

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: )  
 )  
Brian Vincent )  
 )  
 ) Plaintiff ) Jason D. Singer and Ari Singer, Counsel for  
 ) the Plaintiff  
 )  
- and - )  
 )  
The Economical Insurance Group ) Tim Crljenica, Counsel for the Defendant  
 )  
 ) Defendant )  
 )  
 )  
 ) HEARD: September 27, 2021

RULING ON MOTION

CAREY J.

**BACKGROUND**

- [1] This case goes back ten years to 2011 and involves three separate losses at Brian Vincent’s (“the plaintiff”) Windsor property: a water pipe burst in July 2010; a sewer backup on July 23, 2010; and a damage claim for vibrations caused by heavy equipment on September 20, 2010.
- [2] On July 5, 2018, I allowed the plaintiff to amend his statement of claim to add the “Vibration loss” claim.
- [3] Over the last decade the plaintiff has provided multiple unsworn affidavits of documents but not a sworn Proof of Loss, as required by s. 148, Statutory Condition 6, of the *Insurance Act*, R.S.O. 1990, c. I.8.
- [4] The defendant, The Economical Insurance Group (“Economical”), outlines a history of the plaintiff’s claim in damages rising upwards since these events. When the plaintiff brought the claim in 2011, it sought \$350,000 in damages. Two weeks later, the plaintiff amended the claim and sought \$800,000 in damages for the first and second losses.
- [5] An Examination for Discovery was completed in March 2013, and the plaintiff served Economical with an unsworn affidavit of documents that included a content loss list of

650 items. That list was revised within a year to a list of 990 items. In July 2015, further details of the losses and repair estimates were provided to the defendant in the amount of \$464,852.29 including the “Vibration loss” claim, which was not then part of the amended statement of claim. Following my order granting the plaintiff leave to amend the amended statement of claim to add the vibration loss claim, an amended, amended statement of claim was served in August 2018. Following an unsuccessful attempt to appeal that decision, Economical served and filed an amended statement of defence.

- [6] To date, the plaintiff has been paid just short of \$500,000 with respect to the three losses, but he has not complied with the defendant’s request for a sworn Proof of Loss, nor did he offer a reason for not providing same.
- [7] It appears clear that the refusal to provide a sworn proof of loss is driven by the plaintiff’s wish to avoid the appraisal process set out in s. 148, Statutory Condition 11, of the *Insurance Act*. The plaintiff submits it is his right to have these claims decided by a court. There have been attempts at mediation that have failed. The plaintiff does not trust the appraisal process and wants his day in court.
- [8] There is apparently a very wide chasm that separates the damage value positions of the two parties. Based on a cataloguing of damaged contents done by a third party for Economical, the defendant says the contents have a replacement cost value of \$535,975.60 and an actual cash value of around \$300,000. The plaintiff, however, testified at his Examination for Discovery that his contents claim was over \$2,500,000 and he has delivered a revised affidavit of documents with a list of contents totalling over \$1,800,000.

## ISSUES

- [9] The plaintiff has indicated that he is preparing a sworn Proof of Loss in accordance with the amounts he has previously presented to Economical for his claims. However, he resists an order pursuant to s. 128(2) of the *Insurance Act*, which requires the plaintiff to appoint an appraiser within seven days. If he does not, or if the appointed appraisers cannot agree upon an umpire, the appointment of Glenn Gibson as umpire is requested by the defendant.
- [10] The defendant says the appraisal process is designed as an efficient and cost-saving measure to effectively resolve the dispute. It says that there is no time limit by which a request for an appraisal must be made and that s. 148, Statutory Condition 11, is unambiguous and cannot be unilaterally waived by either party in the event of a disagreement: see *Seed v. ING Halifax Insurance* (2005), 78 O.R. (3d) 481 (Div. Ct.), at paras. 9 and 14. The defendant says the right to the appraisal process is one that continues despite a concurrent action including other claims beyond the issue of the quantum of recovery under the policy: see *56 King Inc. v. Aviva Canada Inc.*, 2016 ONSC 7139, at paras. 23 and 28, aff’d 2017 ONCA 408, at paras. 5 and 6, leave to appeal to S.C.C. refused, 37702 (January 11, 2018).



