

[King v. Aviva Insurance Co. of Canada](#)

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

R.A. Skolrood J.

Heard: April 14, 2022.

Judgment: June 10, 2022.

Docket: S213776

Registry: Vancouver

[\[2022\] B.C.J. No. 1043](#) | [2022 BCSC 973](#) | [\[2023\] I.L.R. para. I-6358](#) | [2022 A.C.W.S. 2289](#) | [24 C.C.L.I. \(6th\) 103](#) | [64 B.C.L.R. \(6th\) 107](#) | [2022 CarswellBC 1526](#)

Between Pauline King, Plaintiff, and Aviva Insurance Company of Canada, Allianz Global Corporate & Specialty, Temple Insurance Company, Lloyd's Underwriters, Marc Lipman, Attorney in Fact in Canada for Lloyd's Underwriters, HUB International Coastal Insurance Brokers, Claimspro, The Mutual Fire Insurance Company of British Columbia, Square One Insurance Services Inc., All Perils Claims (2019) Inc., The Owners, Strata Plan BCS856 and Ecotech Restoration Inc., Defendants

(51 paras.)

Case Summary

Alternative dispute resolution — Non-binding procedures — Court-annexed or connected procedures — Judicial dispute resolution — Application by King (plaintiff) for order that dispute resolution process (DRP) be terminated and that matters in dispute in that process be determined by Court, dismissed — Both DRP and this proceeding was related to water leak that occurred on strata unit owned by plaintiff — Plaintiff advised parties that she no longer wished to participate in DRP — Plaintiff was understandably frustrated by situation in which she found herself and length of time that this dispute was ongoing — Court was not satisfied that plaintiff had established grounds for terminating DRP — DRP was mandatory process that was initially triggered by plaintiff.

Application by King (plaintiff) for order that dispute resolution process (DRP) be terminated and that matters in dispute in that process be determined by Court. Both the DRP and this proceeding were related to a water leak that occurred on a strata unit owned by the plaintiff. The plaintiff owned unit #1702. The strata complex was owned by the defendant, the Owners Strata Plan BCS856 (Strata). Square One Insurance Services Inc. (Square One) issued a policy of insurance to the plaintiff with respect to the Unit (Homeowner Policy). Mutual underwrote the Homeowner Policy. Square One was an authorized agent of Mutual Fire Insurance Company of British Columbia (Mutual). The defendants Aviva Insurance Company of Canada, Allianz Global Corporate Specialty, Temple Insurance Company and Lloyd's Underwriters (collectively the "Strata Insurers") issued a policy of insurance to the Strata with respect to the strata development (Strata Policy). On or about April 8, 2019, a water loss occurred in the Unit, which caused damage to the Unit. The plaintiff submitted claims with respect to the damage under both the Homeowner Policy and the Strata Policy. All Perils Claims (2019) Inc. (APC) was retained by Square One under the Homeowner Policy to adjust the Water Loss. The defendant, Claimspro was retained by the Strata Insurers under the Strata Policy to adjust the Water Loss. During the adjustment of the Water Loss, a disagreement arose between the plaintiff and each of the Insurers with respect to the value of the damage caused by the Water Loss and the nature and extent of the repairs required. As a result of this disagreement and the hurdles encountered by the plaintiff in having the necessary repairs effected, the plaintiff invoked two DRP's on November 24, 2020, one with

respect to the Homeowner Policy and one with respect to the Strata Policy. The Insurers took the position that the cooperation agreement was intended to avoid duplication and potential inconsistencies in the appraisal process. While the DRP was ongoing, the plaintiff filed the notice of civil claim commencing the action. The plaintiff advised the parties that she no longer wished to participate in the DRP, that it should be halted and that all issues should be dealt with in this action.

HELD: Application dismissed.

