IN THE MATTER OF THE *INSURANCE ACT*,
R.S.O. 1990, c. I. 8, and REGULATION 664 AS AMENDED

AND IN THE MATTER OF THE *ARBITRATION ACT*, S.O. 1991, c.17

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N:

UNIFUND INSURANCE COMPANY

Applicant

\- and -

CHARTIS INSURANCE COMPANY OF CANADA

Respondent

DECISION

COUNSEL

Nathalie Rosenthall and Nathan M. Fabiano – Zarek, Taylor, Grossman, Hanrahan LLP
Counsel for the Applicant, Unifund Insurance Company
(hereinafter referred to as "Unifund")

Ms. Leilah Edroos – Rapley & Company
Counsel for the Respondent, Chartis Insurance Company of Canada
(hereinafter referred to as "Chartis")

ISSUE - LOSS TRANSFER / INDEMNITY / REASONABLENESS OF PAYMENTS

[1] In the context of a loss transfer dispute pursuant to s. 275 of the *Insurance Act, R.S.O. 1990, c. I.8,* the issue before me is to determine the extent to which Chartis ought indemnify Unifund with respect to payments made to or on behalf of the claimant Matthew Asiedu who sustained serious personal injuries in a motor vehicle accident on September 20, 2013. The disputed payment involved a payment made by Unifund in the amount of $630,000 with respect to a full and final settlement of all accident benefit claims reached at a private mediation on February 7, 2019. Up until then all requests for indemnity had been paid by the Respondent Chartis.

PROCEEDINGS

[2] The matter proceeded on the basis of Examination Under Oath transcript of the Unifund Claims Consultant, Document Briefs, Books of Authority and Written Submissions.

BACKGROUND

[3] Mr. Matthew Asiedu was involved in a motor vehicle accident on September 20, 2013. At the time of the accident, Mr. Asiedu was only 25 years old. He was single, had no dependents and was living with his family in Brampton. At the time of the accident, Mr. Asiedu was insured with Unifund Insurance Company (hereinafter "Unifund"). He was employed full time in family businesses involved in the sale of juices and a cleaning business. Tax returns show income in 2012 of $27,555 and income in 2013, the year of the accident, of $28,176. As for pre-accident health there appears to be no psychiatric diagnosis but there were complaints of anxiety.

[4] On September 20, 2013, Mr. Asiedu was operating his 2001 Chevrolet automobile on Steeles Avenue when Mr. Siddioui, who was operating a transport truck (a heavy commercial vehicle) insured with Chartis Insurance Company of Canada (hereinafter "Chartis"), made a left turn in front of Mr. Asiedu's car and the vehicles collided. Mr. Siddioui was charged with violating s. 141(5) of the *Highway Traffic Act* (left turn across path of approaching vehicle).

[5] Mr. Asiedu's vehicle was completely destroyed in the accident as evidence by the photographs produced. The repair estimate totalled $19,644.09. His GCS on the scene was a 14/15. He was taken by ambulance to the Brampton Civic Hospital. He suffered a laceration to his scalp and a CT scan of his head revealed a questionable subdural hematoma in the right anterior temporal region. Medical records thereafter indicate a closed head injury with post-concussive syndrome, soft tissue injuries leading to a diagnosis of chronic pain disorder / somatic symptom disorder and an adjustment disorder. Approximately 3 years post accident and as a result of suicidal ideations the claimant was taken by ambulance to Brampton Civic Hospital where he was confined between November 14 and December 2, 2016. He was diagnosed with a psychosis. The relationship of the development of the psychosis to the claimant's involvement in the subject accident became a major issue in the accident benefit dispute and, in particular, with the claimant's claim for CAT benefits.

