

**CITATION:** Aviva Insurance et al v. Sahara Resturant, 2024 ONSC 1415  
**COURT FILE NO.:** CV-22-1494-00  
**DATE:** 2024-03-08

**SUPERIOR COURT OF JUSTICE – ONTARIO**

7755 Hurontario Street, Brampton ON L6W 4T6

**RE:** AVIVA INSURANCE COMPANY OF CANADA, ALSO KNOWN AS AVIVA INSURANCE COMPANY INC. ALSO KNOWN AS AVIVA INSURANCE, LLOYD’S UNDERWRITERS ALSO KNOWN AS CERTAIN UNDERWRITERS AT LLOYD’S AND CHUBB, Applicants

**AND:**

3 KINGS SHAWARMA INC. OPERATING AS SAHARA RESTAURANT, Respondent

**BEFORE:** Justice C. Wilkinson

**COUNSEL:** DUNN, Christopher R, for the Applicants

TUBIE, Matthew, for the Respondent

**HEARD:** February 12, 2024, In person

**MOTION ON NOTICE – ENDORSEMENT**

[1] There are two Applications before the court, both of which are rooted in an insurance claim arising from a water damage incident, which occurred on January 1, 2018. On that date, a water pipe in a sprinkler burst in a restaurant owned by the Respondent, 3 Kings Shawarma Inc. operating as Sahara Restaurant (“Sahara Restaurant”), which resulted in damage to Sahara Restaurant’s property and contents.

[2] The Applicants, Aviva Insurance Company of Canada also known as Aviva Insurance Company Inc., also known as Aviva Insurance, Lloyd's Underwriters, also known as Certain Underwriters at Lloyd's and Chubb Insurance Company of Canada ("the insurers"), were the property insurers for Sahara Restaurant pursuant to a Hospitality Insurance Policy, which included coverage for the building and contents of Sahara Restaurant.

[3] The insurers move for a declaration that the limitation period for Sahara Restaurant to pursue a claim for loss under the Hospitality Insurance Policy issued to Sahara Restaurant expired on January 1, 2019. The insurers take the position that although Sahara Restaurant notified the insurers of the loss in a timely fashion, it did not file a Statement of Claim against the insurers prior to the expiration of the limitation period.

[4] Sahara Restaurant brings an Application in court file CV-21-00003422-0000 for a declaration that the insurers be compelled to participate in an appraisal of the losses suffered by Sahara Restaurant pursuant to section 128 of the *Insurance Act*.

[5] The insurers take the position that the invocation of the demand for an appraisal by Sahara Restaurant occurred after the limitation period had already

expired. They therefore submit that the Application of Sahara Restaurant should be dismissed in its entirety.

[6] For the reasons that follow, I find that the limitation period to file a claim against the insurers had already expired when Sahara Restaurant sent its notice demanding an appraisal, and when it issued a Statement of Claim against the insurers. The Application of Sahara Restaurant is dismissed. Sahara Restaurant is statute-barred from making any further claims against the insurers with respect to the January 1, 2018, loss.

### **Facts**

[7] On January 1, 2018, Sahara Restaurant suffered significant damage to its restaurant business when a pipe from a sprinkler burst. At the time of the water damage, Sahara Restaurant had a valid policy of insurance with the insurers that included certain coverages for water damage claims.

[8] Sahara Restaurant reported the loss to Aviva on January 1, 2018.

[9] Adjusters from the insurers were on the site to commence their investigation by January 2, 2018.

[10] Sahara Restaurant's insurance policy included Statutory Condition 14, which incorporates the language of section 148 of the *Insurance Act*, which sets out a one-year limitation period to commence a claim:

Every action or proceeding against the Insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs.

[11] The insurers advised Sahara Restaurant of the one-year limitation period in correspondence dated May 30, 2018, which included specific reference to the January 1, 2019, limitation date.

[12] The insurers advised Sahara Restaurant or its representative of the one-year limitation period a second time in an email dated August 20, 2018.

[13] The insurers paid \$72,313.34 towards some of the claims that were submitted by Sahara Restaurant, and rejected other claims, as they determined that those losses were not covered by the policy.

[14] On July 29, 2019, Sahara Restaurant demanded that an appraisal be conducted regarding the rejected claims.

[15] On September 24, 2019, the insurers informed Sahara Restaurant that they were refusing to participate in the appraisal process, as they took the position

that the limitation period for Sahara to proceed further with its claims against them had expired.

