Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06–001216

BETWEEN:

ROMAN LUSKIN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

DECISION ON EXPENSES

Before: John Wilson

Heard: May 4, 2007, at the Offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Ms. Samiya Ahmad, student-at-law for Mr. Luskin
Heather Kawaguchi for Personal Insurance Company of Canada

Issues:

The Applicant, Roman Luskin, claimed to have been injured in a motor vehicle accident on July 13, 2005. He became involved in a dispute with his insurer and filed for arbitration at the Financial Services Commission.

Arbitrator Slotnick presided at the first, February 27, 2007, pre-hearing. Ms. Dimple Verma of Mr. Mazin's office appeared on behalf of Mr. Luskin, although Mr. Mazin remained counsel of record in this matter.

Following the non-attendance of Mr. Luskin at the pre-hearing, Arbitrator Slotkick wrote in his pre-hearing letter: "the parties agreed to reschedule the pre-hearing discussion to a time when Mr. Luskin is able to attend."[1]

The issue in this hearing is:

1. Is Personal entitled to its expenses incurred in respect of costs thrown away due to the non-appearance of Mr. Luskin at the February 27, 2007 and April 23, 2007 pre-hearings?

2. If an expense order is appropriate, by whom should it be payable?

Result:

1. Personal is entitled to its expenses incurred in respect of costs thrown away due to the non-appearance of Mr. Luskin.

2. Mr. Luskin and the counsel of record, Mr. Alexander Mazin, shall be jointly and severably liable for the expense order.

Although Arbitrator Slotnick's comment in his pre-hearing letter has been variously referred to as an "order" or the record of an "undertaking", it is clear that at the very least, it is indicative of an intention to have Mr. Luskin present in person for the pre-hearing resumption.

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[1] It is apparent Mr. Mazin's office did at least advise Personal's solicitor prior to the pre-hearing that Mr. Luskin would be at school and not present, since Ms. Kawaguchi in turn faxed the information to the case administrator on April 23, 2007, the day of the pre-hearing. At that time I had the case administrator confirm to the parties that in light of Arbitrator Slotnick's order the matter would still proceed in person. There is no record of any such correspondence to the Commission from Mr. Mazin's office.

Both sides agreed to new dates for the purpose mentioned by Arbitrator Slotnick and the pre-hearing was scheduled for April 23, 2007. Once again Mr. Luskin was not available for the pre-hearing. Apparently this was not a surprise to Mazin & Rooz, who stated that Mr. Luskin was at school and could not attend. He was, however, "reachable by cell phone at school."

This, however, turned out not to be the case either. The telephone number that they had was not Mr. Luskin's. In spite of reportedly "telephoning the treatment provider" to ascertain the correct cell phone number, Mr. Adam Ezer, a student-at-law with Mazin & Rooz who attended at the pre-hearing, was unable to contact the client.

At the April 23 pre-hearing I made the following order:

> With the agreement of both parties I have re-scheduled this pre-hearing yet again **to Friday May 4, 2007 at 2:00 p.m. at the offices of the Financial Services Commission of Ontario**. It is not only anticipated but ordered that Mr. Luskin shall attend personally.

Mr. Luskin did not attend once again at the May 4, 2007 pre-hearing.

In my pre-hearing letter dated April 23, 2007, I pointed out the problems raised by Mr. Luskin's non-attendance, and the apparent failure of Mr. Mazin to abide by an undertaking to have his client attend the rescheduled pre-hearing. I invited Mr. Mazin to provide submissions as to whether he is in breach of an undertaking or an arbitrator's order.

> Consequently, Mr. Mazin may wish to have counsel appear on his behalf at the next resumption on May 4, 2007 to make any necessary submissions, should an expense award ultimately be found appropriate. To summarize, the parties should be prepared to make submissions on the appropriateness of an expense order arising from the adjournments, as well as on the issue of against whom the order should be made.

