CITATION: Wilson v. Scotia Mortgage Corporation et al., 2016 ONSC 7000
COURT FILE NO.: CV-11-442476
DATE: 20161114

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Paul Wilson, Plaintiff/Responding Party

AND:

Scotia Mortgage Corporation and GCAN Insurance Company, Defendants/Moving Parties

BEFORE: S.F. Dunphy, J.

COUNSEL: *Carrie Kennedy*, for the Moving Party Scotia Mortgage Company

Neil Colville-Reeves for the Moving Party CGAN Insurance Company

Phillip J. Trotter for the Plaintiff/Responding Party Paul Wilson

HEARD: October 18, 2016

ENDORSEMENT

[1] It is never a good time for a house fire. Even so, disaster managed to strike in this case with unusually bad timing. This fire occurred shortly after the plaintiff had settled a lengthy dispute with his mortgage-provider but before he was able to put in place the financing needed to pay for the settlement and discharge the mortgage. Instead, the parties have been mired in six years of litigation about whether the plaintiff is entitled to the direct or indirect benefit of the fire insurance that the mortgagee had placed on his house and charged him for.

[2] The defendant Scotia Mortgage Corporation and the issuer of its insurance policy, the defendant GCAN Insurance Company, have brought parallel summary judgment motions seeking to dismiss the plaintiff's claim to damages arising from his claimed interest in the fire insurance policy secured by Scotia. Scotia also seeks to enforce its mortgage and asks for judgment in the amount of its mortgage claim plus ancillary relief. Scotia acts as claims administrator for the insurance policy that it procured for itself as insured and charged the premiums to its client, the plaintiff Mr. Wilson. Despite the clear wording of a policy that provides indemnity for physical damage to property subject to its security, Scotia has declined to process a claim for indemnity arising from the fire and prevented the plaintiff from doing so either.

[3] For the reasons that follow, I am dismissing the defendants' motions in part and allowing Scotia's alternative counterclaim relief to enforce a Settlement Agreement. While I have

rejected the defendants' core premise – that the plaintiff has neither a direct nor indirect interest in the insurance policy he is paying for – I have also ruled that it is time to permit Scotia to enforce the Settlement Agreement and see to a rational sales process for the repair or sale of a derelict house effectively abandoned for six years while this squabble persisted. There are however enough wrinkles and issues not yet dealt with in this proceeding to preclude me from issuing a comprehensive judgment disposing of all issues between the parties even if this decision disposes of the largest of them. I shall accordingly be required, consistent with the principles in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), to supervise a summary process to resolve these outstanding issues if the parties are unable to arrive at a settlement under their own steam with this major issue in the rear view mirror.

Overview of Facts

[4] In January 2010, the plaintiff had been embroiled in litigation for the previous five years with the mortgagee of his house, Scotia. Scotia had commenced an enforcement action and issued a Notice of Sale in 2005. Counterclaims and cross-claims soon filled the shelves. The precise nature of the dispute is not material for present purposes. Suffice it to say that I am not in possession of evidence that would enable me fairly to judge those claims and counterclaims on their merits were I called to do so (and I have not been).

[5] The plaintiff claims that he was unable to obtain insurance for the house as a result of the power of sale proceedings initiated by Scotia. I find that excuse a hard one to credit, but my doubts on the subject have no bearing on this case. It is not disputed that Scotia in fact exercised the option it had under the mortgage to place its own fire insurance on the property and to charge the plaintiff the premiums paid to acquire the coverage. It did so in 2006 and continues to add the premium to the mortgage debt to this day. The details of that policy are referred to below.

[6] On January 27, 2010 a Settlement Agreement was entered into to put an end to the mortgage litigation. Scotia agreed to a compromise on its contractual claim to interest and enforcement costs. The plaintiff was to arrange to pay out the mortgage at its compromised value within 90 days. He also agreed to pay property taxes and to pay the cumulative premiums for the insurance that Scotia had placed on the property after the mortgage went into default.

