COURT OF APPEAL FOR ONTARIO

CITATION: Intact Insurance Company v. Laporte, 2024 ONCA 454
DATE: 20240610
DOCKET: COA-23-CV-1037

Paciocco, Nordheimer and Monahan JJ.A.

BETWEEN

Intact Insurance Company

Applicant (Respondent)

and

John Laporte o/a Warrior Gear

Respondent (Appellant)

Natalia Rodriguez and Joseph Rucci, for the appellant

Anthony Bedard and Alex Sharpe, for the respondent

Heard: May 1, 2024

On appeal from the order of the Divisional Court (Justices David L. Edwards, Robyn M. Ryan Bell, and Janet Leiper, dissenting), dated March 31, 2023, with reasons reported at 2023 ONSC 1828, quashing an umpire's assessment of actual cash value, dated May 12, 2020.

Paciocco J.A.:

OVERVIEW

[1] For the following reasons, I am persuaded that the majority of the Divisional Court erred in quashing an umpire's determination under s. 128 of the *Insurance Act,* R.S.O. 1990, c. I.8, of the actual cash value ("ACV") of a business premises

that had been partially destroyed in a fire. The umpire's assessment was reasonable. I would allow the appeal.

MATERIAL FACTS

[2] The appellant, John Laporte, operates a military apparel business out of a former rural schoolhouse near the Petawawa military base. On November 23, 2018, the commercial premises were extensively damaged by fire. Mr. Laporte had a valid insurance policy in place with the respondent, Intact Insurance Company, that provided approximately $3 million of insurance on the property. The policy provided for replacement value coverage in qualifying cases, failing which ACV would be paid.

[3] The parties agreed before us that the replacement value for the buildings was $2.5 million, and that based on prior sales the market value was much less, at $265,000. In circumstances that are not important to this appeal, Intact would not commit to paying replacement value coverage, and the process provided for under s. 128 of the *Insurance Act* was instituted to resolve the amount payable based on the ACV.

[4] A s. 128 settlement process is meant to be an easy, expeditious, collaborative, and cost-effective way of settling disputes about appraisals: *Desjardins General Insurance Group v. Campbell*, 2022 ONCA 128, 467 D.L.R. (4th) 480, at para. 36. It begins with each party appointing an appraiser of their

own. If the appraisers cannot resolve the matter between them, an umpire whom they have appointed will determine the matter.

[5] The umpire appointed in this case conducted a site visit where he had the opportunity to observe the location and structure of the business as well as the damage and the partial repairs that had been effected. It would have also been obvious to him that approximately 16 months after the fire, Mr. Laporte was continuing to operate his business in a limited capacity.

[6] The parties' respective appraisers provided the umpire with briefs outlining their positions. Intact proposed an ACV based on a market value of $265,000, suggesting that a higher valuation of ACV would be an error in principle. Mr. Laporte argued that replacement value minus depreciation, a sum of $2,093,046, was the proper ACV. The umpire ultimately proposed an ACV of $886,000.

[7] Neither party agreed with the ACV proposed by the umpire. So, the umpire invited the parties to resubmit proposed ACV amounts and advised them that he would choose between the amounts they proposed, an approach that is contemplated in *Campbell*, at para. 36. Intact proposed an ACV of $390,000 based on an income approach appraisal that it had described in its initial brief as "not ideal". Mr. Laporte proposed an ACV of $1,084,000. The umpire chose Mr. Laporte's proposal and assigned $1,084,000 as the ACV.

[8] Intact disagreed with that outcome. It sought judicial review claiming that the umpire's decision was unreasonable, contrary to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, because the decision was "untenable in light of the relevant factual and legal constraints that bear on it": *Vavilov*, at para. 101. Specifically, it argued that a decision assigning an ACV amount of approximately four times the market value of the entire property, without quantifiable evidence showing that amount to be warranted, does not respect the factual constraints before the umpire. It also argued that there were gaps in the evidence, and that an ACV of $1,084,000 is unsupported by evidence and therefore arbitrary. It further argued that this award was inconsistent with legal constraints because an ACV payment of $1,084,000 would represent a profit, contrary to the indemnity principle, thereby raising a moral hazard that insured persons entitled to such an ACV payment would be incentivized to cause or permit damage to profit from their policies.