The plaintiff was understandably frustrated by the situation in which she found herself and the length of time that the dispute was ongoing. That frustration caused her to question, with some validity, whether the DRP was meeting the objective of providing a timely and cost-effective dispute resolution mechanism. It was not satisfied that the plaintiff had established grounds for terminating the DRP and had all matters determined in this action. The DRP was a mandatory process that was initially triggered by the plaintiff. The matters in issue before the Umpire fall squarely within the terms of statutory condition 11 set out in s. 29 of the Insurance Act. Further, the DRP had advanced to the stage where all that was left to be done was for the plaintiff to make her submission and the Umpire to render a decision. In contrast, the action was still in its infancy with no steps taken beyond the initial filing of pleadings. It would be antithetical to the principles of proportionality, efficiency and fairness to require the parties to essentially start all over and engage in a lengthy and potentially expensive court process. It was acknowledged that the plaintiff had lost the services of her designated representative and that she was statutorily barred from acting in that capacity personally. However, it was accepted that the defendants' position that given the plaintiff's knowledge of the facts and issues and the degree of preparation she exhibited on the application, she could likely find someone to stand as even a bare nominee to present her case. It was important to note that by permitting the DRP to continue, the plaintiff was not foreclosed from bringing the matter before the Court. The defendants Square One and the Strata Insurers were entitled to their cost.

Statutes, Regulations and Rules Cited:

Insurance Act, [R.S.B.C. 2012, c. 1, s. 12](#), s. 29

Counsel

The Plaintiff appearing on her own behalf: P. King.

Counsel for the Defendants, Aviva Insurance Company of Canada, Allianz Global Corporate & Specialty, HUB International Coastal Insurance Brokers, Claimspro, Lloyd's Underwriters, Marc Lipman, Attorney in Fact in Canada for Lloyd's Underwriters and Temple Insurance Company: P. Dawson, O. Li.

Counsel for the Defendants, All Perils Claims (2019) Inc., Square One Insurance Services Inc. and The Mutual Fire Insurance Company of British Columbia: C. Manning.

Counsel for the Defendant, Ecotech Restoration Inc.: C. Philip.

Counsel for the Defendant, The Owners Strata Plan BCS856: C. Bakker.

Reasons for Judgment

R.A. SKOLROOD J.

1 This is an application by the plaintiff for an order that a dispute resolution process ("DRP") commenced under s. 12 of the *Insurance Act*, *R.S.B.C. 2012, c. 1* (the "*Act*") be terminated and that the matters in dispute in that process be determined by the Court in this proceeding.

2 Both the DRP and this proceeding relate to a water leak that occurred on or about April 8, 2019 in a strata unit owned by the plaintiff.

3 For reasons that were canvassed at some length during the hearing of this application, and that form the basis for the DRP and this action, work commenced to repair the damage caused by the water leak but the work was not completed and the plaintiff has been living in the unit in what she describes as an "uninhabitable state" for approximately the last three years.

DRP Provisions of the Act

4 It is useful at the outset to outline the relevant provisions of s. 12 of the *Act* setting out how the DRP works as this will provide context for many of the background facts summarized below:

Dispute resolution

12 (1) In this section, "representative" means a dispute resolution representative appointed under subsection (4).

- (2) This section applies to disputes between an insurer and an insured about a matter that under Statutory Condition 11 set out in section 29, or another condition of the contract, must be determined using this dispute resolution process.
- (3) Either the insured or the insurer may demand in writing the other's participation in a dispute resolution process after proof of loss has been delivered to the insurer.
- (4) Within 7 days after receiving or giving a demand under subsection (3), the insured and the insurer must each appoint a dispute resolution representative and, within 15 days after their appointment, the 2 representatives must appoint an umpire.
- (5) A person may not be appointed as a representative if the person is
 - (a) the insured or the insurer, or
 - (b) an employee of the insured or the insurer.
- (6) The representatives must
 - (a) determine the matters in dispute by agreement, and
 - (b) if they fail to agree, submit their differences to the umpire,and the written determination of any 2 of them determines the matters.
- (7) Each party to the dispute resolution process must pay the representative whom the party appointed, and each party must bear equally the expense of the dispute resolution process and the umpire.

5 Statutory condition 11, as referred to in s. 12(2), is set out in s. 29 of the *Act*:

11. (1) In the event of disagreement as to the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required or, if made, their adequacy, or the amount of the loss or damage, those questions must be determined using the applicable dispute resolution process set out in the *Insurance Act*, whether or not the insured's right to recover under the contract is disputed, and independently of all other questions.
- (2) There is no right to a dispute resolution process under this condition until
 - (a) a specific demand is made for it in writing, and
 - (b) the proof of loss has been delivered to the insurer.

