

ONTARIO

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

Lococo, Myers and Sheard JJ.

BETWEEN:	)	
	)	
AVIVA INSURANCE COMPANY OF	)	<i>Maya M. Kanani, for the Applicant</i>
CANADA	)	
	)	
	)	
Applicant	)	
– and –	)	
	)	
	)	
LAWRENCE FREEDMAN, DR.	)	<i>Gordon McGuire, for the Respondents</i>
LAWRENCE FREEDMAN DENTISTRY	)	
PROFESSIONAL CORPORATION and	)	
1465151 ONTARIO LIMITED	)	
	)	
Respondents	)	
	)	
	)	HEARD at Toronto: March 18, 2024

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] The applicant Aviva Insurance Company of Canada brings an application for judicial review of an Appraisal Award dated November 6, 2023, under s. 128 of the *Insurance Act*, R.S.O. 1990, c. I-8. The appraisal was requested by the insured respondents Lawrence Freedman, Dr. Lawrence Freedman Dentistry Professional Corporation and 1465151 Ontario Limited.

[2] The appraisal arose from the respondents’ claim under their insurance policy with Aviva, following a fire in the commercial building where the respondents’ dentistry practice was located. The claim was for smoke and water damage to the office equipment used in the dentistry practice.

[3] The respondents sued Aviva under the policy after it rejected the respondents' claim for the equipment's replacement cost. Aviva's position was that the amount payable under the policy should be based on the cost to clean rather than replace the equipment.

[4] The appraisal was conducted by appraisers appointed by each side together with a jointly appointed umpire. The Appraisal Award determined the equipment's replacement cost and its actual cash value. The umpire and the respondents' appraiser signed the Appraisal Award. Aviva's appraiser did not.

[5] Aviva submits that the appraisal panel exceeded its jurisdiction by determining the amount of the respondents' loss to contents based on the cost to replace rather than clean the office equipment. Aviva says that by doing so, the panel usurped the court's function and acted unreasonably by making what amounts to a coverage decision. Aviva also submits it was denied procedural fairness.

[6] For the reasons below, I would dismiss the judicial review application.

II. Factual background

[7] In August 2020, there was a fire on the main floor of the commercial building where the respondents' dentistry practice was located. Aviva insured the respondents under an "all risks" policy. The policy provided for a limit for loss or damage to contents of \$1,695,000.

[8] The respondents made an insurance claim for smoke and water damage to dental and IT equipment in the respondents' third-floor clinic and basement storage space. The respondents sought replacement of the equipment on the basis that it was irredeemably contaminated by smoke. Aviva did not agree that the equipment needed to be replaced. In November 2020, Aviva obtained an estimate to clean rather than replace the equipment for a cost of \$58,400.

[9] The respondents retained a firm of public adjusters to assist with their claim. With the adjusters' assistance, the respondents submitted a sworn Proof of Loss dated January 6, 2022 to Aviva, together with supporting documents, including an unsworn schedule of loss and suppliers' estimates. The Proof of Loss made a claim for loss or damage to contents in the amount of \$1,695,000, being the policy limit. The amount specified in the Proof of Loss for "Total Loss or Damage" to contents was \$2,349,689.22, being their "Replacement Cost". Aviva rejected the respondents' claim, maintaining its position that the equipment did not need to be replaced.

[10] By Statement of Claim dated August 18, 2021 (served in January 2022), the respondents commenced a legal action against Aviva under the policy.

[11] In March 2022, the respondents invoked Statutory Condition 11 under s. 148 of the *Insurance Act* by providing Aviva with notice of their intention to proceed with an appraisal under s. 128 of that Act. Statutory Condition 11 (which is deemed by s. 148 to be part of the insurance policy) provides:

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 therefor is made in writing and until after proof of loss has been delivered.

[12] Section 128 of the *Insurance Act* provides in part:

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.

Appraisers, appointment

(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.

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.

