CITATION: 4811837 Manitoba Ltd. v. Wynward Insurance Group, 2022 ONSC 4532
COURT FILE NO.: CV-21-67-00
DATE: 2022-08-03

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
4811837 Manitoba Ltd., 9120459 Canada Ltd. and 9120696 Canada Ltd. Carrying on business as Clarion Inn Lakeside and Conference Centre	*T. Fry*, for the Plaintiffs
Plaintiffs	
- and -	
Wynward Insurance Group, The Wawanesa Mutual Insurance Company, Aviva Insurance Company of Canada, Llyod's Underwriters and Western Financial Group (Network) Inc.	*G. Lisi for the Defendants,* Wynward Insurance Group, The Wawanesa Mutual Insurance Company and Aviva Insurance Company of Canada No one appearing for Llyod's Underwriters *B. Papazian for the Defendant*, Western Financial Group
Defendants	
	HEARD: June 24, 2022 at Kenora, Ontario, via Zoom

Mr. Justice W.D. Newton

Decision on Motion

Overview

[1] The defendant insurers bring two motions. Their motion to amend their statement of defence is granted on consent. Their motion to appoint an umpire under the *Insurance Act* is granted for the reasons that follow.

The Facts

[2] The plaintiffs are the owners and operators of the Clarion Lakeside Inn & Conference Centre (the "hotel") in Kenora. On January 17, 2020, a fire destroyed the hotel, its contents and interrupted all business operations.

[3] The defendants Wynward Insurance Group, The Wawanesa Mutual Insurance Company and Aviva Insurance Company of Canada (the "insurers") insured the hotel, its contents and the plaintiffs' business operations pursuant to an insurance policy with a policy period of December 29, 2019, to December 1, 2020 (the "policy").

[4] The defendant Western Financial Group (Network) Inc. (the "broker") obtained the policy for the hotel, its contents, and business operations on behalf of the plaintiff from the insurers.

[5] Disagreements have arisen between the hotel and the insurers over the value of the property insured and the value of the loss. The hotel has sued the insurers for $25,000,000 for breach of the insurance contract and the broker for failing to secure adequate insurance coverage.

[6] The policy contains the following statutory condition requiring appraisals to determine values if disputed:

> **Appraisal**
>
> 11. In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefore is made in writing and until after the proof of loss has been delivered.

[7] These sections of the *Insurance Act*[1] govern the procedure for appraisals:

> **Contracts providing for appraisals**
>
> 128 (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer. R.S.O. 1990, c. I.8, s. 128 (1).
>
> **Appraisers, appointment**
>
> (2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire. R.S.O. 1990, c. I.8, s. 128 (2).
>
> **Appraisers, duties**
>
> (3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters. R.S.O. 1990, c. I.8, s. 128 (3).
>
> **Costs**
>
> (4) Each party to the appraisal shall pay the appraiser appointed by the party and shall bear equally the expense of the appraisal and the umpire. R.S.O. 1990, c. I.8, s. 128 (4).

[1] RSO 1990, c 1.8

Appointment by judge

(5) Where,

(a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;

(b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or

(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

a judge of the Superior Court of Justice may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer. R.S.O. 1990, c. I.8, s. 128 (5); 2006, c. 19, Sched. C, s. 1 (1).

[8] The insurers appointed their appraiser on December 6, 2021. The plaintiffs appointed their appraiser on January 17, 2022. Since then, the plaintiffs have refused to co-operate in appointing an umpire. They do not contest the qualifications of either proposed umpire. Despite the mandatory requirement for an appraisal, the plaintiffs argue that it is not appropriate to proceed with the appraisal and note that the power granted to a judge to appoint an umpire is permissive, rather than mandatory.

Positions of the Parties

[9] Relying upon the plain language of the statutory condition and the statute, and cases such as *Northbridge General Insurance Corp. v. Ashcroft Homes-Capital Hall Inc*.[2] and *S.H.W. Investments Inc. v. Lloyds's Underwriters*[3], the insurers argue that an umpire must be appointed and that the only parties to the appraisal process under the *Act* are the insurers and the insured.

[2] 2021 ONSC 1684. [*Northbridge*]
[3] 2018 ONSC 5697. [SHW]

[10] The hotel argues that the valuation issue is also relevant to its claim against the broker, and that it is inefficient to proceed to appraisal unless the broker is also a party. The insurers seek to impose a co-insurance penalty[4]. If the co-insurance penalty applies because the hotel and contents were underinsured, then the hotel claims that the broker is liable for failing to advise on and arrange appropriate insurance coverage. Initially, the insurers appeared to suggest that the broker could participate in the appraisal. Later, the insurers said the broker could not be a party to the appraisal. As the valuation issue is important to all three parties, the hotel submits that the broker should be part of the appraisal. Alternatively, since the parties are already parties in a single court action, the hotel submits that the appraisal should not procced and that the valuation issues be determined by this court in the action. It relies upon *Sholidis v. Economical Mutual Insurance Co.*[5] and distinguishes *S.H.W.*

[11] The broker argues that the appraisal is not binding upon it as it is mandated to resolve issues of value between insurer and insured and that the scope of the appraisal process is limited to determination of value, and not other issues such as the determination of whether a co-insurance penalty applies. The broker cites *Agro's Foods v. Economical*[6].