Background

- 6** The plaintiff went into considerable detail about the background facts and the difficulties she has encountered in advancing her insurance claim. While I will touch upon some of her concerns later in my reasons, the following summary of key facts and events is taken largely from the application response of the defendants Square One Insurance Services Inc. ("Square One"), The Mutual Fire Insurance Company of British Columbia ("Mutual") and All Perils Claims (2019) Inc. ("APC").
- 7** The plaintiff owns unit #1702 (the "Unit") in a strata complex located on Beach Avenue in Vancouver.
- 8** The strata complex is owned by the defendant, The Owners, Strata Plan BCS856 (the "Strata").
- 9** Square One issued a policy of insurance to the plaintiff with respect to the Unit (the "Homeowner Policy").
- 10** Mutual underwrote the Homeowner Policy. Square One is an authorized agent of Mutual. I will refer to these parties collectively as Square One.
- 11** The defendants Aviva Insurance Company of Canada, Allianz Global Corporate & Specialty, Temple Insurance Company and Lloyd's Underwriters (collectively the "Strata Insurers") issued a policy of insurance to the Strata with respect to the strata development (the "Strata Policy").
- 12** Throughout the balance of these reasons, when speaking of Square One and the Strata Insurers together, I will refer to them collectively as the "Insurers".
- 13** On or about April 8, 2019, a water loss occurred in the Unit (the "Water Loss"), causing damage to the Unit.
- 14** The plaintiff submitted claims with respect to the damage under both the Homeowner Policy and the Strata Policy.
- 15** APC was retained by Square One under the Homeowner Policy to adjust the Water Loss.
- 16** The defendant Claimspro was retained by the Strata Insurers under the Strata Policy to adjust the Water Loss.
- 17** During the adjustment of the Water Loss, a disagreement arose between the plaintiff and each of the Insurers with respect to the value of the damage caused by the Water Loss and the nature and extent of the repairs required.
- 18** I pause here to note that the plaintiff led extensive evidence about this disagreement, in particular about the apparent disagreement between the Strata Insurers and its adjuster and Square One and its adjuster about the cause of the Water Loss and responsibility for the repairs.
- 19** As a result of this disagreement and the hurdles encountered by the plaintiff in having the necessary repairs effected, the plaintiff invoked two DRP's on November 24, 2020, one with respect to the Homeowner Policy and one with respect to the Strata Policy. The plaintiff delivered an interim proof of loss to the different Insurers on the same date.
- 20** The plaintiff designated her then counsel, Ms. Vivienne Stewart, as her representative in the two DRP's. Square One designated Mr. Steve Maurer and the Strata Insurers designated Mr. John Valeriote as their representatives.
- 21** On December 30, 2020, Mr. Don Cranston, QC was selected as the Umpire (the "Umpire").
- 22** In or about late November 2020, Square One and the Strata Insurers agreed to cooperate in the appraisal process relating to the Water Loss. Specifically, they agreed that:

- a) Mr. Maurer would inspect the Unit and prepare the scope of repairs on behalf of both Insurers;
- b) Mr. Valeriotte would analyze the information provided by Mr. Maurer and prepare the submissions on behalf of both Insurers;
- c) A joint submission would be made on behalf of both Insurers to the Umpire; and
- d) The Insurers would work together to apportion the damages between themselves under their respective policies once the Umpire had determined the value of the loss.

23 The Insurers took the position that the cooperation agreement was intended to avoid duplication and potential inconsistencies in the appraisal process. The Umpire acknowledged this approach and noted in correspondence to the parties that it would result in a single scope of loss, notwithstanding there were two DRPs that had been initiated. He also confirmed that any final decision would be the product of three votes: one by either Mr. Maurer or Mr. Valeriotte on behalf of the Insurers, one by the Umpire and one by Ms. Stewart as the plaintiff's representative.

24 Mr. Maurer attended the Unit in February 2021 to conduct an appraisal of the Water Loss and the required scope of repairs.

25 While the DRP was ongoing, on April 6, 2021, the plaintiff filed the notice of civil claim commencing this action.

26 On June 14, 2021, Ms. Stewart wrote the parties and advised that the plaintiff would be representing herself going forward in the DRP.

