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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

JOHN SHELDON VINCENT and KELLY LYNN VINCENT,	)	Counsel:
	)	SHAWN C. SCARCELLO
applicants,	)	for the applicants
- and -	)	LYNDA K. TROUP
	)	for the respondent
RED RIVER MUTUAL,	)	
	)	JUDGMENT DELIVERED:
respondent.	)	OCTOBER 26, 2020

SUCHE J.

[1] The applicants seek an order appointing a dispute resolution representative pursuant to section 121(9)(a) of ***The Insurance Act***, C.C.S.M. c. I40 (the "***Act***"). The respondent opposes the application. It argues that no action was commenced for recovery under the policy prior to the limitation date, with the result that the applicants' right to use the dispute resolution process lapsed.

FACTS

[2] The applicants' house was insured by Red River Mutual ("Red River") under a homeowner's policy. On October 27, 2017, a fire occurred in their kitchen,

causing extensive damage. Red River acknowledged coverage and thereafter carried out repairs to the house, replaced, repaired or cleaned various items, and provided compensation for others. Ultimately, however, the parties disagreed about whether some items of personal property had been adequately restored, and the amount of compensation they were entitled to be paid for some others.

[3] The timeline of relevant events is as follows:

- October 27, 2017, the fire occurs and the applicants notify Red River of same;
- December 27, 2017, deadline for Red River to provide the applicants with a proof of loss pursuant to section 126(1) of the ***Act***;
- September 2018, the applicants move back into their house following repairs;
- November 14, 2018, Red River provides the applicants with Part II of the proof of loss, being the schedule of loss;
- May 1, 2019, Red River provides the applicants with a second copy of the schedule of loss;
- September 16, 2019, Red River advises the applicants there is a two-year limitation period, which ends on October 27, 2019;
- October 1, 2019, the applicants submit their completed schedule of loss;
- October 11, 2019, Red River advises the applicants that the items on the schedule of loss will not be reimbursed, and refers to the limitation date of October 27, 2019 to make a claim under the policy;
- October 15, 2019, Red River provides the applicants with Part I of the proof of loss, being the statutory declaration;
- October 22, 2019, Red River advises the applicants that limitation date is approaching;
- October 22, 2019, applicants send emails to Red River's claims representative and to Red River;

- October 28, 2019, the applicants give written notice that they wish to use the dispute resolution process;

- October 31, 2019, Red River advises the applicants that the limitation date has passed so it will not participate in the dispute resolution process;

- November 22, 2019, the applicants submit completed proof of loss to Red River.

LEGISLATION AND POLICY PROVISIONS

[4] The relevant portions of the dispute resolution provisions in the ***Act*** are found in section 121:

> **When section applies**
> 121(2) This section applies to disputes between an insurer and an insured about a matter that under Statutory Condition 11 set out in Schedule B or another condition of the contract must be determined using the dispute resolution process set out in this section.
>
> **SCHEDULE B**
> STATUTORY CONDITIONS
>
> . . .
>
> **In case of disagreement**
> 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.
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> 11(2) There is no right to a dispute resolution process under this condition until
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> (a) a specific demand is made for it in writing, and
> (b) the proof of loss has been delivered to the insurer.

[5] The preconditions in statutory condition 11(2) are repeated in the body of the ***Act***:

> **Insured or insurer may demand dispute resolution**
> 121(4) By a demand in writing after proof of loss has been delivered to the insurer, either the insured or the insurer may demand the other's participation in a dispute resolution process.
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> . . .
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> **Appointment by judge**
> 121(9) If
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> (a) a party to a dispute resolution process fails to appoint a representative in accordance with subsection (5); or
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> (b) a representative fails or refuses to act or is incapable of acting and the party that appointed that representative has not appointed another representative within seven days after the failure, refusal or incapacity;
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> on application of the insurer or the insured on two days' notice to the other, the court may appoint a representative.

