CITATION: 4811837 Manitoba Ltd. et al v. Wynward Insurance Group et al., 2025 ONSC 2523
COURT FILE NO.: CV-21-67-00
DATE: 2025-04-25

2025 ONSC 2523 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
4811837 Manitoba Ltd. et al. 9120459 Canada Ltd. and 9120696 Canada Ltd. Carrying on business as Clarion Inn Lakeside and Conference Centre	)	*T. Fry and R. Walichnowski*, for the Plaintiff
Plaintiffs	)	
- and -	)	
Wynward Insurance Group, The Wawanesa Mutual Insurance Company, Aviva Insurance Company of Canada, Lloyd's Underwriters and Western Financial Group (Network) Inc.	)	*B. Papazian and M. Krygier-Baum*, for Defendant Western Financial Group (Network) Inc.
	)	No-one appearing for Defendants Wynward Insurance Group, The Wawanesa Mutual Insurance Company, Aviva Insurance Company of Canada, Lloyd's Underwriters
Defendants	)	
	)	**HEARD:** February 19, 2025, via Zoom at Kenora, Ontario

Regional Senior Justice W. D. Newton

Decision On Motion

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Overview

[1] For reasons delivered in June 2022,[1] I granted the insurers'[2] motion to appoint an umpire for the appraisal process under s. 128 of the *Insurance Act*[3] to value the loss due to fire to a hotel owned and operated by the plaintiffs.

[2] The plaintiffs resisted the motion because, in addition to their claim against the insurers, the plaintiffs also have a claim in the same action against their insurance broker, Western Financial Group (Network) Inc. ("WFG"), for failing to secure adequate insurance coverage. The plaintiffs argued that the valuation issue was also relevant to their claim against the broker, and that it was inefficient to proceed to appraisal unless the broker was also a party. The plaintiffs also argued that the valuation issue should be determined by the court in the action against both the insurers and the brokers.

[3] The appraisal has now been completed.

[4] The issue on this motion is whether the appraisal is binding upon the broker who was not a party to the appraisal process.

[5] The plaintiff brings this motion pursuant to Rule 21.01(1)(a) for a determination of the following questions of law:

> Is a finding in writing of the value of the insured property made by an umpire and an appraiser pursuant to the appraisal process set forth in section 128 of

[1] *4811837 Manitoba Ltd. V, Wynward Insurance Group*, 2022 ONSC 4532.
[2] The insurers are the defendants: Wynward Insurance Group, The Wawanesa Mutual Insurance Company, and Aviva Insurance Company of Canada, and Lloyd's Underwriters.
[3] R.S.O. 1990, c. I.8

> the *Insurance Act*, R.S.O, c. I.8, as amended, and by Statutory Condition No. 11, binding and determinative of the value of the insured property in Court proceedings including where the finding may impact parties to the Court proceedings who did not participate in the appraisal process?

[6] The insurers take no position on this motion.

[7] WFG raises three preliminary issues:

a. WFG seeks leave to file an affidavit;
b. This question was answered by me in my prior decision; and
c. Rule 21 is not an appropriate procedure to decide this question as:
    i. This question was not raised in a pleading;
    ii. This question is a question of mixed fact and law;
    iii. The answer to this question is not "plain and obvious"; and
    iv. This question of law is not fully settled and should not be disposed of at this stage.

A. Should Leave to File Evidence be Granted?

[8] Rule 21.01(2)(a) provides that no evidence is admissible on a motion for determination of a question of law except with the leave of a judge or consent of the parties. The plaintiffs do not consent.

[9] WFG seeks leave to file the affidavit, dated February 10, 2025, of A. Benson Forrest, a lawyer in the firm representing WFG. Mr. Forrest's affidavit of February 12, 2025, filed in support of the application for leave, sets out that the notice of motion filed by the plaintiff includes 25 paragraphs of information, that the factum contains ten paragraphs under Facts, and that none of these facts are grounded in any affidavit.

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[10] In his affidavit dated February 10, 2025, Mr. Forrest sets out the facts governing the disputes between the plaintiffs and the insurers, and the plaintiff and WFG. In his affidavit of February 12, 2025, Mr. Forrest asserts that the February 10, 2025, affidavit is in response to the plaintiffs' recitation of facts, unsupported by any affidavit, and "present[s] a more complete and balanced framing of the issues…".

[11] Although many of the facts set out in the plaintiffs' notice of motion and factum are not challenged, I agree with WFG that Mr. Forrest's affidavit is "more complete and balanced". I grant leave to file this affidavit on this motion.

B. Have I Already Answered this Question?

[12] What was before me in 2022 was the insurers motion to appoint an umpire for the appraisal process under the *Insurance Act*. That motion was opposed by the plaintiffs. WFG appeared, and I noted WFG's position:

> [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*.

[13] After reviewing the relevant authorities, I concluded:

> [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.

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[14] I, therefore, granted the insurers' motion. I did not decide whether the appraisal process was binding on a non-party, the broker.

