, which held that the Courts cannot punish one for failing to do the impossible.

3. in finding that the alleged undertaking could be assigned to the Appellant on the principle

of *respondeat superior*. While the Appellant may be personally liable for an undertaking given by a student-at-law, he should not be held responsible for an alleged undertaking given by a lawyer. In any event, there was no basis in law to use this principle of vicarious liability in tort law to assign the alleged undertaking to the Appellant.

4. the Arbitrator's decisions regarding subsection 282(11.2) of the *Insurance Act* were based on an alleged breach of an undertaking. As there was no undertaking, no undertaking attributable to the Appellant and/or no punishable breach of an undertaking, the Arbitrator erred in his application of this provision. Further, the Arbitrator's decisions were contrary to *Young*, which held that:

> The basic principle on which costs are awarded is as compensation for the successful party, not to punish a barrister . . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

If the decisions are allowed to stand, then the only defense available to a lawyer at the first hint his client might not attend a proceeding would be to disclose privileged communications. A high threshold should be set and be limited to egregious cases; and,

5. there was no basis for the Arbitrator's finding that the Appellant had taken a cavalier attitude. In any event, a cavalier attitude would not, by itself, constitute an abuse of process. Nor was there was evidence of any lack of effort or unreasonable delay by the Appellant, whose communications with Mr. Luskin were privileged.

III. THE PERSONAL'S SUBMISSIONS

The Personal submits that this appeal should be dismissed and it should be awarded its appeal expenses, arguing that:

1. the Arbitrator made a finding of fact that an undertaking had been given. A finding of fact cannot be appealed. No affidavit or *viva voce* evidence was produced or any

argument raised by the Appellant at arbitration disputing that an undertaking had been provided. Nor was it argued that there was any difficulty in complying with the undertaking, either on May 4, 2007 or later on June 1, 2007, when the Appellant had the benefit of the Arbitrator's earlier reasons. Further, the Appellant had not argued that solicitor/client confidentiality prevented him from advising the Commission as to what steps he had taken to comply with his undertaking and with the order. A simple denial is insufficient to overturn the Arbitrator's decisions.

2. there were other reasons for the Arbitrator's decision in addition to the undertaking.

3. the principle of *respondeat superior* refers to holding an employer or a principal liable for the employee's or agent's acts. There is no allegation that those who attended as Mr. Luskin's legal representatives were not employees of Mazin Rooz Mazin, nor is there any allegation that they were acting outside the scope of their employment;

4. an abuse of process is a factual finding or conclusion and is not subject to appeal.

IV. ANALYSIS

On April 25, 2008 I issued an interim decision allowing Messrs. Mazin Rooz Mazin and the Appellant to withdraw as Mr. Luskin's representative in this proceeding. I further found that the Appellant had standing as a party in this appeal proceeding.

By letter dated August 26, 2008, the Personal stated that it would be seeking leave to admit new evidence at the appeal hearing. The fresh evidence consisted of two short affidavits of Mr. Luskin and his mother, Ms. Irena Luskin, and outlined "their positions with respect to the handling of the arbitration and their representation by the [Appellant]." The Personal advised that Mr. Luskin had been involved in a serious motor vehicle accident and that neither he nor his mother were able to attend the September 3, 2008 appeal hearing.

The hearing date herein was confirmed by Notice of Hearing to all parties dated May 14, 2008. Both the Appellant and the Personal agreed to this date. Before setting this date, the Appeals

Administrator endeavoured to reach Mr. Luskin. She spoke to Ms. Luskin, who had attended the February 27, 2008 appeal motion in the absence of her son, that advising he was working. On May 6, 2008, Ms. Luskin advised that her son was in hospital. On May 14, 2008, the Appeals Administrator wrote Mr. Luskin that a tentative hearing date had been set for some four months hence and that if Mr. Luskin had any concerns about this date he should contact her.

The Notice of Hearing confirmed that if a party failed to attend the hearing, the Director's Delegate may dispose of the case in the party's absence and the party would not be entitled to any further notice of the appeal proceedings. There has been no further contact with the Commission by Mr. Luskin or anyone on his behalf.