- [11] The defendant argues that the appraisal will significantly limit and narrow the issues left for the court to determine. The only remaining issue for trial is Economical's limitation defence regarding the third claim arising from the vibration loss, as allowed for by my earlier ruling. This, they say, will reduce the estimated trial time from six weeks to less than a day.
- [12] The plaintiff relies on r. 48 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, asserting that r. 48.04(1) applies as both parties consented to a six-week trial to take place in January 2018. The plaintiff asserts that Economical's consent to the action being placed on the trial list in 2018 requires leave of the court to bring this motion. The plaintiff further relies on the recent case of *Belanger v. Shaw*, 2021 ONSC 153, at paras. 45-50, to argue there has been no substantial or unexpected change of circumstances as the quantum has always been the main issue throughout the litigation. Economical could have and should have invoked the appraisal process at a much earlier stage had it so wished.
- [13] The plaintiff relies on the Manitoba case of *Winnipeg Regional Health Authority et al. v. Temple Insurance Company*, 2011 MBQB 92, at para. 8.

#### ANALYSIS

- [14] I will deal first with the issue of leave to bring the motion. Notwithstanding that the defendant has not sought leave, I am prepared to grant leave to bring the motion on the basis that there has been a substantial change in circumstances.
- [15] Since this case was set down in 2018, on consent, the COVID-19 pandemic has substantially interfered with this court's ability to deal with trials. Criminal trials, especially those with people in custody, have taken priority over civil and family trials. As a result of COVID-19 protocols and the need for social distancing, criminal trials are taking longer. In Windsor, considerably more staff time and courtroom space have been required to accommodate safe jury selection and appropriate social distancing for jurors and participants. Currently, a murder trial is being conducted in Windsor with an estimated time of two months and a current requirement of up to four courtrooms. This is a substantial change in circumstances since the setting down of this trial. Leave is granted to bring this motion.
- [16] The COVID-19 pandemic effect on the courts is also a consideration in determining whether to grant the defendant's motion. It is fundamental to the role of our Superior Court that we retain control over our processes and the resources required to deliver justice. In my view, it would be an egregious misuse of the court's resources to give precedent to six weeks of valuable and in-demand court time to what is essentially a calculation of damages when there is a legislative alternative. Moreover, the appraisal process remains expeditious and employs experienced appraisers and, if necessary, umpires in a process in which they are trained, qualified, and well-experienced.

- [17] I dare say, the process that is envisioned by the plaintiff's desire for "his day in court" would, in addition to being a misuse of judicial resources, be a particularly daunting prospect for most, if not all, judges of this court with little expertise in the valuation of home contents.
- [18] As indicated in *Winnipeg Regional Health Authority*, at para. 8, the purpose of an appraisal "is to encourage the expeditious resolution of questions of value, to encourage settlement and to expedite the trial process by providing a valuation based on the expertise of an appraiser or umpire" (emphasis added).
- [19] I accept that the defendant has shown that a valuation under s. 128 of the *Insurance Act* would expedite the process, and the expertise of an appraiser or umpire would greatly benefit the court and likely result in a trial whose length could easily be accommodated much earlier than the current time estimate allows. I am further satisfied that this process can fully protect the plaintiff's trial rights, and although the plaintiff indicates the order cannot compensate him for the assessment, I am satisfied that the trial judge's cost order, if the matter proceeds to trial, can adequately assist.

## CONCLUSION

- [20] Accordingly, there will be an order,
- (a) pursuant to s. 128, Statutory Condition 6, of the *Insurance Act*, R.S.O. 1990, c. I.8, that Brian Vincent deliver sworn Proofs of Loss Forms within 14 days;
  - (b) pursuant to s. 128(2) of the *Insurance Act*, that Brian Vincent appoint an appraiser within seven (7) days, failing which The Economical Insurance Group may proceed with an appraisal of Brian Vincent's alleged losses in accordance with the statutory appraisal process;
  - (c) pursuant to s. 128(2) of the *Insurance Act*, that Brian Vincent's appraiser and The Economical Insurance Group's appraiser jointly agree upon the appointment of an umpire within 15 days of Brian Vincent's appointment of his appraiser; and
  - (d) pursuant to s. 128(5) of the *Insurance Act*, that if the appraisers fail to agree upon an umpire within 15 days after Brian Vincent's appointment of his appraiser, the appraisal process proceed with Glenn Gibson appointed as umpire.

## COSTS

- [21] Given the weight that I have placed on the intervening circumstances caused by the COVID-19 pandemic, which of course was not anticipated, I make no order as to costs.



Thomas J. Carey  
Justice

**CITATION:** Vincent v. The Economical Insurance Group, 2021 ONSC 7169  
**COURT FILE NO.:** CV-11-17109

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Brian Vincent

Plaintiff

– and –

The Economical Insurance Group

Defendant

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**RULING ON MOTION**

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Carey J.

**Released:** October 27, 2021