[6] Unifund began payment of accident benefits to and on behalf of Mr. Asiedu, Thereafter, Chartis agreed to indemnity Unifund for loss transfer on a 100% basis consistent with the application of Rule 12(5) the Fault Determination Rules - O. Reg. 668. Unifund submitted the following Requests for Indemnification and Chartis paid as noted in the table below:

RFI	DATE	PERIOD COVERED	TOTAL AMOUNT	AMOUNT PAID

1.	Unknown	Unknown	$355.08	$355.08
2.	Nov 27/2014	June 26 to Oct 28/2014	$10,327.79	$10,327.79
3.	April 21/2015		$7,534.53	$7,534.53
4.	Sept 14/2015	April 19 to Sept 11/2015	$48,269.72	$48,269.72
5.	Dec 16/ 2015	Sept 12 to Dec 15/2015	$4,329.73	$4,329.73
6.	April 21/2016	Dec 16/2015 to April 18/2016	$2,912.86	$2,912.86
7.	Aug 11,2016	April 19 to Aug 10/2016	$20,618.33	$20,618.33
8.	Dec 15/2016	Aug 11 to Dec 13/2016	$8,8.91.45	$8,8.91.45
9.	April 21/2017	Dec 14/2016 to April 17/2017	$1,047.27	$1,047.27
10.	Feb 2/2018	April 17/2017 to Feb 2/2018	$499.22	$499.22
11.	April 10/2019 (received April 22/2019)	Feb 2/2018 to March 12/2019	$620,000.00 (Revised to $630,000.00)	**In Dispute**

[7] It is the final request reflecting a lump sum full and final settlement of Mr. Asiedu's accident benefit claim that is in dispute in this arbitration.

[8] By way of background the evidence reveal that on or about July 7, 2017, the Claimant submitted an Application for Determination of CAT Impairment (OCF-19). Therein, the Claimant applied for a designation of catastrophic impairment based on Criterion 8. At the time of the accident, the definition of Criterion 8 consisted of the following:

> "8. An impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition, 1993, results in a Class 4 impairment (Marked Impairment) or Class 5 impairment (Extreme Impairment) due to mental or behavioural disorder."

[9] In support of the claim of Matthew Asiedu was a report of Dr. Waisman (psychiatrist) dated July 7, 2017 in which he opined that the claimant had a marked impairment in work functioning as a result of his Somatic Symptom Disorder and Major Depressive Episode. There was also the report of Dr. Kurzman (neurologist) dated June 7, 2017 in which he concluded that the claimant had a class 4 impairment in 3 of 4 categories. At the time the claimant only had to have a class 4 impairment in one category to be considered CAT. The medical evidence provided by the claimant supported a claim for a catastrophic designation.

[10] The responding CAT IE's arranged by Unifund were completed March 8, 2018, the date of an executive summary prepared by Dr. Meikle. The diagnosis was that of post traumatic stress disorder, psychosis and schizophrenia. However, the opinion was that the psychosis and schizophrenia was highly unlikely to have been caused by the subject motor vehicle accident. Dr. Eisen (psychiatrist) concluded that the claimant would have a class 4 impairment from a psychiatric perspective in both Activities of Daily Living and Adaption if the psychotic disorder was related to the motor vehicle accident. However, Dr. Eisen concluded that the psychotic disorder was "unlikely related to the subject motor vehicle accident". Dr. Mendis (neurologist) in a report dated July 10, 2018, concluded that the claimant likely sustained a mild traumatic injury with a prolonged post-concussive syndrome and that his current symptoms were more likely related to psychological / psychiatric issues rather than the effects of neurotrauma. He deferred to the psychological / psychiatric experts.

[11] There were clearly conflicting medical opinions as to whether the claimant met the catastrophic threshold with much dependent on whether the claimants psychosis / schizophrenia was caused or contributed to by reason of his involvement in the subject motor vehicle accident.

[12] A global mediation (tort and AB) took place on February 7, 2019, in which the accident benefits claim of Matthew Asiedu was settled on a full and final basis by Unifund. At the time of the mediation, med/rehab benefits either paid or approved, had reached the non-CAT limit. IRB payments had been terminated based on s.44 IE's. Attendant care was not being paid even though Unifund was faced with a Form 1 in the amount of $975.61 monthly. At the time of the mediation, there was an outstanding LAT claim for med/rehab benefits, IRB's, attendant care benefits and a CAT determination.