[9] A majority of the Divisional Court agreed and quashed the umpire's ACV determination. It found that the record before the umpire lacked the evidence needed to establish an ACV in excess of the market value, thereby offending the indemnity principle by creating a windfall and an arbitrary award. Leiper J. dissented, concluding that the majority had misapplied the governing principles and should have deferred to the umpire's conclusion, which was properly arrived at.

THE ISSUES

[10] Mr. Laporte obtained leave to appeal the majority decision to this court. Our task on an appeal from a judicial review decision in the Divisional Court is "to decide whether the Divisional Court identified the appropriate standard of review and applied it correctly", in effect to "step into the shoes" of the Divisional Court: *Ali v. Peel (Regional Municipality)*, 2023 ONCA 41, at para. 23. This is the sole issue before us.

[11] For the reasons below, I would allow the appeal. I agree with the dissenting reasons of Leiper J., substantially for the reasons that she offered, that the majority did not apply an appropriate standard of review, and that the umpire's decision was reasonable and warrants deference.

ANALYSIS

[12] First, I agree with Leiper J. that Intact, and the decision of the majority, have given unwarranted priority to market value in assessing ACV by treating it as a benchmark. Although the market value is an important factor to be considered, depending on the circumstances, ACV can exceed market value. The disparity between market value and an assigned ACV is therefore not necessarily a dependable indicium of an unreasonable ACV assessment. In my view, the majority erred by effectively accepting Intact's position, and giving market value undue weight by treating it as a benchmark.

[13] The reason ACV can exceed market value is that, unless its meaning is altered by the policy, "'actual value' means the actual value of the property to the insured at the time of the loss": *Re Barrett et al. v. Elite Insurance Co. et al* (1987), 59 O.R. (2d) 186 (C.A.), at p. 189, citing *Canadian National Fire Ins. Co. v. Colonsay Hotel Co.*, [1923] S.C.R. 688 (emphasis added). What others may pay for the property may not reflect the value of the property to the insured: *Barrett*, at p. 189. In this case the definition was not altered by the policy. It simply lists "market value" as a factor to be considered, without assigning it any prevalence in quantifying ACV. Specifically, the insurance policy states, in relevant part:

> Actual Cash Value: Various factors shall be considered in the determination of actual cash value. The factors to be considered shall include, but not be limited to, replacement cost less any depreciation and market value. In determining depreciation, consideration shall be given to the condition of the property immediately before the damage, the resale value, the normal life expectancy of the property and obsolescence.

[14] Second, I also agree with Leiper J. that, contrary to the position of the majority, there was a foundation before the umpire permitting him to assign the ACV that he did. It is not contested that Mr. Laporte had been operating a profitable business prior to the fire. The brief furnished to the umpire described the unique location near the Petawawa base as the key to this success, identifying particular advantages that location provided. It also described the functionality and utility of the adapted building to the business, identifying particular features that made it so.

The majority discounted these claims as bald assertions. They were not. The basis for the claims was explained. Moreover, the umpire was able to observe the features of the building during his site visit. These are not mere indications of emotional value that should not be entertained. They are features that affect the monetary value of the premises to Mr. Laporte.

[15] Moreover, Mr. Laporte made clear his intention to continue to operate from the business location as he had been doing before the fire, a claim that was solidly supported by the fact that he was still operating from the partially repaired premises some 16 months after the fire when the umpire attended the location. There was no information before the umpire that Mr. Laporte had attempted to or was intending to sell the building and every indication that retaining that business location was worth enough to him to undertake the necessary expenses to keep the business operating as he had been the day before the fire. To give the amount required to keep him operating in that location, the umpire was provided with three repair estimates, the amounts of which were not challenged.

