CITATION: Sellors v. State Farm, 2023 ONSC 645
DIVISIONAL COURT FILE NO.: 007/20
DATE: 20230209

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Lederer and Nishikawa JJ.

BETWEEN:	)	
BRADLEY SELLORS	)	*Bradley Sellors,* in person
Applicant	)	
– and –	)	
STATE FARM FIRE AND CASUALTY COMPANY	)	*Nadine Nasr*, for the Respondent
Respondent	)	**HEARD at Toronto (by videoconference):** July 8, 2022

REASONS FOR DECISION

D.L. Corbett J.

[1] Mr Sellors seeks judicial review of the appraisal award of Umpire Peter Volaric and the Respondent's appraiser, D'Arcy Kinghorn, dated October 21, 2019. He argues that the Umpire overstepped or exceeded his jurisdiction, denied Mr Sellors procedural fairness, and acted in conflict of interest, giving rise to a reasonable apprehension of bias. For the reasons that follow, I would not give effect to any of these arguments and would dismiss the application.

Background

[2] This case arises out of a fire at Mr Sellors' property in Osprey, Ontario on March 30, 2012. Mr Sellors was insured under a homeowner's insurance policy written by the Respondent, State Farm, which provided coverage as follows:

(a) Dwelling: $214,900

(b) Contents: $161,175

(c) Additional Living Expenses: as incurred, subject to the terms of the policy.

[3] Mr Sellors commenced an action against State Farm on March 18, 2014, and, in separate proceedings, commenced an application against State Farm invoking the appraisal process under the *Insurance Act*, RSO 1990, s.I.18 (the "*Insurance Act*"), seeking an order requiring State Farm to appoint an appraiser.

[4] In response to Mr Sellors' application, State Farm appointed an appraiser (Mr Kinghorn). Mr Sellors appointed Steven Sobel as his appraiser.

[5] The appraisers appointed Peter Volaric as the Umpire for the appraisal in late 2014.

[6] The two appraisers apparently worked together to try to appraise outstanding claims until the spring of 2015, at which time the Umpire scheduled the appraisal hearing for July 20, 2015. He directed the appraisers to provide him with their appraisal briefs, in duplicate, by July 7, 2015. He directed that he would provide each side with the other side's brief after he received them.

[7] State Farm's appraiser sent his appraisal brief to the Umpire, in duplicate, on June 29, 2015. As of July 13, 2015, Mr Sellors' appraiser had not delivered his appraisal brief.

[8] The Umpire conducted a conference call with the appraisers on July 13, 2015. On that call, Mr Sellors' appraiser advised that the appraisal hearing would have to be postponed. Thereafter, Mr Sellors' appraiser did not deliver an appraisal brief and took no steps to reschedule the appraisal hearing. At the end of 2015, Mr Sobel ceased to be Mr Sellors' appraiser.[1]

[9] From the cessation of Mr Sobel's involvement in late 2015 until early 2019, Mr Sellors did not appoint a replacement appraiser and no further progress was made in the appraisal process.[2]

[10] Mr Sellors commenced a separate action against 1659311 Ontario Ltd. related to claims respecting construction work done on his dwelling. Counsel for the defendant in that action moved for an order providing (among other things) that this separate action proceed together with Mr Sellors' claims against State Farm. State Farm consented in principle to an order that the two actions proceed together, conditional on the appraisal process being completed before other steps were taken in the litigation. Mr Sellors agreed that the legal proceedings should proceed together but opposed the requirement that the appraisal be completed before further steps in the actions.

[11] By handwritten endorsement on December 13, 2018, Sproat J. ordered (among other things), that (i) Mr Sellors appoint an appraiser; (ii) that the appraisal be completed before the actions proceed further; and (iii) that the schedule for the remainder of the actions be negotiated

---

[1] State Farm argues that Mr Sobel "stepped down" due to "conflict with Mr Sellors" and "unpaid fees". It does not matter for the purposes of this application whether Mr Sobel resigned or his retainer was terminated by Mr Sellors, or the reasons for Mr Sobel ceasing to act as Mr Sellors' appraiser.