[13] Prior to the mediation Unifund obtained a legal opinion as to the value of the accident benefits claim of Matthew Asiedu for the purposes of settlement and the authority recommended to be obtained for the mediation. With respect to CAT risk, the legal opinion provided was said to be 50-50 on a best case scenario and a 70/30 in the claimant's favour as a worst case scenario. With respect to IRB's the legal opinion was that the exposure was about $545,000 for past and future IRB's on the basis of a structure quote with the chances of successfully defending the IRB claim at 50%. The recommended authority to be sought for IRB's was $252,000. As for med/rehab exposure, treatment had tapered off to psychological treatment only. In the year prior to the mediation $11,000 was expended for psychological treatment. On an ongoing basis the present value on the basis of a structure quote obtained would be $318,702.25. A 50% discount was recommended with a recommended settlement value of $160,000. With respect to attendant care, services were being provided at the rate

of $975.61 per month. The insurer's assessment concluded that no attendant care was required. Once again, there was conflict in the available medical documentation. Present value based the level of services provided came to $347,675.18 according to a structure quote obtained. Based on 50% CAT risk, it was suggested that the range for settlement of attendant care was $173,837.59 or at worse $260,756.39. As for housekeeping, counsel indicated that thus far there was no indication that the claimant had ever obtained housekeeping assistance. Nothing was recommended for this head of claim. In the final analysis it was recommended that the authority to be sought was in the amount of $751,783.08 plus incurred treatment and past incurred attendant care expenses.

[14] The senior accident benefit adjuster handling the claim on behalf of Unifund sought authority as follows:

IRB	$260,000
AC	$150,000
Med/rehab	$220,000
Housekeeping	$35,000
Costs/disb	$10,000

	$675,000

[15] Unifund provided the adjuster with such authority in advance of the mediation.

[16] At the mediation, the Claimant was seeking to resolve his accident benefits claim on the basis of available CAT limits. Ms. Edroos was retained by Chartis to represent the Defendants, Mr. Siddioui and Ceva Logistics in connection with Mr. Asiedu's tort claim. Unifund and their counsel, Tanya Zigomanis, were also present at the mediation for both the tort and AB claims.

[17] Unifund settled Mr. Asiedu's accident benefits claim at the mediation for $630,000.00 all inclusive. The tort claim did not settle at that time.

[18] A Request for Indemnification was sent by Unifund to Chartis for $630,000.00 on or about April 10, 2019, requesting repayment of the settlement. Chartis has refused to indemnify Unifund for this amount on the basis that the payment did not satisfy the "reasonableness of payment" requirements.

[19] A loss transfer claim was then brought by Unifund against Chartis pursuant to section 275 of the *Insurance Act, R.S.O. 1990, c. I.8* and section 9 of *Regulation 644*. Unifund served Chartis with a Notice of Commencement of Arbitration on January 6, 2020. Chartis is disputing the reasonableness of the payments made and essentially the full and final settlement entered into by Unifund to resolve Mr. Matthew Asiedu's claim for accident benefits.

ANALYSIS AND FINDINGS

[20] The jurisprudence with respect the issue of "reasonableness of payments" in a priority dispute or a loss transfer dispute appears well settled. The submissions of each party would indicate that there is little dispute as to the applicable jurisprudence.

[21] An insurer who resists full repayment of eligible benefits bears a heavy onus to establish the payments were not reasonable. Justice Stewart, having considered the onus in the context of loss transfer disputes, stated in *Jevco Insurance Company v Gore Mutual Insurance Company, 2014 CarswellOnt 13474:*

> " The onus is a strict one, and the second party insurer must demonstrate that the first insurer either acted in bad faith or grossly mishandled the claim such that the amounts paid out that it is seeking to recover are grossly unreasonable."
>
> [emphasis mine]

[22] Arbitrator Samworth considered "reasonableness of payments" in *Commercial Union Assurance Company and Boreal Property and Casualty Company, 1998 CarswellOnt 7744,* and articulated her view that the inquiry be limited to confirming that the handling insurer did not:

(1) act in bad faith

(2) make payments that were not covered under the Statutory Accident Benefits Schedule in existence at the time of loss, ie. pay for a weekly benefit when there was no such entitlement, or

(3) in general, so negligently handle the claim that payments were made greatly in excess of that which the insured would have been entitled had the file been managed by a reasonable claims handler.

[23] The strict onus upon Chartis would be to prove "bad faith or gross mishandling" on the part of Unifund in full and final settlement of Matthew Asiedu's accident benefit claim at the mediation of February 7, 2019. Clearly, each case must be decided on its own facts.

[24] In the case before me Unifund has claimed that all payments made were reasonable and consistent with the risk of a CAT finding. The claim was settled at a mediation for $630,000 which was an amount well under available CAT limits. The breakdown as set out in the Settlement Disclosure Notice (hereinafter "SDN") was as follows:

a. $150,000.00 for all past and future income replacement benefits;

b. $430,000.00 for all past and future medical benefits; and

c. $50,000.00 for outstanding incurred expenses and benefits.