27 On June 16, 2021, the Umpire directed that the Insurers provide their submission by June 18, 2021 and the plaintiff provide hers by July 16, 2021.

28 On June 19, 2021, one day after the date stipulated by the Umpire, Mr. Maurer and Mr. Valeriotte provided a joint submission brief on behalf of the Insurers to the Umpire.

29 On June 21, 2021, the plaintiff advised the parties that she no longer wished to participate in the DRP, that it should be halted and that all issues should be dealt with in this action.

Case Law

30 The s. 12 dispute resolution process was described by Justice Punnett in *Westland Insurance Company Limited v. Pouden*, [2020 BCSC 264](#) at para. 65. aff'd [2021 BCCA 156](#):

The dispute resolution provisions under the *Act* are clearly intended to reduce the duration and expense of litigation and encourage settlement of disputes outside of court as they are a simple, cost-effective method to resolve disputes at an early stage. A party who neglects or refuses to participate in the dispute resolution process under s. 12 frustrates this purpose, as the respondents have done in this case.

31 In *Westland*, the petitioner insurance company sought an order compelling the respondents, who were home owners insured by the petitioner, to participate in a DRP.

32 In the Court of Appeal, Justice Dewitt-Van Oosten described the process in these terms at para. 74:
...the purpose of mandating a formal resolution process of the type at issue here is to facilitate the settlement of material issues "without recourse to the courts": *McCallum Construction Ltd. v. Zurich Insurance Co.* (1994), 123 Nfld. & P.E.I.R. 354 (C.A.) at para. 8. The fact that delivery of a proof of loss is a pre-condition to invoking the s. 12 process supports that view. Formal dispute resolution is available only once the parties have functionally reached a stage and a level of disagreement in respect of a particular issue that might otherwise result in litigation. Mandating an alternative means for resolving that dispute benefits both sides to the contract, as well as the civil justice system generally. Non-judicial resolution

processes avoid (or reduce) the delay and expense associated with litigation. They facilitate enhanced access to justice for consumers by removing the barriers associated with a court-based process. They also avoid the unnecessary use of judicial resources. Professor Adjin-Tettey opines that in the insurance context, equitably structured non-judicial resolution processes promote the quick and efficient achievement of fair outcomes. They can also improve the insured-insurer relationship, and they allow for a resolution process better tailored to the dispute at issue (at 728-29). I agree.

33 The plaintiff relies on two main cases in support of her application: *Rilkoff v Portage La Prairie Mutual Insurance Co.*, [2005 SKQB 54](#) and *Agro's Foods v. Economical*, [2016 ONSC 1169](#).

34 In *Rilkoff*, the plaintiff homeowners were insured under a policy of insurance issued by the defendant insurer. The plaintiffs' home was damaged by a severe storm. The parties were unable to agree on the scope of the insured loss so each appointed an appraiser pursuant to s. 108 of the *Saskatchewan Insurance Act*, [R.S.S. 1978, c. S-26](#). The valuation of the loss reached by each appraiser varied substantially, largely as a result of a disagreement about whether the damage was caused by the storm or by pre-existing problems.

35 The insurer then applied for the appointment of an umpire under the statutory process. The Court denied the application on the basis that the question of whether the damage was caused by an insured risk or a pre-existing construction defect was a legal issue for the court to determine and fell outside the scope of expertise of the appraisers (at para. 16).

36 *Agro's Foods* similarly involved a dispute between an insured and an insurer over the the scope of coverage and loss valuation. The plaintiff in that case was a commercial mushroom grower whose facilities were damaged in a windstorm. The plaintiff brought a summary judgment application for specified replacement costs and for business interruption losses. The Court denied the summary judgment application.

37 Essentially, the court found that there were too many legal and factual issues in dispute for the Court to determine the matter summarily. One of those issues was whether the appraisal process set out in the governing insurance policy was applicable. In particular, the insurer sought to invoke the appraisal process to determine the quantification of the windstorm damage.

38 With respect to that process, the Court said at para. 53:

...The appraisal is an efficient method to resolve valuation issues between the insurer and the insured, largely due to the efficiency and cost-effectiveness it can provide. Courts should not be overly eager to interfere in the operation of the section.