[2] State Farm argues that Mr Sellors was responsible for this delay, and that he "refused to substantively participate in the appraisal process." It does not matter for the purposes of this application whether Mr Sellors was at fault for the delay from late 2015 to early 2019.

among the parties after completion of the appraisal process. Sproat J. ordered costs against Mr Sellors of $5,000 in the aggregate.

[12] Following the order of Sproat J., Mr Sellors appointed his current solicitor, Ms Sung, as his appraiser.

[13] The Umpire scheduled a teleconference for August 20, 2019, to schedule the appraisal hearing.[3] State Farm's appraiser attended the conference call. Mr Sellors' appraiser, Ms Sung, did not attend the conference call. Instead, Mr Sellors attended the conference call himself.

[14] During the conference call, the Umpire scheduled the appraisal for either October 18, 2019, or October 21, 2019, depending on Ms Sung's availability, with appraisal briefs to be provided to the Umpire in advance. Neither Mr Sellors nor Ms Sung got back to the Umpire respecting Ms Sung's availability, so on August 27, 2019, the Umpire set October 21, 2019 as the date for the appraisal hearing.

[15] On October 8, 2019, the Umpire wrote to Ms Sung, confirming again the appraisal date of October 21, 2019, and reminding Ms Sung that appraisal briefs were to be provided to the Umpire by October 15, 2019. Ms Sung responded that she would not be providing an appraisal brief and would not be attending the scheduled appraisal hearing.

[16] State Farm's appraiser updated his appraisal brief and sent it to the Umpire the week of October 7, 2019. A copy of this brief was provided to Ms Sung on October 11, 2019.

[17] The appraisal hearing proceeded, as scheduled, on October 21, 2019, at the Umpire offices. State Farm's appraiser attended with two other persons. No one attended on Mr Sellors' behalf. Mr Sellors did "call in" to the appraisal hearing by telephone. He asked permission to record the call. The Umpire denied this request, after which Mr Sellors terminated the call.

[18] The Umpire then conducted the appraisal hearing and released the award. In the award, the Umpire and State Farm's appraiser made global findings of the total replacement cost and total cash value for each of the claims for the Dwelling and the Contents, and a global finding of additional living expenses based on a period of indemnity of eleven months, to January 28, 2013.

---

[3] There was considerable information about why a conference call with the Umpire was delayed from the date of Justice Sproat's order (December 13, 2018) and the date of the conference call (August 20, 2019). It is not necessary to review this information for the purposes of this decision.

Jurisdiction and Standard of Review

[19] There is no appeal from an appraisal decision under s. 128(3) of the *Insurance Act*. This court's jurisdiction is restricted to a judicial review of the decision: *Judicial Review Procedure Act*, RSO 1990, c.J.1, ss. 2(1) and 6(1).

[20] The standard of review of the appraisal award is reasonableness: *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 219 SCC 65; *Madhani* v. *Wawanesa Mutual Insurance Company*, 2018 ONSC 4282, paras. 14-18 (Div. Ct.). Procedural issues are reviewed on a standard of fairness: *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 219 SCC 65; *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras. 23-28; *Madhani* v. *Wawanesa Mutual Insurance Company*, 2018 ONSC 4282, para. 19 (Div. Ct.).

[21] As stated by a majority of this court in *Seed* v. *ING Halifax Insurance* (2005), 78 OR (3d) 481, para. 23:

> The purpose of the appraisal process under s. 128 of the *Insurance Act* is to provide an expeditious and easy manner for the settlement of claims for indemnity under insurance policies. It is intended to be a final and binding determination of the loss…. Courts have afforded substantial deference to an appraisal under the *Insurance Act* and the appraisal process, which is not subject to the *Statutory Powers Procedure Act*, RSO 1990, c.S.22. Unless there is proof of misconduct or that the appraisers or umpire exceeded their jurisdiction, courts have been reluctant to interfere.

[22] As explained in detail below, the appraisal hearing before the Umpire was essentially unopposed. The court will be particularly reluctant to interfere with an award at the behest of a claimant who has failed or refused to participate in the process as directed by the Umpire.