[25] Prior to the mediation Unifund obtained a legal opinion which was disclosed to counsel for Chartis in this arbitration. The opinion concluded that there was CAT risk. The risk was assessed at 50% on a best case scenario and a 70/30 in Mr. Asiedu's favour in the worst case scenario. The legal opinion indicated that there were concerns over Unifund's own medical assessor, Dr. Eisen, finding that although the Claimant had a Class 3 impairment in all 4 spheres, the Claimant could be found to have a Class 4 impairment if the psychotic disorder could be causally linked to the subject accident.

[26] The Claimant had submitted reports that suggested that he indeed did have Class 4 impairments. Psychiatrist, Dr. Zohar Waisman found a Class 4 marked impairment in adaption, thereby meeting the criterion for catastrophic impairment. Neuropsychologist, Dr. Kurzman also assessed the Claimant and found that his condition meets the criteria for a Class 4 (Marked) impairment in three spheres: activities of daily living, social functioning and deterioration or decompensation in work or work-like settings.

[27] As a result, Unifund has claimed that there was a real risk that an Adjudicator at the LAT would find that the Claimant did, in fact, sustain a catastrophic impairment as a result of the accident as supported by the legal opinion obtained in advance of the mediation.

[28] Furthermore, Chartis has been provided with Unifund's Large/Complex Loss Form, which provides a thorough breakdown of how Unifund arrived at its evaluation of the claim. The form notes that Unifund accepted a 50% risk regarding all of the issues in dispute, which Unifund submits was entirely reasonable given the existing exposure. The Form also displays the reserves for this file. The file settled for far under the reserve amount. The IRB portion of the settlement was approximately 1/4 of what the Claimant's lifetime IRBs would have been in an annuity. The Medical/Rehabilitation Benefits were also resolved for approximately 1/2 what the exposure would have been had Unifund lost at the hearing on the causation/CAT issue.

[29] Simply stated, Unifund has claimed that settling a file within the CAT limits and for less than the settlement value of the claim as per the legal opinion that they obtained, when CAT exposure clearly existed, does not meet the standard of "bad faith or grossly unreasonable".

[30] The Respondent Chartis disagrees and has claimed there was a gross mishandling of the full and final settlement reached at the mediation of February 7, 2019. They claim that the amount of the settlement reached, bore no relationship to the documentation produced to substantiate same. The adjuster from Unifund attending the mediation kept no log notes or report on the specifics as to how the settlement was reached. According to Chartis this represents a gross mishandling of the accident benefit claim and no indemnity ought result.

[31] Specifically, Chartis claims that Unifund:

(a) Paid more than 100% of the assessment of the med/rehab based on CAT risk for future med/rehab benefits without explanation.

(b) Paid the claimant 91.72% of his demand at mediation for future med/rehab and 100% of past benefits in dispute.

(c) Paid past incurred without providing proof of same to Chartis as required.

(d) Ignored their own opinion and the recommendation of their counsel on risk.

(e) Ignored their settlement authority on med/rehab benefits by paying $210,000.00 more than authorized.

(f) Failed to deduct post-accident income from the IRB settlement as evidenced in tax returns.

(g) Failed to sufficiently investigate, challenge and give weight to the claimant's pre-accident employment history as it emerged from the documentation provided as well as his post-accident income.

(h) Failed to give sufficient consideration to the issue of causation as it relates to the diagnosis of schizophrenia by the claimant's treating psychiatrist and obtain an expert medical opinion in respect of same.

[32] I will firstly deal with the IRB component of the final settlement. This component is not affected by any CAT risk. At the time of the mediation the claimant claims to have remained totally disabled from any occupation. There was conflicting medical evidence with respect to the issue. The IRB's had been terminated for some time. There was surveillance that could show that the claimant was working despite his denials. There were multiple references in the insurer IME's to the claimant's credibility or lack thereof. The legal opinion provided estimated arrears at about $40,000 not including interest. The calculated present value of future income replacement benefits totalled $505,000. Total exposure was therefore $545,000. The legal opinion assessed the chances of successfully defending the IRB claim at 50%. It was recommended that authority be sought for $252,000 for IRB's. The adjuster obtained authority for $260,000. This component of the claim settled for $150,000.