[13] As required by s. 128(2), each side appointed an appraiser (Steven B. Sobel by the respondents, John Valeriote by Aviva). The two appraisers appointed Stephen Agnew as the umpire. There is no dispute about the appraisal panel's valuation expertise for insurance claims of this nature.

[14] In August 2022, the respondents' appraiser (through one of his colleagues) advised Aviva's appraiser by email that the equipment list attached to the Proof of Loss was incorrect and provided a revised equipment list. A piece of equipment worth \$451,299.40 had been duplicated in the Proof of Loss and the schedule of loss. The revised total for the equipment was \$1,898,389.81, still exceeding the contents policy limit of \$1,695,000. The respondents' appraiser advised that a revised sworn Proof of Loss would be provided in due course.

[15] In June 2023, after receiving updated estimates from suppliers, the respondents' appraiser provided Aviva's appraiser and the umpire with a further revised schedule of loss for the equipment totalling \$2,128,711.04. The respondents did not provide Aviva with a revised sworn Proof of Loss and maintained their contents claim for the policy limit of \$1,695,000. The umpire advised by email that the appraisal "can proceed on the original claim submission, limiting the scope to the proof of loss as [previously] submitted. Additional items claimed would not be part of the appraisal but would be dealt with in a subsequent appraisal."

[16] The appraisal proceeded for a full day on October 30, 2023 before the appraisal panel. Each side provided fulsome appraisal briefs in advance setting out their positions, with included expert

reports and other supporting documents. The insured respondents took the position that equipment in excess of the policy limit had been damaged by smoke and required replacement. Aviva submitted that all items could be cleaned and did not need to be replaced. Five witnesses attended on behalf of the respondents, and seven on behalf of Aviva.

[17] The respondents' witnesses addressed the necessity of replacing, rather than cleaning the equipment. To establish the amount of the loss to contents, the respondents relied on the estimates reflected in their schedule of loss to support the equipment's replacement cost. The respondents' witnesses did not address what it would cost to clean the equipment and did not contest Aviva's cleaning estimate.

[18] Aviva's witnesses supported its position that the equipment could be cleaned and need not be replaced. To establish the amount of the respondents' loss to contents, Aviva relied on the estimate it had obtained to clean the equipment. Aviva's witnesses did not address what it would cost to replace the equipment.

[19] In late afternoon of October 30, 2023, after hearing from each side, the umpire asked the parties' appraisers to work on a reconciliation of their equipment lists, which they agreed to do. However, on Friday, November 3, 2023, the umpire sent an email, advising that after comparing the schedules, he had "a better understanding" of them and proposed a call for Monday morning, November 6, 2023. On that call, the umpire advised that he had reconciled the equipment lists on his own and did not need further information.

[20] The same day, after further discussion with the appointed appraisers, the umpire issued the Appraisal Award dated November 6, 2023, which was also signed by the respondents' appraiser. Aviva's appraiser did not sign the Appraisal Award.

[21] The two-page Appraisal Award referred to the dispute between the parties as being "the amount of loss or damage [arising from the fire]. They also disputed the nature and extent of the repairs or replacement required." The "Matters of Disagreement" were identified as "Office Contents" and "Practice Interruption". Under the heading "Award", the "Replacement Cost" of the "Office Contents" was found to be \$1,720,000 and the "Actual Cash Value" of the contents was found to be \$900,000. The amount for "Practice Interruption" was left "to be determined at a later date if needed". No reasons were provided for the Appraisal Award.

[22] On December 6, 2023, Aviva filed a Notice of Application for Judicial Review of the Appraisal Award.

III. Issues to be determined

[23] In its judicial review application, Aviva submits that the appraisal panel exceeded its jurisdiction by determining the amount of the respondents' loss to contents based on the cost to replace rather than clean the office equipment. Aviva says that by doing so, the appraisal panel usurped the court's function and acted unreasonably by making what amounted to a coverage decision. Aviva also submits that it was denied procedural fairness. Aviva asks that the Appraisal Award be aside and that a new appraisal occur.