C. Is Rule 21.01 an Appropriate Procedure to Answer this Question?

[15] Rule 21.01 states as follows:

> (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly.

i. Is this Question Raised by the Pleadings?

[16] The plaintiffs argue that it is a pure question of statutory interpretation that arises in this case. However, WFG submits that this question was not raised in the statement of claim or WFG's statement of defence. There is no reference to the appraisal process, or specifically to the question of whether WFG is bound by the appraisal. While the appraisal process is mentioned in the statement of defence of the insurers, there is no statement in the defence suggesting that WFG is bound by the appraisal.

ii. Is this a Question of Mixed Fact and Law?

[17] WFG submits that the answer to this question cannot be separated from the history of this fire loss claim, including the positions taken by the parties, and the appraisal process, which did

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not include WFG. If a full factual record is necessary to decide the issue of law, the court should decline to hear the motion under Rule 21.01.[4]

iii. Is the Answer to this Question "Plain and Obvious"?

[18] Precedents going back over thirty years confirm that the determination of the question must be "plain and obvious" before a motion under Rule 21.01(1)(a) will succeed.[5] To be successful on this motion the plaintiffs must satisfy me that it is plain and obvious that the legal conclusion the plaintiffs wish me to draw is correct.[6]

iv. Is this Question of Law Fully Settled?

[19] There is also precedent for the proposition that questions of law which have not been "settled fully" in the jurisprudence should not be disposed of at an interlocutory stage of the proceedings.[7] As the plaintiffs set out at paragraph 36 of its factum:

> The Plaintiffs are not aware of any reported decisions that directly answer the Question before this Court that being the application of the appraisal finding on a party that did not participate in the appraisal process.

Is Rule 21.01 an Appropriate Procedure to Answer this Question?

[4] *Daniela Midtown Corporation v. Mariai*, 2015 ONSC 6568, at para. 11.
[5] *MacDonald et al. v. Ontario Hydro et al*., (1995) 26 O.R. (3d) 401 (Div. Ct.); *Law Society of Upper Canada et al. v. Ernst & Young et al*., (2003) 65 O.R. (3d) 577 (C.A.); *Gauthier v. Toronto Star Daily Newspapers* (2003), 228 D.L.R. (4th) 748 (Ont. C.A.); *Daniela Midtown Corporation v. Mariai*, 2015 ONSC 6568; *Patrie v. Ouimet et al*., 2017 ONSC 5246 ("*Patrie*"); *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57, 154 O.R. (3d) 587; *Alafi v. Lindenbach*, 2022 ONSC 1435 ("*Alafi*").
[6] *Patrie,* at para. 14.
[7] *Portuguese Canadian Credit Union Ltd. v. Cumis General Insurance Co*., 2010 ONSC 6107, 104 O.R. (3d) 16, at para. 27; *Alafi*, at para. 20.

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[20] I begin my analysis by approaching these four questions in reverse order.

[21] As admitted by the plaintiffs, this question is not "fully settled". In fact, there is some authority to the contrary of the plaintiffs' position. In 1987, a panel of the Divisional Court held that, while an appraisal under the *Act* binds the insurer and the insured, the appraisal does not bind the court in assessing damages against a tortfeasor in a claim brought by the plaintiff.[8]

[22] It is not "plain and obvious" that a party who had no standing to participate and, therefore, no rights in the appraisal process, should be bound by an appraisal under the *Act.* Once invoked, the appraisal process is mandatory for the insurer and insured. WFG was not a party to the insurance contract. The legislature did not contemplate anyone or any other entity participating in the appraisal process other than the insurer and the insured(s).

[23] While it is tempting to accept that this is simply a question of statutory interpretation, as the plaintiff suggests, the facts are necessary to understand the context in which this legal dilemma exists. The appraisal process has been described as unique,[9] and those features should not be ignored in attempting to answer this question. Accordingly, I would not describe this as a question of law alone.

[24] Finally, this question is not clearly raised by the pleadings. It is not raised by the pleadings at all.

[8] *Verlysdonk v. Premier Petrenas Construction Co. Ltd et al*., [1987] 60 O.R. (2d) 65 (Div. Ct.).
[9] *The Dominion of Canada General Insurance Company v. Nelson*, 2023 ONSC 386, at para. 32 (Div. Ct.).

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[25] Therefore, for the foregoing reasons I conclude that Rule 21.01 is not the appropriate procedure to answer this question, and the plaintiffs' motion is dismissed.

[26] WFG is entitled to its costs of this motion. If costs are not settled, WFG is to deliver written submissions on costs limited to three pages plus costs outline plus any authorities or offers within 30 days of the date of this decision. Thereafter, the plaintiffs may make reply submissions with ten days of receiving WFG's costs submissions, subject to the same length limitations.

"Original signed by"
The Hon. Mr. Justice W.D. Newton, R.S.J.

Released: April 25, 2025

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Plaintiff

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DECISION ON MOTION

Newton R.S.J.

Released:, April 25, 2025

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