[33] Chartis submitted that the settlement of $150,000.00 was unreasonable for the following reasons:

(a) This settlement amount does not appear to take into consideration the significant amount of future med/rehab that was also being paid of $430,000.00 which included psychological treatment, a chronic pain program, retraining into light work and physiotherapy. If the claimant was going to receive all this care, one would be expected that the claimant would be able to return to work. There is no sound reason or logic for paying a further 5.9 years for IRBs into the future.

(b) Unifund's contention that the settlement was reasonable is based on the erroneous assumption that there was exposure to pay an IRB for life. The claimant asked for funding for retraining and med/rehab, most of which Unifund paid.

(c) Unifund had surveillance in December 2017 which demonstrated that the claimant may well be working, despite his denial which has been called into question. Given his lack of credibility demonstrated in many medical reports prior to and since the September 2013, the fact that he was not forthcoming to the assessors in respect of the November 2011 accident about the September 2013 accident and did not inform Ontario Works about his work history, Unifund should concluded that he was likely working despite his denials.

(d) As of the date of the global mediation, there was no definitive report that the claimant will never be able to return to work and that addressed the many s.44 IRB reports obtained by Unifund. As noted earlier, there was no current report from any treating health care practitioner as to the claimant's condition since March 8, 2017, from Dr. Gozlan, psychologist.

(e) Unifund overestimated the risk to a past and future IRB where their own medical evidence did not support it.

(f) Unifund should have given more weight to the claimant's work history as it evolved as it was clear from the evidence that he was not working for his father's business at the time of the accident despite efforts to successfully fabricate that evidence post-accident. While Unifund may not have been able to recover the IRBs paid to date, they had a lot of evidence to refute his claim for past and future. Moreover, his father had returned to Jamaica, and may well not have been able to testify if required.

[34] Chartis assumed that the claimant received $40,718.39 for past IRBs, leaving a balance of $109,282.00 for futures. Assuming an annual IRB amount of $18,508.36, Unifund paid the claimant IRBs for another 5.9 years into the future. Chartis claims this was unreasonable.

[35] Having considered the submissions of Chartis aforesaid, I cannot find that there was "bad faith or gross mishandling" of the IRB claim. First and foremost, there was conflicting medical evidence as to whether the claimant remained vocationally disabled. Importantly though, even the insurer's own psychiatric assessment of Dr. Eisen dealing with the CAT issue, concluded that there existed a marked class 4 psychiatric impairment in both Activities of Daily Living and Adaption if the psychosis were ultimately found to have been materially contributed to by the subject accident. In my view, there existed serious risk to Unifund with respect to the causation issue with respect to the psychosis. The wording of the IME's would

indicate that the alleged disabling psychosis was not "a consequence the subject accident". However, whether the accident contributed to the development of the condition that would not have developed "but for" remained an issue for the LAT adjudicator. The pre-accident medical records make no reference to there ever having been a psychiatric diagnosis but merely mentioned pre-accident complaint of anxiety. During a month hospitalization in 2016 for his psychiatric disorder there were notes of Mr. Asiedu vividly remembering the crunching of metal sound of the accident and that the voices in his head continued to tell him that he going to be killed. The hospital notes also make reference to the fact that he could not stop thinking of the accident and how it "ruined his life". Causation was clearly to be a hotly contested issue. Also supportive to a conservative approach being taken to the resolution of the IRB claim, as well as the overall AB settlement, was the violence of the collision itself evidenced by the photographic evidence produced. The evidence suggests that the truck turned left across the path of Mr. Asiedu's automobile and the automobile got stuck under the side of the truck. As the Unifund adjuster stated on her Examination Under Oath:

> "Combined – combined with everything else, if you look at the vehicle – the top of the vehicle was sheared right off. He's lucky he didn't lose his head. It was a very severe, traumatic accident , that he was dragged by this truck who didn't know he was under him. Of course he is going to have some psychological symptom."

[36] I cannot help but think that the violent nature of the accident and the extent of property damage may have impacted any adjudicator's assessment as to whether the claimant's disabling psychiatric condition was materially contributed to by his involvement in this accident.

