Appeal P07-00017

OFFICE OF THE DIRECTOR OF ARBITRATIONS

ALON ROOZ
Applicant for Appeal and Variation/Revocation

and

CERTAS DIRECT INSURANCE COMPANY and SERGIY ZAPISNOY
Respondents on Appeal and Variation/Revocation

BEFORE:	David Evans
REPRESENTATIVES:	Alon Rooz for himself Ryan M. Naimark for Certas No one appearing for Mr. Zapisnoy
HEARING DATE:	May 16, 2008

APPEAL and VARIATION/REVOCATION ORDER

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

1. The appeal of the arbitrator's order dated April 25, 2007, is dismissed and paragraphs 1, 2 and 3 thereof are confirmed.

2. The application for variation/revocation of the arbitrator's order dated April 25, 2007, is dismissed.

3. If the parties are unable to agree about the expenses of these appeals, a hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code, Fourth Edition*.

March 26, 2009

David Evans
Director's Delegate

Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

Mr. Alon Rooz, former counsel for Mr. Zapisnoy, has both appealed and applied for variation/revocation of the arbitrator's order that he personally pay the arbitration expenses of Certas Direct Insurance Company.

II. BACKGROUND

Mr. Sergiy Zapisnoy claimed entitlement to accident benefits for treatment and for an examination arising out of a motor vehicle accident on March 10, 2003, pursuant to the *SABS-1996*.[1] The claim was denied, and the issues were not resolved at mediation. On March 14, 2005, an Application for Arbitration was filed by Mr. Alon Rooz on Mr. Zapisnoy's behalf. On December 2, 2005, the firm of Mazin Rooz Mazin was removed as solicitors of record on the basis that it had lost contact with Mr. Zapisnoy. In a decision dated May 10, 2006, the arbitrator held Mr. Zapisnoy's claim to be withdrawn and Certas to be entitled to its expenses of the arbitration proceeding. She also questioned how the firm "was able to obtain instructions from Mr. Zapisnoy when he had returned to the Ukraine almost two years prior to the Application being filed." She ordered that an expense hearing be held and that a copy of the decision be provided to the firm of Mazin Rooz Mazin so that the firm would be made aware of her concerns.

The arbitrator's findings at that subsequent expense hearing are under appeal and subject to an application for variation/revocation, as discussed below.

At that hearing, the arbitrator heard from Mr. Oleksandr Zhylko, Mr. Zapisnoy's uncle, who testified on behalf of Certas. The arbitrator accepted his evidence that Mr. Zapisnoy resided with Mr. Zhylko and his wife for the two years prior to his departure from Canada on June 25, 2003,

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

and had not returned to Canada since, so she found Mr. Zapisnoy had not participated in the mediation held July 15, 2003, and had not been living in Ontario for over 18 months when Mr. Rooz filed the Application for Arbitration. She accepted that Mr. Zhylko was unaware that Mr. Zapisnoy was alleged to have been involved in an accident in March 2003 and that he had not observed injuries or mobility restrictions in the months prior to his nephew's departure that would necessitate treatment totalling approximately $11,000.00. She found that Mr. Rooz had knowledge of the two addresses provided by Mr. Zapisnoy in the Collision Reporting Centres Supplementary Information Form and in the documents relating to the claim for benefits. The arbitrator found these factors suspect and led her to conclude that Mr. Zapisnoy had no intention of proceeding past the mediation.

The arbitrator found that Mr. Zapisnoy's total claim of over $13,000 plus interest for treatment received represented a debt he owed to the service providers and that his potential liability for arbitration expenses significantly increased his exposure from that debt.

Based on these findings, the arbitrator found that Mr. Rooz was required to personally pay Certas's arbitration expenses pursuant to clauses (a) and (c) of s. 282(11.2) of the *Insurance Act*.

Clause 282(11.2)(a) applies to representatives of insured persons if they "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." The arbitrator found that there was "no evidence that Mr. Rooz or his firm contacted Mr. Zapisnoy at either of his two addresses following the mediation." She concluded that he did not confirm his retainer and did not have an insured person as a client at the time he filed the Application for Arbitration, so he had no authority to commence and conduct an arbitration proceeding.