[16] Sahara Restaurant issued a Statement of Claim against the insurers on January 29, 2020.

### **The Issues**

[17] Did Sahara Restaurant issue its Statement of Claim against the insurers after the expiry of the one-year limitation period?

[18] Have the insurers engaged in conduct that extends the limitation period for Sahara Restaurant to issue a claim against the insurers?

[19] Can Sahara Restaurant invoke the right to appraisal pursuant to section 148 of the *Insurance Act*?

### **Position of the Insurers**

[20] The insurers take the position that the one-year limitation period to commence a claim began running the day of the loss, or at the latest, on the day that the insurance company was notified about the loss, which in this case, was January 1, 2018. The insurers therefore state that to preserve its right to sue the insurers for reimbursement for its losses under the policy, Sahara Restaurant should have issued a Statement of Claim against the insurers by January 1, 2019.

[21] The insurers note that prior to the limitation expiring, Sahara Restaurant was informed twice in writing that the limitation expired one year after the loss. The insurers submit that they took no action or made any statements to Sahara Restaurant to suggest that they were waiving their rights to rely upon the one-year limitation under the policy.

[22] The insurers further submit that the appraisal process under section 128 of the *Insurance Act* is intended to deal with disputes regarding the quantum of a claim; not entitlement to make a claim. Accordingly, if the underlying claim is statute-barred, the insurers argue that there is no purpose in conducting the appraisal, and that the process thereby becomes a nullity.

### **Position of Sahara Restaurant**

[23] Sahara Restaurant provides evidence that it, or its adjuster agent, continued communications with the insurers regarding quantifying the loss throughout 2019. It points to email communications from the insurers after January 1, 2019, in which the insurers continue to ask for information to consider the business interruption aspect of the claim. It therefore claims that the insurers cannot rely upon the limitation period of January 1, 2019, to deny its claim, as they were continuing to consider and adjust the claim after the expiry of the one-year limitation period. It submits that the limitation period did not begin to run until the

insurers made their final position known to Sahara Restaurant on September 24, 2019.

[24] Sahara Restaurant further argues that the insurers breached the contract of insurance held by Sahara Restaurant by failing to thoroughly evaluate and approve its claim for water damage and its business interruption losses resulting from the water damage. Sahara Restaurant further alleges that the insurers acted in bad faith in refusing to accept its claim for damages and business losses resulting from the water damage, and in continuing to communicate that it was considering the claim after the limitation period had already expired.

[25] Sahara Restaurant also argues that the insurers breached their covenant of fair dealing with Sahara Restaurant by refusing to participate in an appraisal process provided for in the insurance agreement. It argues that once the appraisal process was engaged, its right to recover the value of the loss determined through the appraisal process was preserved. It also argues that the appraisal process is a stand-alone process that need not be tied to a lawsuit, and that no limitation period operates to prevent the appraisal process from being invoked.

### **The Law**

[26] Section 22(5) of the *Limitations Act* indicates that the general two-year limitation period set out in the *Act* may be varied or excluded by a “business

agreement” made on or after October 19, 2006. Insurance related to the operation of a business falls within the definition of “business agreement” in section 22(6) of the *Limitations Act* (*Boyce v. Co-Operators General Insurance Co.*, 2013 ONCA 298, 116 O.R. (3d) 56, at para. 25).

[27] Section 22(6) of the *Limitations Act* defines a “business agreement” as “an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act*.” Section 1 of the *Consumer Protection Act* defines “consumer” as “an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes”.

[28] If the insurance policy has clear, unambiguous language that incorporates Statutory Condition 14 of the *Insurance Act*, a one-year limitation period contained in the policy may be relied upon (see *Qureshi v. Royal & Sun Alliance Insurance Company*, 2022 ONSC 4997).

[29] The party arguing promissory estoppel bears the onus of establishing that the words and conduct of the insurer could be interpreted as a promise, expressed or implied, not to rely on the limitation period. An admission of liability to pay on the part of an insurer does not extend the limitation period against the insurer. Justice Sopinka stated in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50, at pp. 58-59:



The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff and the effect of the admission in the circumstances led the plaintiff to miss the limitation period, the elements of promissory estoppel have been established.

