Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER of the *Insurance Act,* R.S.O. 1990, c.I.18, and Regulation 283/95;

AND IN THE MATTER of the *Arbitration Act, 1991* S.O. 1991, c.17;

AND IN THE MATTER of an Arbitration between:

B E T W E E N :

SECURITY NATIONAL INSURANCE COMPANY

Applicant
(Responding Party)

- and –

THE PERSONAL INSURANCE COMPANY/CERTAS INSURANCE

Respondent
(Moving Party)

A W A R D

Counsel:

Todd McCarthy

Counsel for the Moving Party (Respondent), The Personal Insurance Company/Certas Insurance

Nestor Kostyniuk

Counsel for the Responding Party (Applicant), Security National Insurance Company

Introduction:

1. This matter comes before me as an Arbitration within an Arbitration. The principal Arbitration involves a dispute between two insurers, which is pending before Arbitrator Kenneth Bialkowski. The insurers are both automobile insurers carrying on business in the Province of Ontario. They both have a connection with an incident in which one Miguel A. [1] was injured in a motor vehicle accident on September 5, 2008.

2. Security National has been paying statutory accident benefits to the claimant. It commenced what is commonly known as a priority dispute arbitration wherein it asserts that Certas has higher or greater priority, by reason of the issue of principal dependence, such that the claim should be transferred to Certas for ongoing handling and whereby Certas should be called upon to reimburse Security National for monies it has spent in relation to the claim.

3. In the context of the arbitration pending before Mr. Bialkowski, an issue has arisen as to whether the parties, through their counsel, settled the priority dispute. I have been engaged as an Arbitrator to determine whether the priority dispute claim was settled by agreement of counsel in August 2010?

[1] In recognition of the privacy interests of non-parties, I have deleted references to surnames from these Reasons.

Background Facts:

4. In 2009, Security National commenced the private arbitration process before Mr. Bialkowski. An initial pre-hearing discussion was arranged for January 14, 2010 and further pre-hearing discussions were conducted over the first half of 2010.

5. The first pivotal discussion between counsel occurred on July 6, 2010 (after the pre-arbitration teleconference with Mr. Bialkowski had concluded). Both parties were represented by counsel experienced in this area. Security National was represented by Mr. Greenside (called to the Bar in 1987). Certas was represented by Mr. Carlesi (called to the Bar in 2001).

6. In advance of the July 6, 2010 pre-hearing, Mr. Greenside spoke with his client and was asked to canvass with counsel for Certas whether there was any interest in the possibility of sharing the claim equally. The proposal contemplated the possibility of Certas reimbursing Security National for 50% of past and future benefits. Mr. Greenside deposed in his Affidavit that he did not receive formal instructions from his client to advance an offer but "only to float the idea and report back to Security National".

7. Mr. Greenside deposed further that when he spoke with Mr. Carlesi on July 6, 2010, he discussed the proposal and asked Mr. Carlesi that he make inquiries of his client to see whether there was any interest. According to Mr. Greenside, Mr. Carlesi advised Mr. Greenside that this was highly unlikely and Mr. Greenside was left with the impression that there was no interest in the idea and reported to his client to this effect.

8. In contrast to the foregoing, Mr. Carlesi deposed in his Affidavit that when he spoke with Mr. Greenside on July 6, 2010, Mr. Greenside made an offer to settle the priority dispute on a 50/50 basis. Mr. Carlesi stated, in the course of cross-examination by counsel for Security National, that the offer was unqualified with no limitations attached to the offer or on Mr. Greenside's authority to make the offer. Mr. Carlesi was not authorized to accept the offer (nor to reject it). He acknowledged that his client's position remained that it was not likely to be found to be the priority insurer and that his "posture" was that his client would be unlikely to accept the offer but he would seek instructions. [2]

9. The next pre-hearing discussion took place on August 17, 2010. Once concluded, Messrs. Carlesi and Greenside spoke again. Mr. Carlesi deposed that he verified that the offer made by Mr. Greenside, on behalf of Security National, "remained on the table". In cross-examination, Mr. Carlesi acknowledged that he attempted to elicit a sense from Mr. Greenside as to whether Security National would be amenable to an 80/20 split in relation to the claim (in favour of Certas). Mr. Carlesi was careful not to make a counter-offer (since, at that time, he was not authorized to do so nor did he wish to displace the offer which he understood had been made by Mr. Greenside on behalf of Security National). When the telephone conversation of August 17, 2010 concluded, Mr. Carlesi continued to be of the belief that the "offer" as made by Mr. Greenside on July 6, 2010 remained open for acceptance.

---

[2] On a procedural level, I determined in advance of the hearing date, after input from counsel for the parties, that the Arbitration before me would proceed with Affidavits from Messrs. Carlesi and Greenside being filed in lieu of their giving evidence in chief. Each would be produced for purposes of cross-examination by the party opposite in interest. Mr. Carlesi was produced for cross-examination and this occurred by Mr. Kostyniuk followed by reply evidence elicited by Mr. McCarthy. Mr. Greenside was offered for cross-examination by Mr. McCarthy who elected not to cross-examine Mr. Greenside.