[7] The Settlement Agreement provided "in the event Wilson does not pay Scotia the funds referred to in paragraphs 1 and 3 herein within 90 days of executing this agreement, Scotia shall be at liberty to move to enforce this agreement and/or to otherwise exercise its legal rights in connection therewith" (paragraph 1 referred to the amount of principal and agreed interest to be paid; paragraph 3 the obligation to pay tax and insurance).

[8] The Settlement Agreement also resolved the status of Ms. Julie Nagy who was formerly on title as a 1% co-owner of the property co-mortgagee. Ms. Nagy's status as part-owner and mortgagor and Scotia's role in that was a significant issue in the litigation being resolved. She has not been named in this action and Scotia is not pursuing her in this action or on the mortgage. She transferred her nominal interest in the property back to Mr. Wilson at the time of the settlement in January 2010 and Scotia has deleted her from the mortgage.

[9] Unfortunately for all, disaster struck soon afterwards. On March 1, 2010 the house caught fire, causing substantial damage to the house. The plaintiff was severely injured and was hospitalized for a period of time, including spending 20 days in a coma.

[10] The parties have sparred in the past over whether the plaintiff should bear a measure of responsibility for the fire. Being injured running back into a burning house to rescue his dog and spending 20 days in a coma as a result offers strong evidence that the fire was unplanned by this plaintiff at least. There is no evidence that the plaintiff had any hand in his own injury and the defendants appear to have wisely dropped any attempt to press that line of attack.

[11] The Fire Marshall's report was unable to determine the source of the fire and estimated damage to the building at $150,000. Estimates obtained by the parties are in a range around that figure, with the defendants alleging damage closer to $100,000 and the plaintiff claiming it was closer to $200,000. The precise amount of the loss due to the fire does not fall to me to determine today and I should not expect to be able to do so on the sparse evidence before me.

[12] While the plaintiff was in hospital, his lawyer sought to arrange to have an insurance claim made to cover the loss. He was not successful. Scotia resisted disclosure of the policy and claimed to be self-insured. The plaintiff was ultimately successful in obtaining production of the policy – issued by the defendant GCAN – but was unsuccessful in processing a claim.

[13] Although Scotia is the insured under the policy, it is also claims administrator on behalf of the insurer. Scotia and GCAN have taken parallel positions throughout this proceeding. GCAN has taken the position that its insured is Scotia alone and denies the plaintiff has the status of "Additional Insured". Both assert that the loss, if any, arising from the fire can only be determined after the property is sold unless Scotia goes into possession and makes the repairs itself. Scotia has never committed to make repairs if granted possession.

[14] The plaintiff has to date been unwilling to surrender possession of the property. The plaintiff's reasons for resisting handing the derelict property over to the bank are obvious enough. The land value appeared (and continues to appear) to be sufficient to retire the mortgage. If a sale were to confirm the values preliminary appraisal opinions suggest, Scotia would claim that it has suffered no loss and make no claim on the insurance. In that case, the plaintiff would lose all value he otherwise expected he had secured with the Settlement Agreement.

[15] The precise nature of the relationship between Scotia and GCAN in relation to this policy was not explored in the evidence. However, Scotia's refusal to process a claim that would have extricated it from this litigious morass is, to say the least, puzzling.

[16] At the hearing of the motion, CGAN conceded that it would have to pay for the fire damage to the building if Scotia elected to make those repairs, but justifies its inaction by pointing to the possession stand-off that has kept Scotia from going into possession in the first place.

[17] For the past six years, the parties have been unable to solve the problem of how to deal with the insurance policy. The house has been left derelict to the undoubted chagrin of its neighbours and to the delight of local wildlife.

[18] In December 2011, Mr. Wilson started this proceeding against both Scotia and GCAN claiming $250,000 in damages pursuant to a contract of insurance plus other amounts for mental distress and punitive damages. Scotia defended. It denied that the plaintiff had any interest in the property insurance policy it had taken out (and charged the premiums to the plaintiff's account) and claimed that it alone was a beneficiary and then only if and when it took possession. It counterclaimed seeking seeks possession of the property plus either payment of the full contract amount under the original mortgage or, in the alternative, the amount payable pursuant to the Settlement Agreement.