Mr. Mazin chose not to attend the May 4, 2007 pre-hearing. Only Ms. Samiya Ahmad, a student-at-law in Mr. Mazin's office, attended. Ms. Ahmad neither called any witnesses, nor did she file any affidavit evidence on behalf of either Mr. Luskin or Mr. Mazin. She stated, however, that she had instructions from Mr. Mazin with regard to the expense issue. She had no instructions, however, from Mr. Luskin.[2]

EVIDENCE AND ANALYSIS:

Some procedural background to Arbitrator Slotnick's insistence that Mr. Luskin be present for the pre-hearing of his own claim is useful. Section 279(5) of the *Insurance Act* reads as follows:

> (5) If an insurer or an insured is represented in a mediation under section 280, an evaluation under section 280.1, an arbitration under section 282, an appeal under section 283, or a variation under section 284, the mediator, person performing the evaluation, arbitrator or Director, as the case may be, may adjourn the proceeding, with or without conditions, if the representative is not authorized to bind the party he or she represents.

As part of the commitment to achieve timely resolution of arbitrations, the *Practice Code* at Rules 9.2 and 9.3 and Practice Note 3 reiterates the provisions of the *Insurance Act* mandating the attendance of persons with authority to bind the parties at an arbitration or its component parts. Even absent the comments of Arbitrator Slotnick, Mr. Luskin had a positive obligation to attend at these proceedings.[3]

As noted earlier, section 279(5) of the *Insurance Act* specifically mandates the presence of a person "authorized to bind the party he or she represents." This involves more than just the

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[2] I leave aside for the moment the propriety of Ms. Ahmad apparently representing both Mr. Luskin and Mr. Mazin when there was a possibility of divergence between their respective interests. see: *Iroquois Falls Power Corp. v. Jacobs Canada Inc. et al.*83 O.R. (3d) 438

[3]This approach is not restricted to matters at the Commission and has been applied in the court setting as well. *Magahaes v. Lusitania Portugese Recreation Club* [1999] O.J. No. 3754

presence of counsel for the party. It means that someone with appropriate authority has to be present who can impose one or more legal duties on a person or institution.

The ordinary sense of the word "attend" means being present at a particular location. In this case, Mr. Luskin was physically absent from the place where the pre-hearing was held. Nor was he reachable by cell phone as indicated by counsel.

Mr. Luskin was not in attendance and could not be perceived as having "attended" the two pre-hearings and the further expense hearing. As such, he was in breach of not only section 279(5) of the *Insurance Act*, but also his counsel's agreement and, ultimately, my order. While various students and lawyers working for the Mazin & Rooz firm attended over time, they did not even have the saving grace of access to Mr. Luskin to obtain directions.

At the February 27, 2007 pre-hearing, the issue was merely the non-attendance of Mr. Luskin. At the April 23, 2007 pre-hearing the problem had grown beyond the mere non-appearance of Mr. Luskin to include whether his solicitor fulfilled his obligations, evidenced in the March 2, 2007 pre-hearing letter to find a date when his client would be able to attend. In other words, did the notation "the parties agreed to reschedule the pre-hearing discussion to a time when Mr. Luskin is able to attend" constitute an undertaking given to the Commission, and was counsel in breach of an undertaking by appearing without Mr. Luskin, without a reasonable excuse or explanation?

The *Canadian Oxford Dictionary* defines "undertaking" in the legal context as a "pledge or a promise." I have no hesitation in finding that counsel for Mr. Luskin pledged or promised to arrange the pre-hearing date to a time when Mr. Luskin could and would appear. Indeed, Ms. Ahmad, who appeared at the May 3 hearing, specifically acknowledged that the reference in the February pre-hearing letter concerning the setting of a new date for a resumed pre-hearing, could and should be interpreted as an undertaking.

The *Rules of Professional Conduct* of the Law Society of Upper Canada deals succinctly with undertakings given by lawyers:

> **Undertakings**
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> **4.01 (7)** A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another lawyer in the course of litigation.
>
> | 2. **Commentary** |
> | --- |
> | Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility. |

The main principles relating to undertakings are summarized by J.W. Quinn J. as follows in *Towne et al. v. Miller et al*:

> An undertaking is an unequivocal promise to perform a certain act. I do not see any material difference between, for example, an undertaking given in the context of a real estate transaction (when lawyers undertake to do, or obtain, something necessary to complete the transaction) and an undertaking given on an examination for discovery. Each involves a promise. In an examination for discovery, the undertaking may be given by the litigant being examined or it may come from his or her counsel. Both are equally binding.[4]

