COURT OF APPEAL FOR ONTARIO

CITATION: Stewart v. Bay of Quinte Mutual Insurance Co., 2024 ONCA 730
DATE: 20241003
DOCKET: COA-23-CV-0796

Hourigan, Trotter and Gomery JJ.A.

BETWEEN

Peter James Stewart, Estate Trustee of the late Dennis Lynch

Plaintiff (Respondent)

and

Bay of Quinte Mutual Insurance Co. and
David Bowden

Defendants (Appellants)

R. Steven Baldwin and Lorraine Thomson, for the appellants

Robert J. Reynolds, for the respondent

Heard: September 26, 2024

On appeal from the judgment of Justice Patrick Hurley of the Superior Court of Justice, dated June 27, 2023, with reasons reported at 2023 ONSC 3855.

REASONS FOR DECISION

[1] On February 26, 2011, Dennis Lynch's home at 1596 County Road 64, Carrying Place (the "Property"), was severely damaged in a fire. His property insurer, Bay of Quinte Mutual Insurance Co. ("BOQ"), paid out the policy limit of $220,000 for the dwelling but only $60,000 for its contents. This was considerably less than the value of items that Mr. Lynch claimed to have lost in the fire. He sued.

[2] After a ten-day trial spanning three years, the trial judge granted judgment to the respondent, Mr. Lynch's estate.[1] He rejected the estate's claim that BOQ had negligently under-insured the Property and its contents. He found, however, that Mr. Lynch had lost personal property worth just over $134,000 in the fire, and that his estate was entitled to recover $51,000, that is, the difference between what BOQ had already paid for personal property loss and the policy limit for lost contents. The trial judge rejected BOQ's argument that Mr. Lynch's failure to submit a sworn proof of loss was fatal to the action or that the court had no jurisdiction to evaluate the value of the lost personal property given that the appraisal process set out in s. 128 of the *Insurance Act*, R.S.O. 1990, c. I-8 (the "Act") was not followed.

[3] BOQ effectively advances three arguments on appeal. First, it says that the trial judge erred in allowing the claim for lost contents despite the insured's failure to deliver a sworn proof of loss. Second, it argues that it was entitled to an order for an appraisal process under the Act. Third, it says that the trial judge erred in assessing the value of Mr. Lynch's lost personal property.

[4] After hearing the appellant's arguments, we dismissed the appeal with costs, with reasons to follow. These are our reasons.

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[1] This amount was awarded to Mr. Lynch's estate as he passed away in 2015.

The trial judge did not err in allowing the claim despite the absence of a sworn proof of loss

[5] The trial judge held that BOQ had waived its right to rely on Mr. Lynch's non-compliance with the requirement that he submit a sworn proof of loss. He furthermore granted the estate relief from forfeiture.

[6] BOQ contends that the trial judge erred on these issues. We do not agree.

[7] Following an occurrence covered by a policy, an insured is required deliver "as soon as practicable to the insurer a proof of loss verified by a statutory declaration … giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed". This is a statutory condition incorporated into every property insurance contract in Ontario under s. 148 of the Act. As the trial judge noted, however, there is no specific form mandated for a proof of loss and the requirement must be interpreted consistent with the Act's consumer protection purpose.

[8] The trial judge noted that Mr. Lynch had submitted a signed but unsworn list of contents to BOQ in 2011 and later, through an expert appraiser he had retained, an even more expansive 17-page "Schedule of Loss". BOQ had an opportunity to examine Mr. Lynch, under oath, in 2013, and could have asked him questions about the items on the Schedule at that time. The trial judge concluded that the information that Mr. Lynch provided about the lost contents was sufficient for BOQ

to assess his claim. He found that BOQ had waived strict compliance with the sworn proof of loss requirement.

[9] A determination that an insurer has waived its rights to insist on an insured's perfect compliance with a contractual obligation is explicitly permitted under s. 131 of the Act. The trial judge's finding of waiver was consistent with the criteria for waiver set out in *Bradfield v. Royal Sun Alliance Insurance Co. of Canada*, 2019 ONCA 800, at paras. 30-3 and open for him to make on the evidence. He considered and rejected BOQ's argument, repeated in this court, that it told Mr. Lynch it would pay nothing further for his lost personal property claim absent a sworn proof of loss, reasoning as follows:

> According to the defendant, Ms. Lyons' letters dated June 7 and July 6, 2011 were clear and unequivocal: without a signed and notarized proof of loss, no payment on account of the contents would be forthcoming. Yet, despite stating in her June 7 letter that no payment would be made, she directly contradicted that by making a payment of $50,000 on July 6 without any such proof of loss. In her letter of April 26, 2012, the first (and only) one after her July 6 correspondence, Ms. Lyons makes no mention of the absence of a proof of loss but only requests receipts as a condition of any further payment. Following that date, the defendant does not raise the lack of a sworn proof of loss as an emergent issue in correspondence, the statement of defence or at the examinations for discovery.

[10] The trial judge furthermore found that the estate was entitled to relief from forfeiture for any imperfect compliance under s. 129 of the Act. Applying the

principles set out in *Monk v. Farmers Mutual Insurance Company (Lindsay)*, 2019 ONCA 616, at paras. 77 and 79, the trial judge found that Mr. Lynch's conduct was reasonable and the breach of the statutory condition was not grave. He noted that there was no evidence that Mr. Lynch's failure to submit a sworn proof of loss prejudiced BOQ in any way or that the omission had any impact on BOQ's approach to the litigation.

[11] BOQ did not argue in its factum that the trial judge erred in granting the respondent relief from forfeiture, although it cited this as a ground for appeal in its notice of appeal. In any event, we see no error in the trial judge's conclusion on this point.