Analysis

[23] The Applicant raises numerous issues on this application. Given the history of this matter, however, there are few genuine issues for this court, and these are addressed systematically in the Respondent's factum. In this decision, I analyse the case following the approach to issues in the Respondent's factum, and I then explain why none of the "other issues" raised by the Applicant are bases for this court to interfere with the appraisal award.

The Umpire Had Jurisdiction

[24] With respect, there is no substance to the Applicant's argument that the Umpire lacked jurisdiction. The Umpire was validly appointed. Sproat J. directed that the appraisal proceed prior to further steps in the litigation. The issues raised before the Umpire were quantification of losses under three coverages provided by the insurance policy (Dwelling, Contents and Additional Living Expenses). The Umpire's award was confined to these quantifications.

[25] Mr Sellors argues that it was a condition precedent to the Umpire conducting an appraisal hearing that the appraisers submit a joint list of "their differences" to the Umpire. As this argument goes, it was for the parties' appraisers to "determine the matters in disagreement" and only then for the Umpire to hold a hearing to decide those disagreed matters. Mr Sellors advances this argument based on the "plain language" of s.128(3) of the *Insurance Act*:

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

[26] Mr Sellors' argument would have it that the parties' appraisers "decide" what is disagreed, and then the list of "matters disagreed" or "their [agreed] differences" is provided to the Umpire. This provision cannot reasonably bear this reading. The phrase "determine the matters in disagreement" means "decide disagreements" – another way of saying that the parties' appraisers are to settle as many issues as they can, and only those issues that the parties' appraisers have not agreed shall be submitted to the Umpire. There is no requirement that the parties "agree" on the list of issues. If they do not, then that is a matter to be addressed with the Umpire as one of the parties' "differences". A list of agreed issues is not a condition precedent for the Umpire exercising jurisdiction.

[27] In this case, the Applicant and his various counsel and appraisers were advised, repeatedly, that anything claimed by the Applicant that remained unpaid by State Farm was in dispute. This was sufficient to move forward with an appraisal process. It was for the Umpire to devise the appropriate process to conduct the appraisal. The Umpire did this. He required the parties to deliver appraisal briefs in advance of the appraisal. That was the manner in which this Umpire decided that contested issues should be identified and a hearing conducted. Any issues arising from this approach were matters to be taken up with the Umpire at the appraisal hearing.

[28] What is clear from the record is that the Applicant did not agree with the process stipulated by the Umpire. He was entitled to raise his disagreement with the Umpire. He was not entitled, however, to opt out of the process as a manner of voicing this disagreement. But that is what he did. He served no appraisal brief and neither he nor his appraiser attended the appraisal hearing.

[29] The Umpire did not lose jurisdiction because he adopted this particular appraisal process. He did not lose jurisdiction because the Applicant decided not to comply with the Umpire's directions to serve an appraisal brief. He did not lose jurisdiction because the Applicant decided not to participate in the appraisal hearing.

[30] The Umpire was validly appointed. The subject matter of the appraisal was within the four corners of the Umpire's jurisdiction under s. 128 of the *Insurance Act*. The directions given to exchange appraisal briefs and scheduling the appraisal hearing were valid exercises of the Umpire's jurisdiction. There is simply no basis for the argument that the Umpire lacked, lost or exceeded his jurisdiction.

No Procedural Unfairness

(a) Exchange of Appraisal Briefs

[31] The Applicant argues that he was entitled to a more detailed statement of the insurer's position before he should have been required to provide an appraisal brief. To say that the correspondence between the parties on this issue is voluminous would be an understatement.

[32] If the Applicant considered that he could not eliminate any issue from the appraisal based on the position taken by the insurer, it was open to him to file a brief that reflected this understanding. If he claimed to be "caught by surprise" in respect to any particular issue pursued at the appraisal hearing by the insurer, it was open to him to seek relief in respect to that particular issue during the hearing (for example, for an opportunity to submit further information in respect to it).

[33] The Applicant had the insurer's appraisal brief as early as June 29, 2015. He received an updated brief on October 11, 2019. I see no substance to the Applicant's claim that the Umpire's approach to disclosure of briefs was unfair.