[24] Aviva's judicial review application raises the following issues:

- a. Jurisdiction: Did the appraisal panel exceed its jurisdiction by determining the respondents' loss to contents based on the cost to replace rather than clean the office equipment?
- b. Procedural fairness: Was Aviva denied procedural fairness?

[25] I will consider each of those issues in turn, after addressing the court's jurisdiction and the standard of review.

IV. Jurisdiction and standard of review

[26] There is no appeal from an appraisal decision under s. 128(3) of the *Insurance Act*. The Divisional Court's jurisdiction is restricted to a judicial review of the decision: *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, ss. 2(1) and 6(1).

[27] The standard of review for an appraisal award is reasonableness: *Sellors v. State Farm Fire and Casualty Co.*, 2023 ONSC 645 (Div. Ct.), at para. 20; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 23-25.

[28] Decision makers are required to conduct their proceedings fairly. The degree of procedural fairness required is determined by reference to all the circumstances of the case, including those factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-28; see also *Vavilov*, at para. 77.

[29] Reviewing courts have accorded a considerable degree of deference to appraisal decisions, given the nature of the appraisal process. In *Campbell v. Desjardins General Insurance Group*, 2022 ONCA 128, 467 D.L.R. (4th) 480, at paras. 36-38, the Court of Appeal for Ontario described the appraisal mechanism as follows:

The purpose of the appraisal scheme under the *Insurance Act* is to provide an easy, expeditious, and cost-effective means for the settlement of claims for indemnity under insurance policies.... It is designed to be collaborative and not adjudicative.... To fulfil the purposes of the appraisal scheme outlined above and to facilitate a collaborative process, an appraiser must attempt, in good faith, to reach a compromise with their fellow appraiser....

If the appraisers are nevertheless unable to agree and therefore appoint an umpire to resolve their disagreement, then the umpire becomes the tie breaker. At that point, the umpire becomes the ultimate decision maker, who must necessarily be impartial and make a binding determination... While the appraisal process is not subject to the [*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22], it is subject to judicial review for denial of procedural fairness at common law from the moment of the umpire's involvement.... It is the umpire who bears the responsibility for ensuring that the process is fair.

The content of procedural fairness in the appraisal process is modest and flexible, and will depend upon the exigencies of the particular case.... There is no requirement that reasons for decision be provided.... To that end, the umpire enjoys considerable discretion. Courts afford the umpire's choice of procedure considerable deference and will be reluctant to interfere unless there is proof of fraud, collusion, bias, or partiality on the part of the umpire, or the umpire or the appraisers exceed their jurisdiction under the Act.... [Citations omitted.]

V. Appraisal panel's jurisdiction

[30] Did the appraisal panel exceed its jurisdiction in determining the Appraisal Award?

[31] As noted above, Aviva submits that the appraisal panel exceeded its jurisdiction by determining the respondents' loss to contents based on the cost to replace rather than clean the office equipment. Aviva says that by doing so, the panel usurped the court's function and acted unreasonably by making what amounted to a coverage decision.

[32] In support of its position, Aviva relies on the decision of the Saskatchewan Court of Appeal in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.* (1990), 71 D.L.R. (4th) 681 (Sask. C.A.).¹ In *Shinkaruk*, at p. 688, the court set aside an appraisal award on the basis that the umpire went beyond the appraisal panel's limited authority to determine "the value of the property insured, the property saved or the amount of the loss" by purporting to determine "disputed legal issues". The court confirmed that all issues other than valuation "are reserved for settlement by negotiation or for determination by litigation in an ordinary action under the policy": see also *Madhani v. Wawanesa Mutual Insurance Co.*, 2018 ONSC 4282, [2019] I.L.R. para. I-6082 (Div. Ct.), at para. 20, in which the court confirmed that "[i]ssues such as legal entitlement under the policy and the validity of the claim – for example, where there is a question of fraud – do not form part of the appraisal process".