[30] The issue of promissory estoppel was also addressed and rearticulated recently by the Supreme Court, confirming that (1) the parties be in a legal relationship at the time of the promise or assurance; (2) the promise or assurance be intended to affect that relationship and to be acted on; and (3) the other party in fact relied on the promise or assurance. It is implicit that such reliance be to the promisee's detriment (see *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, 163 O.R. (3d) 398, at para. 15).

[31] Normal dealings between an insured and an insurer attempting to resolve a claim do not extend the limitation period. In *Gillis v. Bourgard et al.* (1983), 41 O.R. (2d) 107 (C.A.) Justice Brooke of the Ontario Court of Appeal stated at para. 6:

It seems to us that what occurred here was, at best, no more than normal dealings between parties attempting to resolve an insurance claim. To hold that it could or did give rise to any admission of

liability or a promise not to rely upon a condition of the contract, the limitation period, is completely unwarranted and puts in jeopardy the benefit of such dealings to litigants.

[32] Statutory Condition No. 11 and s. 128 of the *Insurance Act* remove from the court the assessment of damages under the policy. In *Seed v. ING Halifax Insurance* (2002), C.C.L.I. (3d) 257 (Ont. S.C.), Justice Wright held at para. 9:

[9] This process is mandatory. No action for recovery under the policy may be taken until the issues in dispute as to damages are settled by the process of appraisal. The intention of Statutory 11 is unambiguous and cannot be unilaterally waived either by the insurer or the insured in the event of a disagreement. The statutory condition to which both parties agree is clear. There must be an appraisal before there can be any recovery under the policy.

[33] In *Terroco v. Industries Ltd. v. Sovereign General Insurance Company*, 2007 ABCA 149, 283 D.L.R. (4th) 501, the Alberta Court of Appeal considered an appraisal provision in the Alberta *Insurance Act* similar to s. 128 of Ontario's *Insurance Act*. The Court of Appeal held that the sole purpose of the appraisal process is to determine value. The umpire on an appraisal has no authority to enforce any decision made as a result of the appraisal process (paras. 23-24), and further, at paras. 25-26:

[25]...The demand for, and participation in an appraisal, does not obligate an insurer to pay the claim and, without something more, the insured must commence an enforcement action on the policy within the [mandated] limitation period to avoid being statute barred.

[26] Accordingly, in the ordinary course, even if the appraisal process is not completed within the limitation period, it is necessary

for the action to be commenced prior to the expiration thereof, to avoid being statute barred. While statutory condition 6 (2) on its face would appear to preclude an action being brought until the amount of the loss has been ascertained, the courts will not strike out an action commenced to preserve the limitation period, but rather will stay the action until the amount of loss is determined.

[34] The *Terroco* decision also quotes at para. 27 from Professor Craig Brown's text, *Insurance Law in Canada*, (Scarborough: Carswell, looseleaf) Vol. 1, at p. 10-20-1:

...the customer should commence the action before the expiration of the limitation period notwithstanding that the appraisal proceedings have not been completed. It is this formal step which avoids the consequences of the limitation section. The worst that will happen in terms of the action will be that it will be stayed on application by the insurer. This does not nullify the action, it merely postpones it. Once the valuation question is settled, the customer may reactivate the action by application without having to commence fresh proceedings.

Professor Brown goes on to state at p. 10-32 of the text:

Faced with this dilemma the customer should commence the action before the expiration of the limitation period notwithstanding that the appraisal proceedings have not been completed. It is this formal step which avoids the consequences of the limitation section.

[35] The insured must have a valid underlying claim in order to invoke the appraisal process. If the limitation period has expired, the insured's right to an appraisal will be deemed to have lapsed (see *Vincent et al. v. Red River Mutual*, 2020 MBQB 153, at para. 37, aff'd, 2021 MBCA 53).

## **Analysis**

[36] There is no dispute between the parties regarding the following key facts:

- i) Sahara Restaurant discovered the water damage on January 1, 2018, and notified the insurers about the loss on the same day; and
- ii) The policy of insurance between Sahara Restaurant and the insurers related to the operation of its business, and accordingly, s. 22(6) of the *Limitations Act* permits a one-year limitation for Sahara Restaurant to bring a claim against the insurers.

[37] In its submissions, Sahara Restaurant acknowledges there is a one-year limitation from the date of loss that applied to the claim it was making against the insurers. However, it argues that the actions of the insurers delayed the commencement of the limitation period. Sahara Restaurant also argues that the demand for an appraisal pursuant to sections 128 and 148 of the *Insurance Act* suspended the expiry of the limitation period.