[37] Furthermore, at the time of the mediation the claimant had already been off work for 5 ½ years. He had been approved and was receiving ODSP benefits where to qualify one must demonstrate a substantial limitation in one's ability to work, look after oneself or carry out daily activities. To pay only an additional 5.9 years (about $109,000) of future benefits to a young man only 30 years of age at the time of the settlement cannot be said to be unreasonable nor can the authority obtained by the adjuster for even the higher amount of $260,000. I find on the totality of evidence that Unifund's assessment of the risk and final settlement number paid with respect to the IRB component clearly does not represent a "gross mishandling" on the basis of the evidence before me.

[38] I will now deal with the housekeeping component. Up until the date of the mediation the claimant had never incurred expenses for housekeeping expenses. Keep in mind that he was living at home with his family. The legal opinion obtained recommended no payment for housekeeping. The adjuster nevertheless obtained authority of $35,000 for this component representing future risk. The ultimate settlement included no payment whatsoever for housekeeping. I do not find the obtaining of authority for $35,000 would amount to a "gross mishandling". Clearly, the payment of nothing for the housekeeping component cannot be criticized in any way.

[39] As for attendant care, Unifund was faced with a claim based on a form 1 in the amount of $975.61 monthly. The insurer's form 1 indicated that no assistance was required. The legal opinion obtained, made it clear that the more recent services provided by a Ms. Friar would likely be considered "incurred". It was noted that the claim with which Unifund was being faced was quite modest and that it would not be a surprise to see an updated form 1 for a larger amount on the basis of requiring more supervision given his psychiatric condition. Also noted was the fact that his mother was living in Jamaica and his father had the house for sale and was returning to Ghana. The family was considering the hiring of a nurse to look after him. A present value calculation based on $12,000 per year totalled $347,675.18. It was recommended that authority be sought for $173,837.59 (50%) to $260,756.39 (75%). The adjuster requested and obtained authority for $150,000 for this head of claim and this head of claim settled for that amount. On the evidence before me I see no "gross mishandling" with respect to the claim for attendant care.

[40] It is the settlement of the component for med/rehab that has proven to be challenging. Counsel for the claimant did not obtain a future care report. At the time of the mediation there were 4 OCF-18's in dispute. These totalled about $23,000. They had been denied on the basis that the non-CAT medical limits had been exhausted. The legal opinion obtained indicated that in 2016, being the last year before claims were denied by reason of the non-CAT limit, $11,000 was paid in treatment. It was suggested that this figure be used for assessment purposes, the present value of which was $318,702.25 using the $11,000 annual figure as the burn rate. It was recommended that authority be sought for $160,000 plus incurred to date with a worse case scenario at $239,026.69. The adjuster obtained authority for $220,000. The med/rehab claim settled at the mediation for $480,000.

[41] Chartis has claimed that settlement for more than double that recommended by counsel and that sought for authority by adjuster represented a "gross mishandling" of the claim. On her examination under oath in April 2021 the handling adjuster had no recollection as to why $480,000 was paid for med/rehab at the February 2019 mediation when the authority obtained was only $220,000. The settlement disclosure notice indicated that $50,000 was for past benefits in dispute as well as incurred expenses up to the date of the mediation. The balance of $400,000 was for future med/rehab benefits. Furthermore, the adjuster had no notes as to what occurred at the mediation and did not prepare a post-mediation report. She made it clear that she did not draft the SDN – Settlement Disclosure Notice which requires a breakdown for the benefits paid with respect to each specific head of claim. She had settlement authority for $675,000 and she settled for $630,000. She made it clear that she was not limited to the authority for each individual head of damage. She stated on her Examination Under Oath that she had $675,000 whether she paid it all for IRB or housekeeping.

[42] The issue which presents itself here, is whether it amounts to a "gross mishandling" to pay a component of the claim far in excess of a reasonable assessment in a situation where nothing is paid for components where there existed a reasonable risk of a sizeable payment. For example, Unifund was faced with an attendant care claim based on a form 1 of $975.61 per month. Authority for attendant care was, in my view, reasonably obtained on the medical

documentation available at $120,000, yet nothing was paid on final settlement. In addition, Unifund managed to resolve the IRB claim for $150,000, an amount far less than what I consider the reasonably obtained authority of $260,000. There is no evidence before me that would indicate that the claimant would have settled each head of damage separately. On the evidence before me I find that payment of $480,000 for past and future med/rehab was unreasonable yet settlement of the overall claims for $630,000 was reasonable considering the exposures existing. This leaves the question as to whether in a lump sum full and final settlement each component must be looked at individually or whether "reasonableness of payment" should be looked at on the basis of the global settlement amount.