Clause 282(11.2)(c) applies to representatives who "caused expenses to be incurred without reasonable cause…." The arbitrator found that the arbitration ought not to have been commenced, so Mr. Rooz caused Certas to incur the expenses of the arbitration proceeding without reasonable cause.

The arbitrator then considered s. 282(11.3), which exempts a lawyer "acting in the usual course of the practice of law" from the provisions of s. 282(11.2)(a). She had to do so in the absence of an explanation by Mr. Rooz for his filing for arbitration. Mr. Rooz relied on Rule 2 of the *Rules of Professional Conduct*[2] as the basis for not releasing any information about his client. The arbitrator noted that while Rule 2.03 (1) requires a lawyer to maintain strict confidence unless required by law to do so, Rule 2.03 (2) provides an exception when required by law "or by order of a tribunal of competent jurisdiction," and Rule 2.03 (4) (b) provides an exception "[w]here it is alleged that a lawyer or the lawyer's associates or employees are … civilly liable with respect to a matter involving a client's affairs…" Mr. Rooz did not seek an order, and the arbitrator found he was bound by that decision. In addition, the arbitrator noted that he did not rely on the exception for potential civil liability.

The arbitrator then considered what a lawyer acting in the usual course of the practice of law would do in the circumstances. She noted that after a failed mediation counsel would normally contact the client, set out various options, and close the file. Instead, Mr. Rooz commenced the arbitration near to the end of the limitation period. The arbitrator noted that lawyers who have lost contact with their clients may do so for two reasons, to preserve the client's rights and to avoid a negligence claim. However, as noted above, the arbitrator had concluded that Mr. Zapisnoy had no intention of proceeding past mediation. That left only one other ground for starting arbitration:

> If in commencing and conducting the arbitration Mr. Rooz was attempting to avoid a negligence action then he was preferring his own interest to that of Mr. Zapisnoy. Such conduct is beyond the usual practice of law. In commencing the arbitration, Mr. Rooz abandoned his role as advocate and donned the mantle of litigant. In so doing, he ceased to be "acting in the usual course of the practice of law" and is liable for Certas' expenses.

The arbitrator assessed the amount of expenses, allowing most of Certas' claim. Mr. Rooz took no position on the amount of the expenses there or in this appeal and variation/revocation proceeding.

[2] Law Society of Upper Canada, November 2000, Consolidated with Amendments February 2007.

III. ANALYSIS

Mr. Rooz sought to file additional evidence in the form of affidavits as fresh evidence in the variation/revocation application and appeal. Pursuant to R. 61.1(b) of the *Dispute Resolution Practice Code*, an application for variation/revocation can be made if evidence not available on the arbitration has become available.[3] Regarding appeals, since *Plows and Jevco Insurance Company*, (OIC P-000175, OIC P-000588, May 22, 1992), adjudicators have applied the criteria set out by the Supreme Court of Canada in *Palmer v. The Queen*, [1980] l S.C.R. 759. The first *Palmer* criterion is that the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial.

However, the evidence in the affidavits was available at the arbitration and could have been adduced by Mr. Rooz if he had not relied on client confidentiality. As noted above, he neither sought the order for the confidentiality exception under Rule 2.03 (2) of the *Rules of Professional Conduct*, nor did he rely on the exception for potential civil liability under Rule 2.03 (4) (b). I agree with the arbitrator's finding that it was up to Mr. Rooz to seek the order and not the insurer. As for the civil liability exception, I reject Mr. Rooz's submission that it applies only after a tribunal has imposed civil liability. The Rule specifically applies where "it is *alleged* that a lawyer" is civilly liable. The whole point of the proceeding before the arbitrator was to determine whether or not Mr. Rooz was civilly liable for arbitration expenses. I accept Certas' submission that Mr. Rooz simply made an intentional and tactical decision not to adduce the evidence at the arbitration hearing. Therefore, I am not prepared to consider the affidavits.