[34] The Applicant's position seems to be that the Umpire was required to review the dealings between the appraisers (back in 2014 and 2015) and the subsequent voluminous correspondence up to 2019 to decide what had been agreed and what was in dispute. The Umpire had no such responsibility. It was for the parties to address these issues in their appraisal briefs. If Mr Sellors considered that it was unclear what issues remained to be resolved, then his appraisal brief would include his support for all aspects of his claim.

(b) Refusal of an Adjournment

[35] The Umpire scheduled the hearing in August for October 21, 2019. The insurer attended and was ready to proceed. Mr Sellors filed no brief and did not attend. The appraisal had already been outstanding for far too long, and no good reason was given by Mr Sellors for adjourning the hearing. Refusing an adjournment, in this context, was well within the Umpire's jurisdiction and was not procedurally unfair.

(c) Failure to Provide Reasons

[36] The *Insurance Act* provides that a decision shall be an award signed by any two among the two appraisers appointed by the parties and the Umpire. The *Act* does not require that reasons be provided. It is not necessary for this court to consider whether reasons might ever be required in a particular circumstance as a component of a fair appraisal process. In this case, where the

Applicant filed no materials and chose not to attend, a joint decision of the Respondent's appraiser and the Umpire is sufficient and there was no requirement to give reasons. See *Madhani* v. *Wawanesa Insurance Company*, 2018 ONSC 4282, paras. 42 and 44 (Div. Ct.).

(d) Objection to the Umpire's Alleged Conflict is Untimely

[37] The Applicant argues that he consulted with Mr Volaric with a view to retaining him as counsel in connection with this very case. He asserts that he imparted confidential information to Mr Volaric during his dealings with him, and as a consequence there is a conflict in Mr Volaric acting as the Umpire.

[38] This issue was raised, for the first time, in this application for judicial review.

[39] Mr Volaric was jointly selected by Mr Sellors' appraiser and State Farm's appraiser in late 2014. Mr Sellors did not raise the issue at that time. Mr Sellors opposed continuing with the appraisal or requiring completion of the appraisal before scheduling steps in the litigation, on the motion before Sproat J. in December 2018. He did not raise this issue then. The Umpire conducted a conference call for scheduling purposes in August 2019, in which Mr Sellors participated. Mr Sellors did not raise the issue at that time. Mr Sellors called in to the appraisal hearing on October 21, 2019. He did not raise this issue at that time.

[40] It is axiomatic that an allegation of conflict of interest or reasonable apprehension of bias is to be made to the decision-maker alleged to have the conflict: see, for example, *Kivisto* v. *Law Society of Ontario*, 2021 ONSC 6394, leave to appeal dismissed (November 25, 2022, Ont. C.A. #M53147) and the authorities referenced therein. Mr Sellors, did not do that, and I would not permit him to raise it as a fresh issue on this application. See: *Perez* v. *Governing Council of the Salvation Army of Canada* (1998), 42 OR (3d) 229 at 233 (CA).

[41] Further, even if there had been a conflict, it is a conflict that Mr Sellors could waive, either expressly or impliedly:

> At common law, even an implied waiver of objection to an adjudicator at the initial stages is sufficient to invalidate a later objection … The principle is stated as follows in Halsbury, Laws of England (4th ed.), volume 1, paragraph 71, page 87:
>
> > The right to impugn proceedings tainted by the participation of an adjudicator disqualified by interest or likelihood of bias may be lost by express or implied waiver of the right to object. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity. (*Geneen* v. *City of Toronto* (1999), 117 OAC 305, para. 19 (Div. Ct.), quoting

> *Energy and Chemical Workers' Union and Atomic Energy of Canada Ltd., Re*, [1986] FC 103, quoting 1 Hals. (4th), para. 71).

Mr Sellers' conduct in selecting Mr Volaric as the Umpire, and not objecting to Mr Volaric for a period of years thereafter, is sufficient basis to conclude that any conflict that may have existed was waived.

Other Arguments

[42] Most of the issues listed by Mr Sellors in his factum, his notice of application, and in oral argument, have been addressed in my reasons above. I distil the following additional issues that may not have been fully addressed above:

(a) Was it unfair to Mr Sellors that he did not receive requested pre-hearing disclosure?

