Citation: Linde v Max Insurance, 2025 MBCA 13
Date: 20250211
Docket: AI23-30-10017

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***R. M. Beamish***
NICOLE LINDE	)	*for the Appellant*
	)	
(Plaintiff) Appellant	)	***K. T. Williams, K.C.*** *and*
	)	***J. M. Nordlund***
- and -	)	*for the Respondent*
	)	
MAX INSURANCE	)	*Appeal heard:*
	)	***October 1, 2024***
(Defendant) Respondent	)	
	)	*Judgment delivered:*
	)	***February 11, 2025***

On appeal from *Linde v Max Insurance Company*, 2023 MBKB 74 [*Linde*]

TURNER JA

[1] The plaintiff appeals the dismissal of her action that the defendant (the insurer) acted in bad faith in its handling of her insurance claim. In addition, she asserts that the trial judge did not have jurisdiction to address issues that had been determined by an umpire under *The Insurance Act*, CCSM c I40 [the *Act*].

[2] For the reasons that follow, I would dismiss the appeal.

Background

[3] On December 8, 2019, a fire occurred at the plaintiff's residence in rural Manitoba, which resulted in significant damage to the house and its contents.

[4] The insurer insured the plaintiff under a Broad Form Homeowner's Policy. The policy provided, in part:

> **Dwelling Building and Detached Private Structures**
> If "You" repair or replace the damaged or destroyed building *on the same location*, with a building of the same occupancy constructed with materials of similar quality *within a reasonable time* after the damage, "You" may choose as the basis of loss settlement either (A) or (B) below, otherwise, settlement will be as in (B).
>
> (A) The cost of repairs or replacement (whichever is less) without deduction for depreciation, in which case "We" will pay in the proportion that the applicable amount of insurance bears to 80% of the replacement cost of the damaged building at the date of damage, but not exceeding the actual cost incurred.
>
> (B) The Actual Cash Value of the damage at the date of the occurrence.
>
> **Guaranteed Replacement Cost – Dwelling Building**
> If this coverage is shown on the Declaration Page, "You" may choose as the basis of loss settlement for the building(s) designated with this coverage either (A) or (B) below; otherwise settlement will be as in (B).
>
> (A) "We" [the insurer] will pay the full cost of repairs or replacement even if it exceeds the amount of insurance stated on the Declaration Page for the Dwelling Building.
>
> (B) *If "You" decide not to repair or replace*, *"We" will pay the Actual Cash Value* of the damage to the Dwelling

> Building up to the applicable amount of insurance stated on the Declaration Page.
>
> [emphasis added]

[5] After the plaintiff made a claim on her insurance, the insurer established that the actual cash value (ACV) for the house (minus the land) was $125,000. It estimated the cost to repair the house would be $248,581.20 and gave the plaintiff the option of putting this amount towards the cost of replacing (which was higher).

[6] By August 2020, the plaintiff had not commenced either repairing or replacing her home and the insurer paid her $125,000, characterizing the payment as an advance. It also paid her $95,807.70 for her contents.

[7] The plaintiff took issue with several aspects of the insurer's handling of her claim and the conduct of the third-party adjuster it appointed. She complained that the handling of her claim was incomplete, slow and included inaccurate information. She was also dissatisfied with the insurer's determination that the house could be repaired; she wanted the house to be replaced. Regardless, she neither repaired nor replaced the house. In fact, in June 2021, she purchased a different house located on a different property.

[8] The plaintiff filed a statement of claim alleging that the insurer breached its obligations under the insurance policy (the policy) and had conducted itself in bad faith.

[9] Shortly after the statement of claim was filed, the plaintiff demanded the parties pursue the statutory dispute resolution process under the *Act*. An umpire was appointed to establish the value of the damage. The umpire

assessed the replacement cost of the house and quantified the loss of its contents.

[10] Following the appraisal by the umpire, several legal issues remained, including whether the terms, conditions and exclusions under the policy permitted the plaintiff to recover the amounts quantified by the umpire.

[11] Relying on the wording of the policy, the trial judge found, "[i]f [the plaintiff] does not 'repair' or 'replace' on the same property, recovery is limited to the ACV, which [the insurer] paid in August 2020" (*Linde* at para 25).

[12] The trial judge concluded that because the plaintiff made no efforts to repair or replace her house on the same property within a reasonable period, the policy entitled the plaintiff to recover only the ACV of the property.