*Promissory Estoppel Claimed by Sahara Restaurant*

[38] Having reviewed the correspondence between the broker for Sahara Restaurant and the insurers, I find that the insurers took no action or made any statements to suggest to Sahara Restaurant that they would not be relying upon the one-year limitation period in Statutory Condition 14 or that the running limitation

period was suspended. To the contrary, the insurers specifically communicated to Sahara Restaurant by letter on May 30, 2018, that the limitation period was going to expire on January 1, 2019. The insurers then sent an email on August 20, 2018, confirming that the limitation period was going to expire one year after the date of loss.

[39] Sahara Restaurant does not present evidence establishing bad faith on the part of the insurers. As in *Gillis*, I find that the communications that took place between the broker for Sahara Restaurant and the insurers were normal dealings between the parties attempting to resolve an insurance claim.

[40] Sahara Restaurant has failed to establish its claim for promissory estoppel as against the insurers.

*Impact of the Demand for an Appraisal*

[41] Having considered the case law as outlined above, I am satisfied that a demand for an appraisal does not suspend the one-year limitation period contained in the insurance contract between the parties and contained in Statutory Condition 14. The solution suggested by Professor Brown is to issue the Statement of Claim prior to the one-year deadline, and then stay the claim to allow the appraisal process to take place. Sahara Restaurant cannot rely on the fact that it made a demand for an appraisal to stop the limitation clock from ticking.

[42] Sahara Restaurant failed to issue a Statement of Claim against the insurers within the one-year limitation period. Although a demand for an appraisal is a mandatory process, the demand will have no force and effect if the claimant's right to make a claim against the insurer has been extinguished. As was found in *Vincent*, if an insured has not filed a Statement of Claim within the mandatory limitation period, the right to the mandatory appraisal process also lapses.

### **Conclusion**

[43] I reject Sahara Restaurant's position that the invocation of the appraisal process referred to in section 128 of the *Insurance Act* extends the limitation period until the value of the loss has been quantified. I also reject Sahara Restaurant's position that the ongoing discussion between the insurers and Sahara Restaurant or its representative regarding the quantum of the claim extended the limitation period. I further reject Sahara Restaurant's submission that the insurers acted in bad faith while considering and adjusting their claim.

[44] The limitation period for Sahara Restaurant to pursue a claim for loss under the Hospitality Insurance Policy issued by the insurers to Sahara Restaurant bearing policy no. SWG2004219 expired on January 1, 2019. Sahara Restaurant is therefore statute-barred from pursuing any further claims against the insurers with respect to the January 1, 2018, loss.

[45] Sahara Restaurant's Application #CV-21-3422, which seeks to appoint an appraiser and to compel the insurers to participate in the appraisal process under the *Insurance Act*, is dismissed. The appraisal process is of no force and effect when the claimant's right to pursue a claim against the insurer has been extinguished by the expiry of a limitation period.

### **Costs**

[46] If the parties are unable to agree upon costs, the insurers may make a cost submission no longer than three pages double spaced, not including Offers to Settle or Bills of Costs, by March 26, 2024. Sahara Restaurant may provide a responding cost submission no longer than three pages double spaced, not including any Offers to Settle or Bills of Costs, within 20 days of receiving the cost submission from the insurers. If I do not receive the cost submissions by these deadlines, I make no order as to costs.

**Released:** March 08, 2024

**CITATION:** Aviva Insurance et al v. Sahara Resturant, 2024 ONSC 1415  
**COURT FILE NO.:** CV-22-1494-00  
**DATE:** 2024-03-08

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

AVIVA INSURANCE COMPANY OF  
CANADA, ALSO KNOWN AS AVIVA  
INSURANCE COMPANY INC. ALSO  
KNOWN AS AVIVA INSURANCE,  
LLOYD'S UNDERWRITERS ALSO  
KNOWN AS CERTAIN  
UNDERWRITERS AT LLOYD'S AND  
CHUBB

Applicants

**- and -**

3 KINGS SHAWARMA INC.  
OPERATING AS SAHARA  
RESTAURANT

Respondent

---

**MOTION ON NOTICE – ENDORSEMENT**

---

Wilkinson J.

**Released:** March 08, 2024