(b) Was it unfair to Mr Sellors that State Farm made negative statements about him and/or his evidence in its appraisal brief?

(c) Did the Umpire make "credibility findings" about competing expert evidence, and if he did so, was this unfair to Mr Sellors?

(d) Did the Umpire make findings of causation outside his jurisdiction?

Each of these points may be dealt with briefly, as follows.

[43] The Umpire was entitled to devise an appropriate process for the appraisal. Directing the parties to serve appraisal briefs and providing those briefs to the parties prior to the appraisal was a reasonable approach to this process. Any resulting issues from this process were matters for Mr Sellors to address with the Umpire at the appraisal hearing. Mr Sellors was not entitled to refuse to serve a brief and refuse to participate because he disagreed with the process stipulated by the Umpire. He may not now pursue an argument that the process worked an unfairness for him when he failed to participate in the process. This conclusion applies to the request for "pre-hearing disclosure" as well as Mr Sellors' argument that he was entitled to a statement of issues from State Farm.

[44] Mr Sellors has failed to identify any unfairness in State Farm making negative statements about him and his evidence in State Farm's appraisal brief. It was open to Mr Sellors to address these points in his own brief and at the appraisal hearing.

[45] An Umpire is entitled to prefer the evidence of one expert over another expert, either generally or on a particular point. To the extent that the Umpire preferred the evidence of one expert over another in this case, this was not unfair to Mr Sellors.

[46] There is no basis, on the materials before the Umpire at the appraisal hearing, or on the basis of the award, that the Umpire made findings of causation outside his jurisdiction.

Establishing the Record for Judicial Review

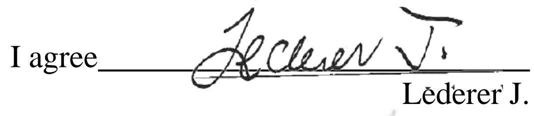
[47] During the case management process, this court directed the Umpire to serve a Record for use on this application. It emerged that the Umpire did not retain a record. The appraisal is not governed by the *Statutory Powers Procedure Act*, RSO 1990, c.S.22, and so there is no statutory requirement to keep a record. There may be a common law requirement to keep a record, but it is not necessary to inquire into this issue in the circumstances of this application. The referral of this matter to appraisal was ordered by a court, and the appointment of the Umpire is not contested. There is no dispute respecting the appraisal brief provided by State Farm, and there is no dispute that the Applicant did not file an appraisal brief. There is no requirement to record the appraisal hearing itself. The form of the award is prescribed in the *Insurance Act*, and the award complies with this requirement. Had the Umpire kept a record, it would have been comprised of these materials before the court. The Record is established sufficiently for the purposes of judicial review.

Summary and Disposition

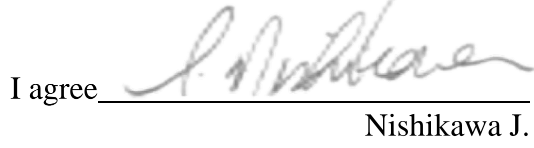
[48] In effect, Mr Sellors withdrew from the appraisal process by failing to file an appraisal brief and failing to attend the appraisal hearing. This was a poor strategy. The Umpire was entitled to proceed on the basis of the Respondent's appraisal brief and the information provided to him during the appraisal hearing. To the extent that this resulted in Mr Sellors' position not being put forward or considered by the Umpire, the fault for that lies solely on Mr Sellors. The application is dismissed.

[49] State Farm is entitled to its costs of this application, which I would fix in the amount of $25,000, inclusive, payable within thirty days.

D.L. Corbett J.

I agree 

Lederer J.

I agree 

Nishikawa J.

Date of Release: February 9, 2023

CITATION: Sellors v. State Farm, 2023 ONSC 645
DIVISIONAL COURT FILE NO.: 007/20
DATE: 20230209

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett, Lederer and Nishikawa JJ.

BETWEEN:

Bradley Sellors

Applicant

– and –

State Farm Fire and Casualty Company

Respondent

REASONS FOR DECISION

D.L. Corbett J.

Date of Release: February 9, 2023