[19] GCAN defended as well denying that the plaintiff was an insured under the policy.

Issues to be determined

[20] Does the plaintiff have a direct or indirect interest in the insurance policy?

[21] Should the plaintiff's claim be dismissed as against Scotia or GCAN?

[22] Should Scotia's counterclaim be allowed in whole or in part?

Analysis and Discussion

(a) Does the plaintiff have a direct or indirect interest in the insurance policy?

[23] The plaintiff's statement of claim alleges that he is an "Additional Insured" under the GCAN insurance policy, that Scotia has a "subrogated claim" such that, save and except his personal claim, proceeds of insurance should be paid to Scotia in reduction of its claim under the mortgage and that Scotia has "refused, failed or neglected to assist" with respect to the fire insurance. He further pleads that Scotia's actions amount to a breach of its contract with him entitling him to damages.

[24] In order to assess Scotia's claim to dismiss the plaintiff's action, it is necessary to analyze both the mortgage and the insurance policy to determine what interest the plaintiff has.

[25] The starting point is the mortgage itself. The mortgage was granted by the plaintiff Mr. Wilson as well as Ms. Nagy (the latter having been released as part of the Settlement Agreement). It includes Standard Charge Terms No. 200117. Section 12 of the Standard Charge Terms provides:

> "**12. Insurance**
>
> You will without delay insure, and keep insured, in our favour and until the mortgage is discharged, all buildings covered by the mortgage…against loss or damage by fire and against any other perils we request. Such insurance must be

> provided by a company approved by us for the replacement cost of the buildings (the maximum amount for which the buildings can be insured) in Canadian dollars….
>
> If you do not:
>
> -Maintain insurance on the buildings that, in our opinion, complies with this paragraph;
>
> …
>
> we can, but are not obliged to, insure any of the buildings. What we pay for this insurance shall be added to the amount you owe under this mortgage and shall bear interest at the mortgage interest rate…You will also do all necessary acts to enable us to obtain payment of insurance proceeds.
>
> …
>
> Insurance proceeds may, in whole or in part, at our option, be:
>
> a) Applied to rebuild or repair the damaged buildings;
>
> b) Paid to you;
>
> c) Paid to any other person who owns or did own the property, as established by the registered title; or
>
> d) Applied at our sole discretion, to reduce any part of the loan amount, whether due or not yet due."

[26] I am satisfied on the evidence before me that the plaintiff has done all that he could to provide necessary proofs of claim to enable Scotia to obtain payment of insurance proceeds. The road was not easy. Scotia would not allow him to file a proof of claim or even give him a copy of the insurance policy without first putting him to the expense of having to obtain a court order for disclosure of it.

[27] I am also satisfied on the evidence that Scotia has made no effort to file a proof of claim under the GCAN policy. Given Endorsement No. 3 of the GCAN policy that names Scotia as the claims administrator for all claims under the policy, Scotia would have had to file such a claim with itself and supervise the adjusting of its own claim. Scotia's multiple hats justifies me in making all necessary adverse inferences as regards the filing of proofs of claim or processing of same.

[28] Before turning to the GCAN policy itself, the following conclusions regarding s. 12 of the Standard Charge Terms appear to be me to be justified:

a. Scotia had the option of taking out or not taking out fire insurance when the plaintiff failed to do so;

b. Scotia elected to take out fire insurance on the building and charged the premiums to the plaintiff as it was entitled to do;

c. Despite being made fully aware of the fire, Scotia made no effort to file a proof of claim and secure payment for the loss and rebuffed all assistance of the plaintiff in doing so;

d. While s. 12 provides Scotia with four options as to what it must do with insurance proceeds once received, it does not give Scotia a "none of the above option"; and

e. The insurance contemplated is clearly *not* credit insurance (i.e. insuring only the ultimate financial loss on the loan after all security is realized upon) since it provides for proceeds to be paid to the mortgagor if so elected by the mortgagee.