[43] It was submitted by the Applicant Unifund, that it is industry practice in the context of a full and final settlement of accident benefits claim, to allocate funds under different lines in the SDN to sometimes suit the claimant or the insurer's purpose. Unifund claimed that the SDN amounts are not always determinative of what line the benefits are approved under. That may especially be the case when at a global mediation, the tort claim does not resolve (as it did not in this case). In the end, Unifund has claimed that what is crucial to an insurer, is that the total settlement does not exceed the total value of the reasonably obtained authority and/or legal recommendations approved to resolve a matter. Unifund has claimed that any misattribution of funds under specific head of claim as set out in the SDN does not amount to "bad faith or gross mishandling". They have claimed that a private arbitration decision suggesting otherwise, would lead to a slippery slope. It would severely restrict a first party's insurer's flexibility and general ability to resolve matters.

[44] In my experience of 46 years as counsel, mediator and arbitrator I can state that it is common practice that AB claims be settled on a lump some basis with each side continuing to have differences of opinion on the value of individual components of the settlement. In many cases the amounts shown on the Settlement Disclosure Notice are not a true statement of a consensus reached by the parties with respect to any particular component, but merely reflective of a consensus on the overall settlement number. On the totality of evidence before me that is what I believe happened here. Unifund may have paid more than it felt reasonable for med/rehab but far less for IRB and attendant care. I am of the view that when assessing the issue of "reasonableness of payments' in the context of a full and final lump sum settlement of all accident benefit components, it is the overall amount of the settlement that must be looked at rather than individual components. Otherwise, many lump sum cash out claims would go unsettled leading to protracted and costly litigation. For example, if Unifund thought that it would be unable to recover the amount that the SDN allocated to med/rehab in the ongoing loss transfer dispute, even though there was consensus on the overall settlement number, the overall claims may not have settled. There would have been consensus on the overall settlement number but not that allocated to each head of claim. The insurer would have lost an opportunity to close a file and the claimant would have lost an opportunity to reach an overall settlement and avoid the ongoing litigation process. I must agree that to require a review of the "reasonableness" of each component of a full and final settlement of an accident benefit claim as set out in a Settlement Disclosure Notice would severely restrict an insurer's flexibility and general ability to resolve matters and would consequently lead to a disservice to claimants who would like their claims resolved

once consensus has been reached on the overall settlement number. Accordingly, I find that when analyzing the "reasonableness of payment' of a lump sum full and final settlement of an accident benefits claim, the "reasonableness" of the overall settlement ought be the consideration rather than analysis of the individual components as set out in the Settlement Disclosure Notice which may not be reflective of how the overall settlement was arrived at in the minds of the two involved parties. As I have indicated, it should not come as a surprise that the two parties in a dispute might be able to reach a consensus as to the overall settlement value but continue to have differences of opinion as to the valuation of individual components. To require strict analysis of individual components and not look at the overall settlement as the primary consideration, would result in many cases not being settled and give rise to protracted and costly litigation with the best interests of both parties not being met.

[45] On the evidence before me I find that the overall settlement was a reasonable one and cannot be said to amount to a "gross mishandling". The established jurisprudence makes it clear that the onus on Chartis to demonstrate "gross mishandling or bad faith" is a "strict one". On the evidence before me that onus has not been met.

[46] I therefore find that Unifund is entitled to indemnity for the full amount of the disputed indemnity request of $630,000.

ORDER

[47] On the basis of the findings aforesaid I hereby order that:

1. Chartis to pay to Unifund $630,000 by way of indemnity plus interest calculated according to the *Courts of Justice Act* from the date of the Request for Indemnity;

2. Chartis pay to Unifund the legal costs of this arbitration on a partial indemnity basis;

3. If possible, Unifund assign to Chartis the balance of the structure and reversionary interest and, if not possible, Unifund pay to Chartis any recovery it may make with respect to the reversionary interest;

4. Chartis pay the costs of the Arbitrator.

DATED at TORONTO this 13th)

day of May, 2022.)

KENNETH J. BIALKOWSKI
Arbitrator