[13] The trial judge dismissed the plaintiff's allegation that the insurer acted in bad faith. He wrote (*ibid* at paras 39-40):

> Examining all the factors which could amount to bad faith, as outlined by Mainella J.A. in ***Intact***, and the Supreme Court of Canada in ***Fidler***, I find [the insurer] did not act in bad faith. My decision was not even a close call. The law is clear an insurer is entitled to process claims as best it sees fit. All I am able to find, based on the evidence, is there was a miscommunication issue between [the adjuster] and [the plaintiff]. However, as previously stated, [the plaintiff]'s position on lack of communication, as mentioned earlier, is not supported by the evidence. [The plaintiff]'s concerns about what may happen once the work was commenced are also unfounded. We will never know what may have occurred because [the plaintiff] did not act.
>
> In ***Fidler***, the test is whether the insurer was "overwhelmingly inadequate" in the claims management process. I find [the plaintiff]'s arguments, at best, in its simplest terms, were that [the

> insurer] failed to pay out her mortgage in a timely manner, the communication between her and [the adjuster] was inadequate, and the claim took too long to resolve. In the circumstances, I have described herein there is no evidence that [the insurer]'s claim management was overwhelmingly inadequate.

[14] The trial judge went on to find that he was not bound by the umpire's valuation decision. Referencing section 123(3) of the *Act*, he concluded that an umpire's decision is limited to determining value and that an umpire cannot rewrite the terms of a policy to extend coverage in areas where coverage is unavailable. Further, the trial judge found that the umpire made errors in his valuation; therefore, the trial judge adjusted the amounts payable to the plaintiff.

Issues and Standard of Review

[15] The Supreme Court of Canada's decision in *Housen v Nikolaisen*, 2002 SCC 33, sets out the standard of review for appellate courts on matters such as the present case. In short, an appeal is not intended to be a retrial of the case. An appellate court reviews the decisions of trial courts on questions of law for correctness. Findings of fact, errors of mixed fact and law and inferences drawn from the facts are generally reviewed for palpable and overriding error, absent a readily extricable legal issue (see *ibid* at paras 26-37).

[16] While the plaintiff raised seven issues in her submissions, in my view, the issues can be consolidated into two areas.

[17] First, did the trial judge err in finding that the insurer did not act in bad faith? This is a question of mixed fact and law, as the trial judge had to

apply the facts to the legal definition of bad faith. Therefore, the question is to be reviewed on a standard of palpable and overriding error. In addition, it is not the role of an appellate court to second-guess the weight to be assigned to the evidence or to interfere with factual conclusions that are based on the evidence (see *ibid* at para 23).

[18] Second, did the trial judge have jurisdiction to address issues determined by the umpire under the *Act*? This issue involves statutory interpretation and is therefore a question of law, reviewed on the standard of correctness.

[19] The plaintiff also argues that the trial judge's reasons were inadequate. Inadequate reasons are not a free-standing ground of appeal (see *FH v McDougall*, 2008 SCC 53 at para 99). I will address whether the reasons were inadequate in my analysis of the other issues.

[20] The appeal was argued on the basis of bad faith and not on the basis of contractual interpretation. Therefore, I make no comment regarding the trial judge's interpretation of the insurance contract.

Analysis

Did the Trial Judge Err in Finding That the Insurer Did Not Act in Bad Faith?

[21] An insurer is required to act in good faith both in "the manner in which it investigates and assesses the claim and to the decision whether or not to pay it" (*Bhasin v Hrynew*, 2014 SCC 71 at para 55).

[22] As stated by Mainella JA in *3746292 Manitoba Ltd v Intact Insurance Company*, 2018 MBCA 59 at para 25 [*Intact*]:

> Given the complexities that often arise in assessing an insurance claim, an insurer is permitted to fairly debate the claim, and its amount, provided it acts reasonably (see Roderick Winsor, *Good Faith in Canadian Insurance Law* (Toronto: Thomson Reuters, 2017) at 5-17 to 5-19; and Gordon G Hilliker, *Insurance Bad Faith*, 2nd ed (LexisNexis, 2009) at 68). In order to establish a breach of an insurer's duty of good faith, more must be shown than simply that errors occurred in the claims-handling process. Also, just because an insurer is ultimately wrong does not mean that it acted in bad faith. A successful action requires proof that there was no reasonable basis in law or fact to deny benefits and that the defendant knew or ought to have known that to be the case. Tell-tale signs of bad faith by an insurer are when the handling of the claim was "overwhelmingly inadequate" or there was an "introduction of improper considerations into the claims process" (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 71; and *Industrial Alliance Insurance and Financial Services Inc v Brine*, 2015 NSCA 104 at para 69, leave to appeal to SCC refused, 36809 (12 May 2016)).