Since there is no evidence that was not available on the arbitration that has become available, there is no basis under R. 61.1(b) for seeking variation/revocation. Therefore, the variation/revocation application is dismissed.

That leaves the submissions made by Mr. Rooz regarding procedural and legal errors on the appeal.

[3] Rule 61.1(a) – if there has been a material change in the circumstances of the insured – only applies to insureds. Rule 61.1(c) – if there is an error in the order – only applies to numerical or clerical errors: *Olszewski and Citadel General Assurance Company*, (FSCO A03–000765, December 16, 2004).

I reject Mr. Rooz's submission that there was an apprehension of bias when the arbitrator refused to recuse herself despite his asking her to do so because she had heard the motion to dismiss. I agree with the arbitrator that, as the hearing arbitrator, she was in the best position to assess the arbitration expenses and that the hearing arbitrator normally conducts the expenses hearing.

I reject Mr. Rooz's submission that he received insufficient notice that the arbitrator was considering awarding costs against him personally as opposed to costs against the law firm of which he is a partner. Mr. Rooz prepared and signed the Application for Arbitration on Mr. Zapisnoy's behalf, he remained as counsel of record, and he also appeared at the arbitration expense hearing. The directing mind in this case was Mr. Rooz, so I am not persuaded that the arbitrator erred in finding him personally liable for the expenses.[4]

Furthermore, as required by s. 282(11.4) of the *Insurance Act*, Mr. Rooz was "given a reasonable opportunity to make representations to the arbitrator," so there was nothing preventing her from making an order under s. 282(11.2). The arbitrator had evidence on which to find that Mr. Rooz had notice of Certas' intention to seek an award of expenses against him personally. I find *Borquaye and State Farm Mutual Automobile Insurance Company*, (FSCO A03-001799, May 3, 2005) – where the arbitrator wrote to the representative warning him of the possibility of a personal expenses award – distinguishable because that was a case where the representative did not appear at the hearing. As already noted, Mr. Rooz did appear and had the opportunity to make representations at the s. 282(11.2) hearing.

I will not dwell in detail on the arbitrator's findings about the exemption under s. 282(11.3), namely whether or not Mr. Rooz acted in the usual course of the practice of law. First, the arbitrator had to make her findings in an evidential vacuum that Mr. Rooz himself created. That is, Mr. Rooz created a quandary for the arbitrator by failing to provide his evidence, and now he seeks to benefit from his actions by seeking a ruling that the arbitrator's decision was made in the absence of evidence. I believe in those circumstances the arbitrator was entitled to make findings on the basis she did. Second, that exemption only applies to s. 282(11.2)(a) (acting

[4] See to similar effect the appeal decision in *Mazin and Personal Insurance Company of Canada and Luskin*, (FSCO P07-00028, September 8, 2008).

without authority or without advising the client of the potential liability for expenses) and not to s. 282(11.2)(c) – causing expenses to be incurred without a reasonable cause.

Mr. Rooz submits that if he is successful under s. 282(11.2)(a) then he automatically succeeds on appeal under s. 282(11.2)(c) based on the findings of fact and limited reasons for judgment of the arbitrator. However, I reject that submission, as s. 282(11.2)(c) is a separate ground for assessing expenses against a representative. In this case, the arbitrator found that Mr. Zapisnoy had no intention of proceeding past mediation and that it was not reasonable to pursue the matter beyond mediation. These were findings that the arbitrator was entitled to make based on the evidence before her, and accordingly I have no basis for overturning them. It follows, as set out by the arbitrator, that the arbitration should not have been commenced and so Certas was required to incur expenses without reasonable cause pursuant to s. 282(11.2)(c). The arbitrator was therefore entitled to award expenses against Mr. Rooz personally under s. 282(11.2)(c).

The appeal is dismissed.

IV. 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*. I will note that, as a former representative bringing his own appeal, Mr. Rooz may be liable to pay the insurer's appeal expenses: *Mazin.*

David Evans Director's Delegate	March 26, 2009 Date