The trial judge did not err in declining to order an appraisal under s. 128 of the Act

[12] The trial judge declined to order an appraisal under s. 128 of the Act, concluding that it was preferable in the circumstances for the court to assess the actual cash value (ACV) of the personal property that Mr. Lynch claimed to have lost in the fire. BOQ contends that this is a reversible error because the statutory appraisal process was mandatory but could not be undertaken, given the insured's failure to deliver a sworn proof of loss.

[13] An appraisal mechanism is set out in s. 128 of the Act. Under s. 128(2) the insured and the insurer each appoint an appraiser, and the two appraisers so

appointed appoint an umpire. Subsection (5) provides for a court order to give effect to the appraisal mechanism:

> (5) Where,
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> (a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;
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> (b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or
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> (c) an appraiser or umpire refuses to act or is incapable of acting or dies,
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> 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.

[14] A judge has the discretion to decline to appoint an appraiser under s. 128(5), based on the permissive language ("may" rather than "shall") and the interpretation of the provision by this court. In *56 King Inc. v. Aviva Canada Inc.*, 2017 ONCA 408, the court held that s. 128 "signals a decided preference for appraisal, as the authorities note, but the language of s. 128 gives the court discretion to curb abuse".

[15] BOQ relies on *The Dominion of Canada General Insurance Company v. Nelson*, 2023 ONSC 386 (Div. Ct.). In that case, the parties engaged in an appraisal process to determine an insured's loss in a fire. Following the appraisal process, the insured brought a civil action against the insurer seeking damages for alleged breach of contract for insurance coverage. The insurer sought the

dismissal of the action through a summary judgment motion. The motion was dismissed at first instance but granted on appeal. The Divisional Court held that "the Superior Court does not have jurisdiction to hear and decide a claim relating to an appraisal of fire insurance damages under an insurance policy that has already been the subject of an appraisal process and determination by an Insurance Umpire under the Act".

[16] *Nelson* involves the jurisdiction of the Superior Court to assess a fire loss claim that has already been subject to a s. 128 appraisal process. It does not address the discretion of a Superior Court judge to compel a party to submit to such a process and does not supersede this court's determination in *56 King Inc*. that a judge has the discretion to refuse to order an appraisal.

[17] BOQ argues alternatively that the trial judge's refusal of an order for an appraisal in this case was unwarranted. We disagree.

[18] Having found that the insured's failure to provide a sworn proof of loss was not fatal to its claim, Justice Hurley found the appellant waived its right to an appraisal. As he noted:

> Neither side expressed any interest in [an appraisal]. They focused on other factual and legal issues. Not only was the defendant's position not pleaded, there was no evidence that the defendant even raised the issue of an appraisal except for the brief reference to it in Ms. Lyons letter of July 6, 2011— not when the claim was being adjusted; at the examinations for discovery; in

> correspondence between counsel; or in the pretrial conference report under rule 50.08. I conclude that both parties were content to proceed with the litigation in the ordinary way and it was not until the trial was imminent that the defendant first asserted that an appraisal was a necessary precondition to the adjudication of the contents claim.

[19] The trial judge found that ordering an appraisal would not save any money or time, as he had all the information necessary to assess the value of Mr. Lynch's lost property:

> Here, I can justly adjudicate the contents claim. I have a comprehensive evidentiary record. I am in as good a position as an umpire would be at an appraisal to decide the ACV of the contents claim. An appraisal would only result in additional delay and expense. I bear in mind the important goals of affordability, timeliness and proportionality: *Hryniak v. Maudlin*, 2014 SCC 7.

[20] We see no basis to interfere with the trial judge's exercise of discretion under s. 128(5). As he observed, the purpose of the appraisal mechanism in the Act is to provide an expeditious and easy means for the settlement of claims for indemnity under insurance policies. By the time BOQ took the position that the ACV could only be decided through an appraisal, nine years had passed since the fire. Mr. Lynch's claim that BOQ had negligently under-insured his property would have had to proceed to trial anyway. In the circumstances, the trial judge's conclusion that an appraisal would result in additional delay and expense was eminently reasonable.

The trial judge did not err in assessing the ACV of the lost personal property

[21] BOQ contends that there was no reliable evidence on which the trial judge could determine the ACV of Mr. Lynch's lost personal property. We disagree.

[22] As the trial judge correctly noted, there is no single or right way to calculate the ACV under an insurance policy. As already mentioned, BOQ had an opportunity to examine Mr. Lynch on the Schedule of Loss prepared by an adjuster he retained, NFA. At trial, an NFA adjuster, David LeBlanc, testified as an expert witness. He calculated the ACV of the items on the Schedule at $134,053; this was lower than the original total as Mr. Leblanc acknowledged that some items should not have been included on the Schedule. BOQ's expert was an auctioneer, Boyd Sullivan. He valued the items at $20,000-$25,000 based solely on his experience as an auctioneer. He acknowledged on cross-examination that he was not familiar with the term ACV or the value of certain items on the Schedule.

[23] The trial judge accepted Mr. Leblanc's evidence, concluding that his opinion was based on information that the trial judge deemed credible and reliable, and that the depreciation factors applied were reasonable. The trial judge found Mr. Sullivan's evidence of no assistance.

[24] The trial judge was entitled to accept the respondent's evidence and to prefer it to BOQ's evidence. BOQ has not identified any palpable and overriding error in the ACV determination.

Disposition

[25] The appeal is dismissed, with all-inclusive costs for the appeal in the amount of $20,340 payable by the appellant to the respondent.

"C.W. Hourigan J.A."
"Gary Trotter J.A."
"S. Gomery J.A."