As noted in Rule 4.01(7) cited above, a lawyer's undertaking is a serious matter which requires *scrupulous* adherence. Failure to abide by an undertaking to a tribunal is of the same nature and quality as the disobedience of an order given by a tribunal. While it can result in disciplinary issues for a lawyer, in the context of the tribunal it is a serious affront to the process, and if unexplained or unexcused may be found to be an abuse of the process of the tribunal. Pitt J. commented in *509521 Ontario Ltd. v. Canadian Imperial Bank of Commerce*:

> It is my view that there comes a time when it is vital to emphasize the need for compliance with orders of the court. We hear judges lecturing young people, and people in other courts, of the importance of preserving the institution of law and

[4](2001), 56 O.R. (3d) 177, [2001] O.J. No. 4241

> order and we have here some of the pillars of the community, the Canadian Imperial Bank of Commerce and Ernst & Young Inc. acting as if what the judge said didn't matter.

Like court orders, undertakings given to a tribunal should not be disregarded lightly, especially by lawyers, who are officers of the Court.

Indifference to the process and orders of a tribunal can go beyond mere disapproved conduct. If it is "conduct calculated to interfere with or obstruct the course of justice" then it can also be found to be contempt and subject to quasi-criminal penalties. In this context it has been held that:

> "calculated" is not synonymous with "intended" and it is sufficient if there is indifference or a contemptuous disregard for the consequences of his act.[5]

Other cases have suggested that "indifference or recklessness to the lawyer's obligation to the Court"[6] will attract serious penalties.

While there is no specific allegation in this matter that either Mr. Mazin or his client has committed an act of contempt, it is important to recognize the seriousness with which courts treat the failure of counsel to obey an undertaking or an order of a tribunal. Mr. Mazin's unexplained conduct in this manner could easily be interpreted as an indifference or recklessness to his obligation to this tribunal and the arbitration process.

Another wrinkle on the issue of the undertaking in question in this matter is that the actions promised may not have been in Mr. Mazin's power to complete. Obviously, if Mr. Luskin decided not to attend the pre-hearings for any reason, Mr. Mazin would not be in a position to force his attendance.

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[5] *R. v. Aster (No. 1) (1980)*, 57 C.C.C. (2d) 450

[6] *R. v. Jones* 42 C.C.C. (2d) 192,

Even that scenario, however, does not necessarily exculpate Mr. Mazin, or relieve him from the consequences of his undertaking. In this matter, Mr. Mazin and his law firm did little prior to the pre-hearing other than to apparently advise opposing counsel at the last minute that Mr. Luskin would be at school and not appear at the pre-hearing. The jurisprudence suggests that it was incumbent upon Mr. Mazin to go further than that, if he wished to be relieved from the consequences of his undertaking.

> Accordingly, the solicitor has a continuing legal obligation to use all reasonable efforts to perform his or her undertaking. In the circumstances contemplated by this action, I conclude this requires the solicitor to cease acting on behalf of the client from the time when the solicitor learns that the client proposes to take actions that would frustrate the undertaking.[7]

While Mr. Mazin may have been the victim of a contumacious client who never intended to attend at any proceedings, and consequently forced Mr. Mazin to breach his undertaking, that issue also has an answer in the jurisprudence:

> A solicitor should not give such an undertaking. An undertaking by a solicitor is given as an officer of the Court and may be enforced by contempt proceedings even though the undertaking has not been, as it was in this case, embodied in an order of the Court.[8]

While the law surrounding undertakings may seem harsh, it is clear that even where a solicitor does not have it in his power to fulfill his undertaking, he or she may be ordered to make good any loss flowing from the failure to perform the undertaking as loss flowing from a breach of duty committed by a solicitor as an officer of the court.[9]

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[7] *Bogoroch & Associates v. Sternberg* [2005] O.J. No. 2522 H.J. Wilton-Siegel J.

[8] *Ontario (Public Guardian and Trustee) v. Kasstan* [2001] C.C.S. No. 23848

[9] *March v. Joseph* [1897] 1 Ch. 213, 245 per Lord Russell of Killowen C.J.

Another aspect of this case that is interesting is that of the ultimate responsibility of Mr. Mazin for the actions of others in his firm.