[6] The ***Act*** also clarifies the effect of the dispute resolution process on other sections of the ***Act***:

> **When a term or condition is not deemed to have been waived**
> 123(2) Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by reason only of
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> (a) the insurer's or insured's participation in a dispute resolution process under section 121;
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> (b) the delivery and completion of a proof of loss; or
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> (c) the investigation or adjustment of any claim under the contract.
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> **Court may proceed in absence of appraisal**
> 123(3) Despite any provision of this Act and any provision or statutory or other condition of a contract, the failure to have an appraisal made, or the fact that an appraisal is being made or has been made, does not preclude a court from determining, in an action brought for that purpose, an issue

> arising under a contract, including the determination of the value of the property insured or the value of any loss or damage to such property.

[7] There are several provisions of the ***Act*** relating to the claims process under a contract of insurance. This includes:

> **Forms of proof**
> 126(1) Every insurer, immediately upon receipt of a request, and in any event not later than 60 days after receipt of notice of loss, shall furnish to the insured or to any person who indicates to the insurer that he wishes to make a claim under the contract forms upon which to make the proof of loss required under the contract.
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> **Failure to provide proof of loss forms**
> 126(2) Every insurer who neglects or refuses to comply with subsection (1) is guilty of an offence, and, in addition, section 131 is not available to the insurer as a defence to an action brought, after such neglect or refusal, for the recovery of money payable under the contract of insurance.

[8] The ***Act*** authorizes a court to grant relief where a party has not met certain obligations:

> **Relief from forfeiture**
> 130 If the court considers it inequitable that there has been a forfeiture or avoidance of insurance, in whole or in part, on the ground that there has been imperfect compliance with a statutory condition, or a condition or term of a contract, as to
>
> (a) the proof of loss to be given by the insured or the claimant; or
>
> (b) another matter or thing done, or omitted to be done, by the insured or the claimant with respect to the loss;
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> the court may relieve against the forfeiture or avoidance on any terms it considers just.

[9] Finally, the time for bringing a claim under a contract is prescribed both by a precondition and an end date in the ***Act***:

Limitation of actions
131 No action shall be brought for the recovery of money payable under a contract of insurance until the expiration of 60 days after proof, in accordance with the provisions of the contract,

(a) of the loss; or
(b) of the happening of the event upon which the insurance money is to become payable;

or of such shorter period as may be fixed by the contract of insurance.

. . .

Limitation of actions
136.2(2) An action or proceeding against an insurer under a contract must be commenced

(a) in the case of loss or damage to insured property, not later than two years after the date the insured knew or ought to have known that the loss or damage occurred;

. . .

[10] The policy incorporates the above:

Other Conditions

. . .

Limitation of Actions:

Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in The Insurance Act.

ANALYSIS AND DECISION

[11] A number of issues were raised at the hearing of this application to which considerable attention was paid by counsel. In the end, however, I am satisfied that only one question needs to be answered to properly determine the matter;

that is, whether the limitation period in section 136.2(2) applies if the dispute resolution process in the ***Act*** has been engaged.

[12] For that reason and because my conclusions on the other issues amount to obiter, I will address them in a summary way.

1. Limitation date

[13] Section 136.2(2) identifies the date on which the insured knew or ought to have known that the loss or damage occurred as the point at which the limitation period is triggered. I am satisfied that here this occurred on October 27, 2017, the date that fire damaged the insureds' home. The limitation date therefore is October 28, 2019, being two years after the date this occurred.[1]

[14] The applicants' position, in essence, was that the relevant date was when they learned of the extent of the loss or damage. This is not consistent with the language of the ***Act***. Further, as they suggest, this could result in more than one limitation period for different parts of a claim. Such a result would be practically and legally untenable.

2. Extension of limitation period

[15] Red River did not provide the applicants with the proof of loss forms within the time required by section 126(1) (i.e., 60 days after receiving notice of loss). The schedule of loss was provided in November 2018 and the statutory declaration form on October 15, 2019. The applicants argue that the interplay of section 126

[1] Counsel for Red River acknowledged that its representatives were in error in asserting the limitation date was October 27, 2019.

with section 130 (prohibiting an action from being commenced until 60 days after the proof of loss has been delivered to the insurer) should result in the limitation period being extended to 60 days from the date they received the proof of loss form. Otherwise they would be in an impossible position.