[33] In *Shinkaruk*, at p. 690, the Saskatchewan Court of Appeal went on to find that the umpire erred in considering his role to be "that of an adjudicator or arbitrator who had before him conflicting testimony that required balancing and a resolution, all with a view of making a final disposition of the controversy between the parties."

[34] Aviva also relies on *Aviva Insurance Co. of Canada v. Cunningham*, 2022 ONSC 6331, 30 C.C.L.I. (6th) 150, at para. 32, in which the application judge stated that "issues of causation and coverage are not for the umpire to decide but rather are matters for this Court to determine." In that case, the court dismissed an application to the Superior Court of Justice to intervene in insurance appraisals then in progress. Among other things, the court rejected as premature the insured's concern that the appraisal panel would exceed its jurisdiction by determining disputed legal issues: see *Cunningham*, at para. 86.

¹ In *Campbell*, at para. 38, the Court of Appeal for Ontario cited *Shinkaruk*, at p. 688, as one of the authorities for courts' reluctance to interfere with appraisal awards unless there is proof of fraud, collusion, bias or umpire's partiality, or unless the umpire or the appraisers exceed their jurisdiction.

[35] Applying the above principles, Aviva submits that the umpire erred in determining the respondents' loss to contents based on the cost to replace rather than clean the office equipment. Aviva argues that consistent with the statutory purpose of the appraisal process, the umpire should have asked the parties to submit separate valuations for cleaning and for replacing the damaged equipment. Aviva says that the ultimate decision as to whether the equipment should be cleaned or replaced should be left to the court in the parties' litigation, since that decision went beyond a valuation determination within an appraisal's scope.

[36] I disagree. While there is some dispute between the parties about factual issues relating to the appraisal, I am satisfied, on the evidence before this court, that the umpire together with the respondents' appraiser acted within the authority provided by the insurance policy and the *Insurance Act* in making the Appraisal Award.

[37] The appraisal panel was limited (by Statutory Condition 11) to determining "the value of the property insured, the property saved or the amount of the loss" (emphasis added). Both parties provided the arbitration panel with extensive evidence about the extent to which the equipment was damaged, and the extent to which the equipment could be salvaged (or "saved"). The insured respondents provided evidence that the equipment in question was sufficiently damaged to necessitate replacement. Aviva provided evidence that the equipment was damaged to such a limited extent that it need only be cleaned (that is, it could all be salvaged). These were questions of "the amount of the loss" and "the property saved". They were the questions that the appraisal panel was charged with determining, and about which the parties provided significant expert and other evidence. The Appraisal Award also determined the "value of the property insured" by fixing the equipment's "Actual Cash Value".

[38] Contrary to Aviva's submissions and consistent with the case law Aviva cited, these determinations did not involve disputed legal issues or questions of coverage or entitlement under the insurance policy, which would be within the court's purview. Unlike in *Shinkaruk*, the umpire did not inappropriately adopt a quasi-judicial role "with a view of making a final disposition of the controversy between the parties." By confining themselves to valuation issues under Statutory Condition 11, the umpire together with the respondents' appraiser did not exceed their jurisdiction or act unreasonably in making the Appraisal Award.

VI. Procedural fairness

[39] Was Aviva denied procedural fairness?

[40] Aviva submits that it was not granted the level of procedural fairness that was required in the appraisal's conduct. Among other things, Aviva says:

- a. After the respondents' appraiser provided revised schedules of loss in August 2022 (correcting the duplication of a significant piece of equipment) and June 2023 (also reflecting updated equipment estimates), the respondents failed to provide an updated sworn Proof of Loss, contrary to the respondents' prior assurance that an undated Proof of Loss would be provided.