The original commitment to produce Mr. Luskin was given by Ms. Dimple Verma, a junior lawyer in Mr. Mazin's firm, and who was acting in place of Mr. Mazin, who remained at all times solicitor of record. The resumed pre-hearing on April 23 was attended by Mr. Adam Ezer, a student-at-law, also on behalf of Mr. Mazin. The further resumption and hearing on May 4, 2007 was attended by Ms. Samiya Ahmad, also a student-at-law.

Given that Mr. Mazin remained solicitor of record I find that it is more appropriate that he bear the responsibility for any consequences arising from the carriage of this claim, not his juniors or his articling students. I am reinforced in this belief by the principle of *respondeat superior* and the following comments of Reid J.:

> Law students are not responsible for the conduct of actions: solicitors are. Some solicitor acting for plaintiff (not Mr. Roebuck, who acted only as counsel on this appeal) was responsible for the presentation of the application to Master Sandler. In the normal course an affidavit of the type presented would be made under the supervision of the responsible solicitor. It is that solicitor who must bear the responsibility for the error here. If the responsibility is to be placed where it belongs, and not on the shoulders of the law student, the responsible solicitor could have come forward, either on the motion before Master Peppiatt or on the appeal to this court, with at least an explanation.[10]

I find, therefore, that there was an enforceable undertaking given to Arbitrator Slotnick at the February 27, 2007 pre-hearing that bound Mr. Mazin as counsel of record to find a date when his client would and could attend a pre-hearing.

I find as well that there is no evidence before me that Mr. Mazin nor his employees took sufficient positive action to ensure that the undertaking was satisfied, nor that they took the

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[10] *Merker v. Leader Terrazzo Tile Mosaic Ltd. et al.*, 43 O.R. (2d) 632

necessary and appropriate steps when they learned that Mr. Luskin would not appear as undertaken.

In addition, I find that the cavalier attitude taken by Mr. Mazin to his obligations arising from his undertaking and its subsequent breach constitute an affront to the arbitration system and amounts to an abuse of the process of this tribunal.

Sanctions:

At the May 4 resumption, I ordered that both Mr. Luskin and Mr. Mazin should be found jointly and severably liable for the costs thrown away by the non-attendance of Mr. Luskin at the first two pre-hearings. Upon submissions by both counsel present, I fixed the amount payable as $800, and made the award of expenses payable forthwith and in any event of the cause.

In doing so, I relied on section 23(1) of the *Statutory Powers Procedure Act* which provides that: "(A) tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes."

This is a wide, discretionary power. Jennings J. writing for a panel of the Divisional Court in *Royal & SunAlliance v. Volfson* remarked: "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."

I also considered Rule 75.2(d) of the *Practice Code* which provides for the award of expenses to a party based on "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."

Unquestionably, the failure to observe the undertaking in question has contributed to delays in the arbitration process.

Section 282 11.2 of the *Insurance Act* reads as follows:

> **Liability of representative for costs**
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> (11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,
>
> (a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;
>
> (b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or
>
> (c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default.

Although the principles applied by McLaughlin J. in *Young v. Young*[11] would suggest that the imposition of costs or expense penalties under section 282(11.2) of the *Insurance Act* is not meant to be a routine sanction for counsel or representatives whose practices offend an adjudicator, nor a standard sanction for a losing party, I find that the fundamental importance of a solicitor's undertakings to our system of justice means that the use of this sanction is appropriate.

Section 282(11.2) is meant to apply 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. This is just such a case.

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[11] [1993] S.C.J. No. 112

I find, therefore, that Mr. Mazin "caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default" and so should be found personally liable for the expense award.

May 25, 2007

John Wilson
Arbitrator

Date

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

FSCO A06–001216

BETWEEN:

ROMAN LUSKIN

Applicant

and

PERSONAL INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Personal is entitled to its expenses incurred in respect of costs thrown away due to the non-appearance of Mr. Luskin in the amount of $800.00.

2. Mr. Roman Luskin and his counsel of record, Mr. Alexander Mazin, shall be jointly and severably liable for the expense order.

3. This expense order shall be payable forthwith and in any event of the cause.

May 25, 2007

John Wilson
Arbitrator

Date