[23] The plaintiff alleges that the trial judge misstated and ignored or failed to address several areas of evidence that demonstrated bad faith by the insurer. However, in my view, the trial judge reached conclusions reasonably open to him when the record is read as a whole. I will provide four examples:

a. The plaintiff says that the trial judge ignored how the insurer went about preparing the list of contents from the house and her allegation that the insurer tried to "lowball" the value.

   The trial judge considered the fact that the insurer provided the plaintiff with a Schedule of Loss past the sixty-day limit set out in section 126(1) of the *Act* but found that this mistake was not indicative of bad faith. In addition, the trial judge found that the insurer acted in good faith by preparing a list of contents for the plaintiff, even though the policy included the statutory

condition 6(1) in Schedule B of the *Act*, which required the plaintiff to complete the list.

b. The plaintiff says that the trial judge ignored evidence that the insurer would not provide the plaintiff with photos of the contents of the house.

   The trial judge noted that the plaintiff was not provided with photos of the damaged contents of the house but that her inability to view the photos was irrelevant to the bad faith allegations.

c. The plaintiff alleges that the trial judge erred in not concluding that the failure of the insurer to pay out the plaintiff's mortgage on a timely basis amounted to evidence of bad faith.

   The trial judge found that the insurer should have paid out the mortgage at the earliest possible date; however, this conduct did not rise to the level of bad faith.

d. The plaintiff says that the trial judge did not consider that the insurer instructed an appraiser to use an inappropriate depreciation value in his assessment of the value of some of the contents of the house.

   At trial, the appraiser testified that the depreciation value was not inappropriate and was consistent with industry standards.

[24] The plaintiff also alleges that the insurer's decision that the house was repairable was evidence of bad faith. The trial judge found that the insurer followed the terms of the policy and that it was within the insurer's discretion to decide whether the house was repairable. The insurer relied on the report of an independent structural engineer, which was unchallenged by the plaintiff and which indicated that the fire was limited in scope such that structural integrity could be maintained and that the house could be repaired. The insurer was entitled to rely on that report to conclude that the house could be repaired (see *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at paras 71-74). The question for the trial judge was whether the insurer's decision was the result of "inadequate handling of the claim, or the introduction of improper considerations into the claims process" (*ibid* at para 71).

[25] All the trial judge's factual findings were available on the evidence. I am not persuaded he committed a palpable or overriding error in determining that the conduct of the insurer did not amount to bad faith. None of the conduct proven against the insurer rises to the threshold required to establish bad faith set out in *Intact*.

[26] The trial judge's reasons related to the above-noted factual findings were far from inadequate. He thoroughly reviewed the relevant evidence, considering the issues in dispute and the positions of the parties and made factual findings reasonably open to him based on that evidence.

Did the Trial Judge Have Jurisdiction to Address Issues Determined by the Umpire Under the Act?

[27] The plaintiff asks this Court to determine the appropriate procedure to be followed when a court is asked to review a valuation completed by an umpire appointed pursuant to section 121 of the *Act*.

[28] In this case, the valuation prepared by the umpire is immaterial because the trial judge found as a fact that the plaintiff was not going to accept the insurer's decision that her house could be repaired. As noted above, she had already purchased a different house on another piece of property.

[29] On the evidence presented at trial, it was open to the trial judge to find that the plaintiff did not repair or replace her house on the same property within a reasonable amount of time. On appeal, the plaintiff did not suggest that the trial judge erred in his interpretation of what was a reasonable amount of time.

[30] In the circumstances, the plaintiff was only entitled to payment of the ACV; therefore, the valuation provided by the umpire is immaterial (see *Carter v Intact Insurance Company*, 2016 ONCA 917 at paras 20-25). The insurer paid the plaintiff the ACV in August 2020.

Conclusion

[31] In the result, I would dismiss the appeal with costs.

Turner JA

I agree: Mainella JA

I agree: leMaistre JA