Analysis and Disposition

[12] In *Northbridge* Perell J. stated:

[4] Co-insurance clauses require the insured to insure the property to a specified percentage of its full value. The greater the extent of underinsurance, the greater the co-insurance penalty and, consequently, less is payable to the insured.
[5] 2003 CanLII 3265 (ONSC). [*Sholidis*]
[6] 2016 ONSC 1169. [*Agro*]

> [22] The appraisal process under the *Insurance Act* is a free-standing mandatory process that must proceed if either party requests it. A proof of loss as stipulated by Statutory Condition 6 is a pre-condition to resort to the appraisal process. In an insurance policy that provides that the loss is payable to all mortgagees as their interest may appear from time to time or that contains the standard mortgage clause, the mortgagee is an insured for the purposes of the mandatory appraisal process established by s. 128 of the *Insurance Act*.
>
> [23] The purpose of the appraisal process under the Insurance Act is to provide an expeditious and easy means for the settlement of claims for indemnity under insurance policies. The appraisal process may be demanded only where there is a dispute about the valuation of the loss. There is no time limit within which to request the appraisal process, and absent proof of prejudice, delay in invoking the appraisal process is not a factor in the right to an appraisal.
>
> [24] The appraisal process is intended to be a final and binding determination of the loss. The appraisal process is mandatory, and unless waived by both parties or unless impossible to perform, there must be an appraisal before there can be recovery under the policy. The appraisal process is intended to a facilitate a quick resolution of a dispute about the value of the property insured, the value of the salvage, or the quantification of the damage to the property, but it is not intended to be an arbitration or an alternative dispute resolution method that will resolve all the issues between the parties; all other non-valuation issues are outside the province of the appraisers and umpire to resolve. [Emphasis added. Citations removed.]

[13] *Northbridge* involved what Perell J. described as a "procedural shipwreck.[7]" He terminated an appraisal process that was "totally off the rails[8]". That is not the case here as the process has not even commenced.

[14] *S.H.W.* is similar to the present case. The insured also commenced an action against the broker and refused to proceed with the appraisal because the broker would not be bound. Noting that courts have found that the appraisal process is mandatory[9]. Nishikawa J. observed:

> The prejudice alleged by the Plaintiffs is speculative because it turns on the Broker's non-acceptance of the appraisal and the possibility of conflicting results in relation to

[7] 2021 ONSC 1684 at para. 1.
[8] 2021 ONSC 1684 at para. 6.
[9] 2018 ONSC 5697 at para. 19.

> the valuation of Units 10 and 14. Contrary to the Plaintiffs' position, the action against the Broker has no impact on whether or not an appraisal should be ordered. The cause of action alleged against the Broker is based on negligence in advising the Plaintiffs about their insurance coverage, and is distinct from the issues in this proceeding. Section 128 of the *Insurance Act* states that the appraisal is a mechanism to resolve a disagreement between the insured and the insurer. The Broker does not have standing to participate in the appraisal process. In any event, the Broker has elected not to take a position on this motion, and has not advanced potential prejudice as a reason for preventing the appraisal.[10] [Emphasis added.]

[15] *Sholidis* is not applicable to this case. It involved an issue with two insured: the named insured and the mortgagee who is also a named insured as noted by Perell J. in *Northbridge*.

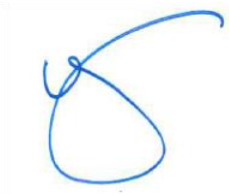
[16] The appraisal process has not been waived. It is not impossible to perform. It is not a "procedural shipwreck". While the broker has an interest in the valuations, the broker is not a party to the appraisal process. As in *S.H.W.*, the hotel's concern about the possibility of conflicting results is speculative at this point. This is not a reason to not follow the plain language of the statutory condition and the statute.

[17] Accordingly, I order that the appraisal shall proceed. Two umpires have been proposed and, during argument, counsel for the plaintiffs indicated that no issues were taken with the qualifications of either. So as not to deprive the hotel of its choice of umpire, the plaintiffs will have 10 days from the date of this decision to choose the umpire from the two proposed by the insurers. Failing an election by the hotel, I will select the umpire upon being advised by counsel for the insurers in writing that the hotel has not selected an umpire.

[18] The insurers shall have their costs of this motion payable by the hotel within 30 days fixed in the amount of $4,000 plus HST. Although the broker was served and participated on the

[10] 2018 ONSC 5697 at para. 23.

motion, the role of the broker was more that of an observer. There will be no award of costs in favour or against the broker.



The Hon. Mr. Justice W.D. Newton

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DECISION ON MOTION

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