

Date Released: October 11, 1991

NO. C895710/F900907
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
VIRGINIA FERRIER o/a NORTHWOOD)	REASONS FOR JUDGMENT
RESTAURANT)	
)	OF THE HONOURABLE
)	MR. JUSTICE MCKINNON
PLAINTIFF)	
AND:)	
)	
MAPLEX GENERAL INSURANCE)	
COMPANY, ELITE INSURANCE)	
COMPANY, INLAND CLAIMS LTD.)	
)	
DEFENDANTS)	

Dates of Hearing:	October 8 and 9, 1991
Counsel for the Plaintiff/Petitioner:	M. Sacks
Counsel for Maplex, Elite, Inland and Netzel:	N.H. Smith and S.M. Larter
Counsel for Archibald, Clarke & Defieux and Moore:	H.P. McLaughlin

The plaintiff claims on a fire insurance policy following the total destruction of a restaurant at Wells, B.C. on December 23, 1988. The plaintiff was a "lessee" but with some additional rights which do not concern me today. The claim centres around leasehold improvements, equipment and stock which the plaintiff claims has a replacement value in excess of \$350,000.

The insurance companies involved declined to pay and an action was commenced. The matter is set for trial in November. The statement of defence alleges the usual general denial that the

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plaintiff suffered any loss and then in the alternative claims fraud or wilful misconduct. There are five "particulars" of this alleged fraud which essentially state that the plaintiff either did not possess or did not own most of the items claimed.

The plaintiff obtained an order in March 1990 pursuant to Section 11 of the Insurance Act, which provides for the appointment of an umpire and generally sets out the mechanics of an appraisal. That process was finally commenced after much delay but bogged down over an issue concerning the umpire's authority to conduct the "hearing" and various other ancillary matters.

I have several motions before me:

I am asked by the defendants to answer a series of questions concerning the appropriate procedure before the umpire.

The plaintiff asks that I make an order requiring the defendants to particularize their claim of fraud, providing facts upon which the claim is based. She also seeks an order requiring the attendance of a representative of one of the defendants for discovery. Additional relief seeking an order binding the corporate defendants was abandoned.

I turn to the first issue respecting the appropriate procedure at the appraisal.

Section 11 of the Insurance Act sets out the process of appointing an appraiser for each party who then appoint an umpire, which has been done in this instance. Regulation 11 then determines the process which essentially gives that body the right to determine value. It is, as many cases have suggested, an efficient process involving experts to resolve valuation, thereby avoiding delay and duplication at trial where such evidence would otherwise have to be led.

In this case there is a serious dispute over quantities and interpretation of the contract referencing the method of evaluation. The defendant says that the plaintiff's own records suggest something is amiss and points to records placing a value on goods of \$23,000 which now have an insurance value of \$90,000. The umpire insists that he can proceed to hold a "hearing" relying upon whatever information he sees fit to consider to determine the actual quantities and can then use "industry standards" to answer the disputed issue of evaluation.

The defendant does not dispute the umpire's authority to value but says it must be based upon either agreed quantities or on alternate scenarios presented by each side, leaving to the trial judge the right to determine which is appropriate.

I was referred to a great many cases and several interesting articles but most were not on the narrow issue before me. For

example Arlington Investments Ltd. v. Commonwealth Insurance Co., (1985) 60 B.C.L.R., 113 is authority for the proposition that an allegation of fraud in the pleadings does not preclude the appointment of an umpire. That is not disputed. It also stands for the proposition that where there is dispute over methods of calculation, as here then the appraisers could make an assessment on each basis, leaving to the trial judge the one he or she finds appropriate.

I am of the view that what the umpire proposes to do here infringes upon the jurisdiction of the trier of fact and it is therefore not authorized by the Insurance Act. The question of quantity and interpretation of the reference to valuation in the contract are matters for the trial judge. It offends the concept of a fair hearing to permit an enquiry that has no right to counsel, no right to cross examination or any of the usual safeguards available to parties. I do not mean this as any criticism of the appraisers or umpire who I am sure genuinely believe that such a course is necessary to their determination.

I have found considerable support for this position in Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co., a decision of the Sask. C.A. (1990) No. 9371. That court dealt with a similar statutory provision. It stated inter alia that the authority of an umpire and appraiser was limited to determining "the value of the property". All other disputed issues including

construction of the policy are left to negotiate or litigate. On page 8 the following appears:

"The intent and object of a statutory provision like the ones under scrutiny here are twofold: to encourage a quick settlement of the insured's loss and to facilitate the use of the expertise of an appraiser (or an umpire) in the sphere of property values. There is nothing in the express wording or in the intent or object of the statutory provision which would justify or even suggest leaving to an appraiser or an umpire disputed legal questions (as one would a court or an arbitration board) about which there is no reason to believe the appraiser or umpire would have any expertise."

Like the Shinkaruk case I believe the umpire here has misconstrued his role to be one of arbitrator. In the result I answer the questions posed in the motion as follows:

1. Can the umpire determine the quantities of items claimed on the proof of loss? - No.
2. In deciding the issues raised in the appraisal is the umpire entitled to hear and consider evidence respecting:
 - a. the quantities claimed? - No.
 - b. the age and condition of the items - No.
3. What effect does the umpire's findings in respect to the amount of the loss have on the trial of the main proceedings

in respect of the claims for gross exaggeration and fraud? -
the answer to this was agreed and it was none.

4. Is the umpire entitled to determine the meaning or method by which "actual cash value" or replacement value" is to be determined? - No.
5. What is the umpire's jurisdiction in respect to a determination of the value of the leasehold improvements? - I am not going to answer this question because it is not capable of a precise answer. He has jurisdiction to value but not to determine what is or is not a leasehold improvement.
or extent of damages
6. If the umpire holds a hearing, is counsel entitled to be present? - Yes.
7. Is the umpire required to give reasons? - No.

The answers given do not preclude a hearing, rather they restrict the hearing to one of valuation only. Values can be given on one or more theories. For example the claim as presented can be valued and the valuation process could be on two or more methods. If the umpire believes that quantities affect value then he or she is entitled to make assumptions and qualify the value by the assumptions. It may also be the case that the umpire determines that he cannot act at all because there are too many qualifications

which must first be answered by a Court.

I leave the process to the umpire.

I turn now to the claim for particulars which I believe is really a request that the defendant not spring any surprises at trial. I do not see, given the defence that the plaintiff is lying or exaggerating based on her own financial records, any particulars that could assist the plaintiff. I accept however that it would be appropriate to have the defendant respond in the following manner:

In response to the claim for particulars to the allegations in paragraph 5 the defendant will rely at trial upon the financial records and viva voce evidence respecting the claims set out in ss. 5.1 to 5.5.

The plaintiff claims frustration in examining the proper officers or agents of the defendant companies. In particular he seeks to examine an officer of Elite Insurance Co. but concedes that he has not actually taken out an appointment to do so. While I accept that there may be an element of frustration the application in my view is premature. The defendants concede the plaintiff's right and so I will adjourn this application pending due process. In the event the defendants refuse or frustrate the plaintiff in the examination then the application can be renewed.

"McKINNON J."