- b. The Appraisal Award does not provide any indication of how the appraisal panel resolved the duplicated equipment issue that the respondents' appraiser raised in August 2022, unfairly prejudicing Aviva. Aviva also submits that the duplicated equipment issue should have been left to the court to address in the parties' litigation.
- c. At the appraisal meeting on October 30, 2023, the respondents' valuation experts (who had provided their oral evidence when Aviva's valuation experts were present) had already left the meeting when Aviva's valuation experts provided their oral evidence, contrary to the agreed procedure for the appraisal. Aviva submits that there could have been a different outcome had the respondents' valuation experts been present to ask question of Aviva's experts.
- d. After advising the appointed appraisers that he required a reconciliation of their equipment lists to reach a valuation decision, the umpire proceeded with making the Appraisal Award without obtaining the reconciliation.
- e. In his affidavit, Aviva's appraiser disputes the affidavit evidence of the respondents' appraiser that the two of them had agreed upon \$900,000 as the Actual Cash Value of the equipment. There was no other evidence to support that value.

[41] I do not agree that there was any procedural unfairness to Aviva that would justify setting aside the Appraisal Award.

[42] As previously noted, the umpire's procedural choices are afforded considerable deference and will generally be respected unless there is proof of fraud, collusion, bias or the umpire's partiality, or if the appraisal panel has exceeded its jurisdiction: *Campbell*, at para. 38. I have already found that the appraisal panel did not exceed its jurisdiction. As well, there is no evidence of misconduct that would justify the court's intervention.

[43] Addressing some of Aviva's specific instances of alleged unfairness, I see no procedural unfairness arising from the fact that the respondents did not provide an updated sworn Proof of Loss after their appraiser provided updated unsworn schedules of loss in August 2022 and June 2023. The August 2022 schedule of loss addressed the duplication of a significant piece of equipment in the previous sworn Proof of Loss, which resulted in a lower total replacement cost for the equipment (that is, \$2,128,711.04). However, that amount was still higher than the amount the respondents were claiming under the policy (being the policy limit for contents of \$1,695,000). The further revised schedule of loss in June 2023 set the equipment replacement cost at a higher amount, but the umpire's June 2023 email made it clear that the appraisal would proceed based on the Proof of Loss as previously submitted. As well, the amount being claimed under the policy remained unchanged at the policy limit. Given the previous clarification that the respondents' appraiser provided about the duplicated piece of equipment, I see no prejudice to Aviva arising from the fact that the umpire did not require the respondents to provide an updated Proof of Loss prior to the appraisal meeting.

[44] I also see no procedural unfairness arising from the asserted absence of the respondents' experts when Aviva's experts provided oral evidence at the appraisal meeting (which the respondents dispute). Accepting as correct Aviva's factual assertion, the result would be that Aviva's experts were able to provide their oral evidence when the respondents' experts were not present to cross-examine them or otherwise contest their evidence. In those circumstances, I fail to see any resulting prejudice to Aviva.

[45] As well, I see no basis for challenging the umpire's decision to proceed with making the Appraisal Award without obtaining the reconciliation of equipment lists he had requested at the conclusion of the appraisal meeting. The umpire explained that upon his own further examination of the equipment lists, he did not require the appraisers' reconciliation. It was within the umpire's purview to proceed on that basis. I see no unfairness to Aviva that he did so.

[46] Finally, I see no merit in Aviva's challenge to the determination of the Actual Cash Value for the equipment. Accepting as correct Aviva's factual assertion that the appointed appraisers did not agree on the \$900,000 amount, the Appraisal Award was signed by the umpire and the respondents' appraiser. The two of them had the authority to make that determination whether Aviva's appraiser agreed with it or not: *Insurance Act*, s. 128(3). In those circumstances, I see no basis for Aviva's challenge to that determination.

VII. Disposition

[47] Accordingly, I would dismiss the application for judicial review and order Aviva to pay costs to the respondents in the agreed amount of \$18,800 all inclusive.

Lococo J.

Myers J.

Sheard J.

Date of Release: May 24, 2024

CITATION: Aviva Insurance Co. of Canada v. Freedman, 2024 ONSC 2886
DIVISIONAL COURT FILE NO.: DC-23-691-JR
DATE: 20240524

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, Myers and Sheard JJ.

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Applicant

– and –

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