10. It is significant to note that whatever transpired in the settlement negotiations conducted by telephone between Messrs. Carlesi and Greenside on July 6, 2010 and, subsequently, on August 17, 2010, Mr. Greenside did not reduce his "idea/offer" in writing nor did Mr. Carlesi ask Mr. Greenside to do so nor did Mr. Carlesi confirm in writing the "idea/offer".

11. On August 19, 2010 at 3:30 p.m., Mr. Carlesi sent an email to Mr. Greenside and indicated, inter alia, "my client has instructed me to accept your client's offer to resolve the subject priority dispute on the basis of a 50% - 50% indemnity split."

12. On the same date at 4:54 p.m., Mr. Greenside replied, inter alia, as follows:

> "…I think this to be a reasonable result for both insurers but I need to speak with my client before I can confirm we have a settlement".

13. Mr. Carlesi responded on the same date at 5:03 p.m. as follows:

> "….you advised me July 6, 2010 that you had instructions to settle on a 50% - 50% basis, …"

14. There is a factual discrepancy as to whether counsel spoke during the week of August 9, 2010. While Mr. Carlesi's email makes reference to a discussion of August 8, 2010 [which happens to be a Sunday], Mr. Carlesi was cross-examined and testified to the effect that the reference to a discussion on August 8, 2010 was a typographical error and that there were no discussions between counsel, in relation to settlement or otherwise, between July 6, 2010 and August 17, 2010.

15. By comparison, in Mr. Greenside's Affidavit, Mr. Greenside deposed to the effect that he recalled speaking with Mr. Carlesi during the week of August 9, 2010 at

which time Mr. Carlesi inquired as to whether Security National would still be interested in the original proposal which Mr. Greenside had floated on July 6, 2010. Mr. Greenside deposes that he suggested to Mr. Carlesi that this was likely and thought that once he heard back from Mr. Carlesi in relation to Certas' level of interest in the proposal, he would seek formal instructions from Security National.

16. Ultimately, Mr. Greenside sent email correspondence to Mr. Carlesi on August 24, 2010 to the effect that they wished to obtain an opinion from an accountant before continuing settlement discussions. Settlement, on a 50/50 basis or otherwise, did not materialize and this ultimately led to the issue that has been arbitrated before me.

The Dispute:

17. Certas takes the position that Mr. Greenside made an offer to settle or, at minimum, held out that he had authority to male an offer to settle and did not communicate any limitation on that authority. Thus, Mr. Carlesi's acceptance of the offer by email on August 19, 2010 should put an end to this dispute. [3]

18. Certas submits that a settlement concluded by a solicitor acting within his apparent authority is binding upon his client where the retainer is not disputed or not held out to be limited in any way. [4]

19. Security National takes the position that there was no "offer" communicated by Mr. Greenside on behalf of Security National and, as a result, there was nothing

[3] Milios v Zagas(1996), 3 C.P.C. (4th) 149; Scherer v Paletta, [1966] 2 O.R. 524
[4] Fabian v. Bud Mervyn Construction Limited (1981), 35 O.R. (2d) 132

for Mr. Carlesi, on behalf of Certas, to accept. Moreover, the parties, as represented by counsel, were not in "ad idem".

20. Counsel for Security National submits that the common law respecting offers and acceptance and what constitutes a settlement or agreement has been established for over 100 years.

> "It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."[5]

21. In the course of hearing submissions from counsel for the parties, I inquired as to which party had the onus or burden of proof. It was agreed between the parties that Certas, as the moving party, bore the onus or burden of proof. This is correct so far as I am concerned.

22. In my view, the issue which I am called upon to decide turns on the onus or burden of proof. In the absence of any written communications between counsel on or about July 6, 2010 or on or about August 17, 2010 or between those dates, I find that two capable counsel formed two very different impressions from their telephone discussions and negotiations. Mr. Greenside believes that he made a settlement proposal; Mr. Carlesi believes that Mr. Greenside made a settlement offer. Each version of the discussions is plausible. In the absence of any contemporaneous documentation from either counsel, I am unable to find that Certas, which has the onus of proof, has discharged the onus and proven, on the

[5] Dickensen v. Dodds (1876), 2 Ch. Div. 463

balance of probabilities, that there was an offer made on July 6, 2010 and continuing to August 19, 2010 which was capable of acceptance.

CONCLUSION:

23. I am not satisfied that Certas has discharged the onus or burden of proof that there was a settlement offer made by Security National, through its counsel, on or about July 6, 2010 which was open for acceptance when Certas attempted to accept the offer on August 19, 2010. As a result, the application made by Certas to enforce the "settlement" is dismissed.

24. The parties agreed, as an aspect of the Arbitration Agreement, that if the application is dismissed, the responding party shall be entitled to their costs. The quantum of such costs is to be determined by me. I received submissions from counsel such that both parties agree that costs should be awarded in the sum of $2,500.00 inclusive of assessable disbursements and applicable taxes and that my account should be borne by the unsuccessful party.

25. As a result, costs are awarded in favour of Security National Insurance Company in the amount of $2,500.00 all inclusive. My account for services rendered will be prepared shortly and submitted to Certas in the care of Mr. McCarthy.

26. I am indebted to counsel for their efforts throughout the Arbitration and their conscientious and thoughtful submissions at the hearing.

Dated at Toronto, this day of May, 2011.

Vance H. Cooper, Arbitrator