[16] I disagree. Section 126(2) addresses this situation, by preventing an insurer from relying on an insured's failure to deliver a proof of loss as a defence.

3. Whether the dispute resolution process engaged

[17] The parties agree that the dispute between them falls within the ambit of section 121(2), and that the process is mandatory if the preconditions in statutory conditions 11(2) and section 121(4) have been met. This includes delivery of the proof of loss.

[18] The applicants gave notice to use the process but did not deliver their completed proof of loss to Red River until November 22, 2019. Red River argues that the notice was therefore not valid.

[19] The applicants agree that they had not provided the proof of loss, but say they should be relieved from this obligation given that Red River did not provide them with the proof of loss form until October 15, 2019, and thereafter did not respond to their inquiry emails asking Red River for clarification about completing the form.

[20] Section 130 provides that a court may relieve against forfeiture if an insured has imperfectly complied with a statutory condition or term of the contract regarding, among other things, the proof of loss.

[21] If necessary to the outcome of this application, I would have granted the requested relief to the applicants. Red River was in no way prejudiced by this situation. It had the applicants' schedule of loss and was well aware of what was in issue between the parties. Although it is true that the applicants had time to complete the statutory declaration before they gave their notice on October 28, they raised some questions about it and they took steps to get answers. Had Red River supplied the forms at the time it was obliged to do so there would have been ample time for these issues to have been sorted out.

[22] I turn, then, to what I consider to be the main issue before me.

DOES THE LIMITATION PERIOD IN SECTION 136.2(2) APPLY?

[23] The applicants argue that section 121 creates a discreet and independent process, which takes the dispute outside the scope of the ***Act***, and renders the limitation date inapplicable. The dispute must be resolved by the parties' appointed representatives or, if needed, an umpire. The only remedy for an insured or insurer dissatisfied with the result would be an application for judicial review. Thus, as long as an insured has given notice to use the process before the limitation date, their right to utilize the process and recover the value of their loss so determined is preserved.

[24] ***Terroco Industries Ltd. v. The Sovereign General Insurance Company***, 2007 ABCA 149 (CanLII), concerns the appraisal process in the ***Insurance Act***, R.S.A. 2000, c. I-3 (the "***Alberta Act***"), which, for the purposes

of matters in issue here, is identical to the dispute resolution process in section 121.

[25] The facts of the case were that Sovereign insured a truck owned by Terroco that was damaged in a fire. The parties disagreed about the value of the loss. Each engaged an appraiser. The appraisers were unable to agree so they appointed an umpire. The umpire had not made a valuation before the limitation date passed. The insurer then refused to complete the process.

[26] At trial, the court found that the statutory limitation period was suspended upon written notice to engage the appraisal process and did not recommence until the time for the insurer to pay had expired. The court found it was without jurisdiction to determine the value of the truck, so she directed the parties to return to the appraisal process.

[27] On appeal, the Alberta Court of Appeal upheld the result but rejected the trial judge's reasons.

[28] The Court of Appeal began with a consideration of section 517 of the ***Alberta Act***, which states (at paragraph 13):

> Waivers
>
> 517(1) No term or condition of a contract is deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer.
>
> (2) Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract

The Court of Appeal went on to say:

> [25] Section 517 (2) of the *Insurance Act* is plain. There is no waiver of any term or condition of the policy by an act relating to the appraisal of the amount of loss. 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 one year 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 statue 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: *Hopkins v. Pitts Insurance Co.* (1986), 1986 CanLII 2500 (ON SC), 54 O.R. (2d) 592, per Galligan J. at 597; affirmed C.A. (1988), 1988 CanLII 4811 (ON CA), 63 O.R. (2d) 640 n; *Gautron v. Wawanesa Mutual Insurance Co.* (1995), 1995 CanLII 3289 (BC SC), 2 B.C.L.R. (3d) 330 per Clancy J. at paras. 25-27.
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> [27] Professor Craig Brown in his text, *Insurance Law in Canada,* (Scarborough: Carswell, looseleaf) Vol. 1, summarized the situation as follows at p. 10-20-1:
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> > ...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.