39 The Court also observed however that legal issues are not within the jurisdiction of appraisers and an umpire to resolve (para. 56) and the appraisal process is not a bar to the institution of legal proceedings nor does it give rise to a stay of proceedings (para. 60).

40 Notwithstanding its general endorsement of the appraisal process, the Court found that the process was not suitable in that case given the numerous intertwined factual and legal issues and because the umpire had no jurisdiction to determine policy interpretation issues or to deal with the claim for business interruption losses (para. 63). The Court also noted that "it would offend the concept of a fair hearing to permit an inquiry to proceed that has no right to counsel, no right to cross examine or any of the usual safeguards available to parties" (para. 63).

The Parties' Positions

41 The plaintiff submits that, as in *Rilkoff* and *Agro's Foods*, there are numerous issues and disputes relating to her claim that cannot be addressed through the DRP and that form the basis of this action. She argues that it only makes sense for all matters to be addressed together. She also notes that it is difficult for her to continue with the DRP since she no longer has her designated representative and she is statutorily barred from acting personally in that capacity. She notes that much of the delay that has occurred resulted from the inability of the different Insurers

to agree on the scope of loss, which causes her to question the appropriateness of the cooperation agreement reached in the DRP. She submits that this agreement is simply an attempt by the Insurers to agree on a reduced scope and cost of repairs to her detriment.

42 The defendants collectively take the position that the DRP should be permitted to continue to a determination. They note that given the thoroughness of the materials compiled by the plaintiff in support of this application, it is clear that she is capable of advancing her position before the Umpire. They submit that it would be open to the plaintiff to essentially nominate anyone as her representative through whom her submissions could be made.

Analysis

43 The plaintiff is understandably frustrated by the situation in which she finds herself and the the length of time that this dispute has been ongoing. That frustration causes her to question, with some validity, whether the DRP is meeting the objective of providing a timely and cost-effective dispute resolution mechanism.

44 That said, I am not satisfied that the plaintiff has established grounds for terminating the DRP and having all matters determined in this action. I reach this conclusion for the following reasons.

45 The DRP is a mandatory process that was initially triggered by the plaintiff. The matters in issue before the Umpire fall squarely within the terms of statutory condition 11 set out in s. 29 of the *Act* (see para. 5 above) in that the dispute concerns the value of the insured property, the nature of the repairs required and the amount of the loss or damage.

46 Unlike in *Rilkoff* and *Agro's Foods*, these issues are not intertwined with other factual and legal issues that are beyond the jurisdiction of the Umpire. In her notice of civil claim, the plaintiff alleges that the Strata Insurers breached their duty of good faith in their dealings with her, but those claims are largely independent of the scope and valuation questions before the Umpire.

47 Further, the DRP has advanced to the stage where all that is left to be done is for the plaintiff to make her submission and the Umpire to render a decision. In contrast, this action is still in its infancy with no steps taken beyond the initial filing of pleadings. It would be antithetical to the principles of proportionality, efficiency and fairness to require the parties to essentially start all over and engage in a lengthy and potentially expensive court process.

48 I acknowledge that the plaintiff has lost the services of her designated representative and that she is statutorily barred from acting in that capacity personally. However, I accept the defendants' position that given the plaintiff's knowledge of the facts and issues and the degree of preparation she exhibited on this application, she can likely find someone to stand as even a bare nominee to present her case.

49 The plaintiff questions the cooperation agreement reached by the Insurers and its impact on the fairness of the process. However, I find nothing untoward about this agreement and, in fact, it is likely to enhance efficiency by eliminating the need for the plaintiff to get involved in the issue of apportionment between the parties.

50 Lastly, it is important to note that by permitting the DRP to continue, the plaintiff is not foreclosed from bringing this matter before the Court. The other claims advanced in this action may continue, although the incentive to proceed with them may diminish once the scope and valuation issues are resolved. Further, in the event that the plaintiff is unhappy with the decision of the Umpire, she may seek judicial review of the decision. On such a review, the onus would be on her to meet the standard of review of patent unreasonableness (see *Vandale v. Wawanesa Mutual Insurance Company*, [2015 BCSC 766](#)).

Conclusion

51 The plaintiff's application to terminate the DRP is dismissed. The defendants Square One and the Strata Insurers are entitled to their costs at Scale B.

R.A. SKOLROOD J.

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