In *Budd and Personal Insurance Company of Canada*, (FSCO P99-00032, January 8, 2000) Delegate McMahon set out the following regarding fresh evidence:

> The principles that guide the introduction of fresh evidence at the appellate levels of Canadian courts are well established. In *Palmer v. The Queen*, [1980] 1 S.C.R. 759, an appeal on a criminal matter, the Supreme Court of Canada, set out the following four criteria:
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> > •The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
> >
> > •The evidence must be credible, in the sense that it is reasonably capable of belief;
> >
> > •The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; and
> >
> > •The evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

I declined to accept the fresh evidence for the following reasons:

- Although the Personal could not obtain an affidavit from Mr. Luskin or his mother until the Appellant and his firm were removed as solicitors of record on April 25, 2008, there was no explanation as to why Mr. Luskin failed to provide this evidence to the Arbitrator, either in person or by telephone or, if Mr. Luskin was unhappy with his representation, as

to why he failed to take any to steps to remove the Appellant as his legal representative or provide his consent to such removal;

- Credibility is a legitimate question. Mr. Luskin and the Appellant are now adverse in interest; if the Appellant is successful in this appeal, the expense awards will be solely payable by Mr. Luskin. In his reasons, the Arbitrator was hardly complimentary to Mr. Luskin, including using the word "contumacious," which the *Concise Oxford Dictionary of Current English* (Eighth Edition, 1990, Clarendon Press – Oxford) defines as "insubordinate; stubbornly or willfully disobedient, esp. to a court order." The inability of either of the deponents to be cross-examined is prejudicial to the Appellant;
- While the evidence may have some relevance, I am not persuaded it could be expected to affect the result. This evidence appeared simply to enhance the affidavit evidence already submitted by the Personal at the arbitration motion and upon which the Arbitrator relied in significant measure; and,
- Rule 39.2 of the *Code* provides that in "extraordinary circumstances," a party may seek an arbitrator's permission to serve a document less than thirty days before the first day of the hearing. Although Part 4 of the *Code*, which pertains to Appeals, has no similar provision, Rule 1.2 states that where something is not specifically provided for in the Rules, the practice may be decided by referring to similar Rules in the *Code*. I see no reason in this case not to apply the criteria in Rule 39.2. My April 25, 2008 decision removed the Appellant as counsel of record for Mr. Luskin. No extraordinary circumstances were argued to justify late service of the Personal's proposed documentary evidence four months after that order and eight days before this appeal hearing.

However, in any event, I find that there is no substance to this appeal.

This appeal essentially rests on the Arbitrator's finding that an undertaking had been given by the Appellant on February 27, 2007. Although the undertaking was addressed at some length by the Arbitrator, it was only part of his reasons and only part of the major concerns in this case. In any event, as found by the Arbitrator, on May 4, 2007 Ms. Ahmad of the Appellant's office conceded that an undertaking had been given. This admission is not disputed by the Appellant.

More importantly, in my view, Rule 33 of the *Code* sets out the purposes of the pre-hearing

discussion. These include obtaining agreement as to the issues in dispute and the facts, production exchange, addressing interim issues including interim relief or expenses, identifying witnesses, addressing how documentary evidence will be put before the hearing arbitrator and setting hearing dates. The pre-hearing discussion combines motions court, settlement discussion, informal examination for discovery and pre-trial conference. It is the key, and sometimes the only, pre-hearing event.

Pre-hearing discussions are not unilaterally arranged by the Commission. Rather, case administrators spend much of each day trying to arrange dates convenient with all parties.

The direct participation of the principals themselves is crucial to the pre-hearing discussion. This is reflected in Practice Note 7 of the *Code*, which states that:

> Whether the discussion is in person or by telephone, both the applicant and the representative from the insurance company should take part. Arbitrators have noted that the absence of parties from the pre-hearing discussion frequently impedes settlement discussions – even when the parties are represented by legal counsel who participate in the pre-hearing on their behalf.
>
> **Clients who cannot participate in person are expected to be available to participate in the pre-hearing discussion by phone.** [emphasis in the original]

The importance of the personal participation of the principals in arbitration is reinforced by Practice Note 3 of the *Code* which pertains to binding authority and which states that "[i]t is essential that people claiming benefits participate in neutral evaluation, mediation or arbitration to hear and discuss settlement offers and give instructions to any representative … Appointing a representative does not relieve any party of their obligation to participate in the dispute resolution process, except in extenuating circumstances (for example, confinement in hospital)."

In addition to meaningful settlement discussions, the personal participation of the parties is pivotal to a productive pre-hearing in the meaningful exchange of information, most effectively explaining one's case, efficient production exchange, identifying expert and lay witnesses and the setting of realistic hearing dates.

As the Arbitrator noted, subsection 279(5) of the *Insurance Act* provides that an arbitrator may

adjourn a proceeding if a representative is not authorized to bind the party he or she represents.