[29] This is precisely the situation here. Like the provisions in place in Alberta, section 123(2) of the ***Act*** states that an insurer is not deemed to have waived any term or condition of the contract by participating in the dispute resolution process. The limitation period is both a term of the contract by operation of law and a stated condition of the contract.

[30] There is a further section in the ***Act*** not found in the ***Alberta Act***, which reinforces the decision in ***Terroco***:

> **Court may proceed in absence of appraisal**
> 123(3) Despite any provision of this Act and any provision or statutory or other condition of a contract, the failure to have an appraisal made, or the fact that an appraisal is being made or has been made, does not preclude a court from determining, in an action brought for that purpose, an issue arising under a contract, including the determination of the value of the property insured or the value of any loss or damage to such property.

[31] Quite clearly, then, the jurisdiction of the court to decide any of the issues to which the dispute resolution process applies.

[32] The applicants maintain that the result in ***Terroco*** assists them. While the Court of Appeal concluded that participation in the appraisal process did not render the limitation date inapplicable, it upheld the result at trial for a different reason.

[33] The evidence at trial showed that parties had agreed to be bound by the decision of the umpire. For that reason the limitation date was not applicable. The court explained:

> [30] The evidentiary record before us in this case discloses that prior to the undertaking of the appraisal process, there was admission of coverage on the part of the Insurer and, implicitly if not expressly, an agreement to pay to Terroco such amount as was ultimately determined to be the value of the loss.
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> [31] Following its initial investigation of the loss, there was no issue of coverage. The Insurer offered to make payment of $46,410 and withheld its payment only when Terroco placed a higher value on the loss. There was no suggestion that this offer was made without prejudice. Indeed, evidence of the offer was tendered by the Insurer as part of its case. The offer indicated that coverage was admitted as did all the Insurer's course of dealings with Terroco.

[34] The evidence of the representatives of both Terroco and Sovereign was that they understood the appraisal process would result in a valuation by the umpire that would be binding on them. After noting this, the Court of Appeal goes on:

> [35] We are satisfied that the Insurer admitted its liability under the policy and implicitly, if not expressly, agreed to make payment of the claim subject only to the amount being determined by the appraisal process, which was intended to be carried out in accordance with the procedure outlined in the legislation.
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> [36] In these circumstances, the limitation period in the statutory condition is not engaged and is inapplicable. The limitation period is directed against actions against the insurer *under this contract*, i.e., the insurance policy. Here the action is not brought to enforce the policy but rather to enforce the agreement to value the loss as a prelude to its payment. Any defences under the policy are not available to the Insurer.
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> [37] The situation, in principle, is the same as if prior to the expiration of the limitation period the insurer had agreed to pay a fixed amount, but payment had not yet been made. Any action in that case is founded on the agreement to pay, as distinct from being a claim to enforce the policy. The distinction made by Master Funduk in *Montgomery* is apt; here *the insurer has accepted the claim before the last day*. All that remains is to fix the amount of the payment.
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> [Emphasis in original.]

[35] The facts of the case before me are quite different than ***Terroco***. It is true that Red River acknowledged coverage, and had already made substantial payments for repairs or replacement of property. The only issue between the parties was whether the applicants were entitled to be compensated for the outstanding items and, if so, the amount of the compensation to be paid. However, there was no discussion about using section 122 to resolve the dispute, nor was anything said by Red River's representative that either expressly or impliedly demonstrates an agreement to pay the loss as valued under that process.

In fact, Red River's representatives specifically rejected the applicants' request for compensation and pointed out several times that a claim had to be brought before the limitation date.

[36] The applicants also argued that the wording of the policy gives rise to an obligation to use the dispute resolution process and pay a resulting valuation. I disagree. The wording in the policy is nothing more than a recitation of statutory condition 11(2).

CONCLUSION

[37] I find that the two-year limitation period described in section 136.2(2) applies to all claims under a contract of insurance, even where the dispute resolution process in section 121 has been engaged. The applicants did not bring an action by October 28, 2019, being the applicable limitation date. As a result, their right to use the dispute resolution process lapsed. The application is therefore dismissed.

[38] Costs may be spoken to if counsel are unable to agree to same.

_____ J.