[16] However, the majority accepted Intact's submission that this repair cost information could not be considered in assessing ACV because to do so would be to conflate ACV with depreciated replacement value, which was not the valuation method under consideration. I do not agree. As I have indicated, the policy specifically identifies depreciated replacement value as a factor for consideration in assessing ACV. Indeed, as Laskin J.A. recognized in *Carter v. Intact Insurance*

Company, “[s]ince most property depreciates over time, actual cash value is equivalent to replacement cost less depreciation”, in some cases: 2016 ONCA 917, 133 O.R. (3d) 721, at para. 21, leave to appeal refused, [2017] S.C.C.A. No. 53. Without question, repair estimates can assist in identifying replacement costs before depreciation. Moreover, it is clear that the umpire did not conflate the two evaluation methods. As I will elaborate below, he selected the amount of $1,084,000 based on the competing ACV calculations offered by the parties.

[17] Third, I agree with Leiper J. that, contrary to the position of the majority, the umpire’s award does not offend the indemnity principle. According to that principle, an insured is entitled to be put back into the position they were in before the loss, not to profit or receive a windfall that would create a moral hazard: *Carter*, at para. 21. Mr. Laporte’s position was based on the unique facility and location of the premises. He asserted and it was not disputed that there were no other similar premises available. Simply put, Mr. Laporte could not enjoy the actual value that this premises had been offering him prior to the fire without some repair. He provided evidence of the work required, and he was continuing to operate. All indications were that the award would be consumed by the restoration. There was simply no evidentiary basis for the majority’s conclusion, or Intact’s submission, that the umpire’s ACV assessment is a profit or windfall that would create a moral hazard.

[18] Finally, I do not find the umpire's ACV award to be arbitrary. The majority found it to be so because, unlike Intact's proposed ACV that was supported by an income approach appraisal, the $1,084,000 award could not be quantified using available information, and differed from and exceeded the umpire's own ACV appraisal of $886,000. In my view, this finding, and the call for such precise quantification, overlooks two crucial considerations.

[19] First, s. 128 does not call for a scientific identification of value but provides instead for an easy, expeditious, collaborative, and pragmatic dispute resolution mechanism. After his proposed ACV was rejected, the umpire chose to select from the two proposed awards, as he was entitled to do. This was a permissible tactic designed to encourage the parties to be reasonable. In this context, it was not arbitrary for him to accept what he considered to be the most suitable of the two offerings, even though the precise quantum he awarded differs from his proposal or may resist precise, objective validation. Courts reviewing appraisals made under s. 128 cannot insist on precise quantification without destroying the pragmatic dispute settlement role that process plays.

[20] Second, appraisal is not a science. It is an art that operates based on best estimates of myriad factors, which is precisely why appraisers are given discretion to consider context and to draw on their expertise. The majority did not defer to the umpire when it should have done so.

CONCLUSION

[21] In all of the circumstances, I am persuaded that the majority did not correctly identify and apply the appropriate standard of review, and I am satisfied that the umpire's award was reasonable and warrants deference.

[22] I would allow the appeal and set aside the decision of the Divisional Court. We have been asked by the parties to make no other disposition, and so I will refrain from doing so.

[23] The costs ordered to be paid by Mr. Laporte below should be reversed, as agreed. I would set aside the costs order below, and order Intact to pay Mr. Laporte costs in the Divisional Court of $16,000 inclusive of applicable taxes and disbursements. I would also order Intact to pay costs in this appeal to Mr. Laporte in the agreed amount of $18,000 inclusive of applicable taxes and disbursements.

Released: June 10, 2024 "D.M.P."

"David M. Paciocco J.A."
"I agree. I.V.B. Nordheimer J.A."
"I agree. P.J. Monahan J.A."