Binding authority means that the person participating does not have to contact anyone else to obtain instructions to respond to any reasonably foreseeable pre-hearing event or item of discussion. If a party decides that binding authority shall be held only by a company president or by a board of governors, the Commission expects, as highlighted by Rule 9.3 of the *Code*, their direct involvement in the pre-hearing discussion, subject to reasonable extenuating *and* extraordinary circumstances. The Commission further expects the best efforts of representatives to ensure the direct participation of their principals and to advise opposing counsel and the Commission in a timely manner of any difficulties in this regard.

Practice Note 3 specifically states that if a party is unable to attend, the adjudicator can adjourn the proceeding on whatever terms the adjudicator considers appropriate, including an interim award of expenses. These terms can, as specifically set out in subsection 282(11.2) of the *Insurance Act*, include an award against the legal representative.

In this case, there was not merely a single instance of non-attendance by Mr. Luskin. Arbitrator Slotnick adjourned the first pre-hearing due to Mr. Luskin's non-attendance upon the express agreement of the parties to reschedule this event to a time when Mr. Luskin was able to attend. No explanation is provided by the Appellant as to why the initial pre-hearing discussion was arranged for a date that Mr. Luskin was not available in person or apparently by telephone or why timely notice was not given to opposing counsel and to the Commission indicating that the Applicant would not be available. The uncontradicted affidavit evidence of the Personal states that the Appellant did not have any instructions at the pre-hearing discussion and, therefore, was unable to proceed.

Notwithstanding the express agreement of the parties noted by Arbitrator Slotnick, Mr. Luskin failed to attend the second pre-hearing. No explanation is provided by the Appellant as to what efforts were made to comply with their agreement. The Arbitrator adjourned the pre-hearing to a third date, now ordering Mr. Luskin's attendance. Mr. Luskin did not attend. Again, no explanation is provided by the Appellant as to what efforts, if any, had been made, to endeavour to secure his attendance.

Clause 282(11.2)(c) of the *Insurance Act* provides that an arbitrator may make an order requiring a representative to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

In this case, three pre-hearing discussions were arranged, all of which were adjourned due to Mr. Luskin's non-attendance. I agree with the Arbitrator citing *Bogoroch & Associates v. Sternberg* [2005] O.J. No. 2522, that the Appellant should have either fulfilled his obligations or sought leave to be removed from the record if his client was the obstacle to fulfilling his obligations. One does not wait until the day before a motion to dismiss the proceeding to advise the Commission, to use the Appellant's submission, of his intention to "abandon" his client.

The further case law provided by the Appellant at the hearing, in my view, supports the Arbitrator's decisions. In *Fong v. Chan* (1997), 15 C.P.C. (4th) 298 (Ont. C.A.), the Court set aside an expense order against counsel on the grounds that the counsel never understood that the motions judge was considering such an award against him personally, Rule 57.07(2) of the *Rules of Civil Procedure* requiring that counsel be given a reasonable opportunity to make submissions to the court. It is not argued that the Arbitrator erred in this regard. Rather, on April 23, 2007, prior to the resumed pre-hearing, the Arbitration specifically advised the Appellant of a possible cost order, in writing in bold and in italics. Regarding the June 1, 2007 motion, the Personal set out in its materials that it was seeking costs against counsel.

Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc., 2002 CanLII 49474 (Ont. S.C.) was not a case where counsel was found to have been in breach of undertakings or orders, or similar professional responsibilities. Rather, as framed by the Court, the question was whether lawyers were required to be gatekeepers of what is or is not a meritorious case and risk being held personally for legal costs by taking on difficult cases. The Court discussed whether *Young* adhered to a lesser threshold of Rule 57.07, looking strictly at the words therein that counsel must merely have "caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default," or whether a higher "inexcusable misconduct standard" requiring reproof was necessary. The Court found that the latter had been the general interpretation.

The Appellant submitted three prior Commission cases in support of its submission that the Arbitrator had applied the incorrect standard regarding the expense order against counsel. All three decisions were written by the same Arbitrator herein.

In *Boamah and ING Insurance Company*, (FSCO A05-001772, May 16, 2007), the Arbitrator found "irresponsible and unethical breaches of trust" by one representative which required condemnation. In *Al-Hajam and Allstate Insurance Company of Canada*, (FSCO A03-001830, April 21, 2005), the Arbitrator stated that:

> … the application of this provision is contingent upon some serious default by the representative of an insurer or an insured. It is not meant to be a routine sanction for counsel for representatives whose practices offend an adjudicator. It is meant to apply to egregious cases where the conduct of a representative, if unchecked, would tend to bring the arbitration system and the administration of justice into disrepute, as enunciated in *Young* …

This approach was repeated in *Popalzai and Co-operators General Insurance Company*, (FSCO A03-001231, September 9, 2004).

I am not persuaded that *Young* is the anthem of, or salvation for, the unreasonable default of professional responsibilities, specifically respecting undertakings and orders, by a representative that leads to legal expenses being unreasonably incurred by a party adverse in interest. In any event, it is clear from the Arbitrator's decision that he applied the higher standard that this was not a routine sanction but rather was applicable in egregious cases of inexcusable conduct which required reproof, consistent with his earlier decisions upon which the Appellant relies.

In this case, I am most troubled by the Appellant's failure to explain his failure to comply with the Arbitrator's April 23, 2007 order or to show that any effort was made to try to comply. It was for this and not, as argued, for failing to physically transport Mr. Luskin to the pre-hearing discussions, that costs were awarded. No case law was provided by the Appellant to support the proposition that alleged solicitor/client confidentiality is a defence to a lawyer breaching his or her undertakings, not complying with orders and failing to account to a tribunal regarding one's apparent default in professional responsibilities. Further, the Appellant never made clear what, if any, communication, was sought to be protected, nor what alleged privilege survives

Mr. Luskin's recent affidavit evidence regarding his relationship with the Appellant.

I further have difficulty following the logic of the argument that a former client should be solely liable for a cost award on the basis that disclosure of counsel's communications with the client, if any, as to the necessity of attendance would prejudice the client. To paraphrase *Young*, the expense order did not conflict with counsel's fundamental duties but was forthcoming due to his neglect of such duties.

I agree with the Arbitrator's reliance on *Baksh v. Sun Media (Toronto) Corp.*, 63 O.R. (3d) 51, that "(f)or orders of the court to have any meaning they must be enforced" and *509521 Ontario Ltd. v. Canadian Imperial Bank of Commerce*, [1996] O.J. 2567 "that there comes a time when it is vital to emphasize the need for compliance with orders of the court."

The British Columbia Court of Appeal in *Pugh v. Pugh*, 17 B.C.L.R. 14 (C.A.) stated that:

> . . . this Court does not have an independent discretion and should only interfere with the exercise of discretion by the trial judge when clearly of the opinion that he acted on a wrong principle, or wrongly exercised his discretion in not giving sufficient weight to relevant considerations, or that, on other grounds, the decision might result in injustice.

Further, as stated by Delegate Naylor in *Allison and Markel Insurance Company of Canada*, (OIC P-001231, August 21, 1996), albeit regarding party and party costs and the appeal being initiated prior to appeals being restricted, under the amended subsection 283(1) of the *Insurance Act*, to issues of law:

> An award of expenses is a matter within the discretion of the arbitrator, although the discretion must be exercised reasonably. Because the discretion is given to the arbitrator, it should not be interfered with lightly on appeal … Generally, his or her determination should not be disturbed unless the party appealing the order can point to a serious error in the exercise of the discretion: for example, the arbitrator adopted a wrong approach, based the decision on irrelevant considerations or inadequate evidence, or failed to look at the merits of the individual case by inappropriately fettering his or her discretion.

I am not persuaded that the Arbitrator acted on a wrong principle, gave insufficient weight to relevant considerations or committed an injustice. Nor am I persuaded that the Arbitrator based

his decision on irrelevant considerations or on inadequate evidence, or that he fettered his discretion. The expense award was not punitive but compensatory, the Personal having had time and expense wasted in this matter. Indeed, considering the number of attendances in this matter and the $3,000 filing fee incurred by the Personal, which is not recoverable, the $2,551.83 awarded is relatively modest and, in any event, the amount is not disputed by the Appellant. Further, the Appellant was not held solely liable for the expense award.

Regarding the Appellant's argument that he should not be held responsible for at least the actions of his junior lawyer, the Application for Arbitration herein was signed not by Mr. Luskin but by the Appellant and the Appellant remained counsel of record throughout. There were four attendances in arbitration and three different juniors attended from the Appellant's office. It was a fair and supportable inference that there is a directing mind in this matter and that it has been the Appellant.

Accordingly, the Arbitrator's decisions dated May 25 and October 1, 2007 are confirmed and the appeal herein is dismissed.

V. EXPENSES

If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*.

If either party has served a Bill of Costs, then the other party shall forthwith provide a written response to the account, identifying the items in dispute and the reasons for the dispute, including whether entitlement to expenses is in dispute. If a party seeking its legal expenses has not yet served a Bill of Costs describing the expenses claimed, services received and costs, it shall do so forthwith.

Lawrence Blackman Director's Delegate	September 8, 2008 Date