[29] There can be no serious question that Scotia's good faith and fair dealing obligations in relation to a policy of insurance it *elected* to acquire *and charged its client for* extends at least as far as filing a claim and collecting any proceeds of insurance available. Whether I have regard to the obligations of good faith of an insurer (and the cases of *Kang v. Sun Life Assurance Company of Canada*, 2013 ONCA 118 (CanLII) or *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII) cited by the plaintiff) or more generally to the duties of good faith in the performance of contractual obligations described by the Supreme Court of Canada in *Bhasin v. Hrynew*, [2014] 3 SCR 494, 2014 SCC 71 (CanLII), it seems to me that the result is the same.

[30] The issue as I perceive it is whether there was a claim for which Scotia could have been paid at any time. To answer that question, I must now turn to examine the GCAN insurance policy.

[31] The GCAN Policy (identified as "TOR-10-14512" internally) named Scotia as "Named Insured". Section A contains the General Insuring Agreements. Section 1 thereof provides:

> "This policy insures against ALL RISK of direct *physical* loss or damage, howsoever caused, occurring during the term of this policy, except as hereinafter excluded….
>
> Within the policy period, coverage shall attach when the Insured becomes responsible for the placement of insurance…or the date on which the property comes inadequately insured or uninsured and action is being, or has been initiated by the Insured or its representative to realize on the security and secure or recover its interests or the interests of others". (emphasis added)

[32] Section 2, titled "Property and/or Interest Insured" provides:

> "This policy shall insure Property of Every Description as herein defined, except as specifically excluded elsewhere in this Policy, on which the Insured holds a mortgage or other security interest, being foreclosed properties, properties under Power of Sale, Quit Claim Deed and other means of realization on security, prior and subsequent to title passing to the Insured and where there is no other insurance…

> Coverage shall apply only with respect to the Named Insured's interest in such property…".

[33] In the present case, two conditions for the attachment of insurance were present. There was (and is still) a pending power of sale proceeding and there was no other insurance in place. Neither s. 1 nor s. 2 makes insurance conditional upon going into actual possession.

[34] The "Basis of Loss Settlement" in s. 5 of the Policy provides that "settlement shall be based on replacement cost".

[35] Scotia is "Named Insured" under the Policy. "Insured" is defined to mean the "Named Insured and/or the Additional Insured". "Additional Insured" means "any other individual or legal entity who, by lease agreement or any other contractual obligation, is entitled to indemnity under this policy and is not specifically included in the Named Insured".

[36] Both moving party defendants took the position that there is no insured loss until Scotia takes possession of the mortgaged property and repairs it or sells it. They rely upon the general insuring clause in the certificate of insurance that provides that the "Insurer will indemnify the Insured against the *direct loss* so caused" (emphasis added).

[37] In simple terms, Scotia seeks to treat this *property* insurance policy as if it were *credit* insurance – insuring its ultimate loss if any on the loan rather than insuring against physical loss or damage to the value of each item of security it holds. As a result, if it should transpire that the land alone retains enough value to retire Scotia's loan to the plaintiff notwithstanding the destruction of the house over which Scotia also had security, then Scotia takes the position that there would be no "direct loss" if it manages to be paid out in full and thus nothing to be paid under the policy.

[38] The defendants' position misconstrues the meaning of "direct loss". Scotia *does* suffer a direct loss when *any* property subject to its security is damaged since the value of its total security package is thereby impaired. It matters not whether Scotia was at the time undersecured or oversecured. The time of the loss is the time of the physical damage, not the time of Scotia's realization upon its security nor even the time of the repair of that physical damage. The value of the loss is the replacement value of the security damaged subject only to the policy limit (the total amount of Scotia's loan at the time of loss is the extent of Scotia's interest in the property at the time of its damage or destruction).

[39] The logic of the defendants' position would require that the policy limit fluctuates with subsequent changes in the amount secured (i.e. the loan). That would be absurd. In this case, the loan was for more than the value of the property destroyed, but the opposite could just as easily have been true (i.e. the value of the property destroyed may exceed the loan for which it is pledged as security). Were Scotia to have increased its loan the day after the fire, the aggregate exposure of the insurer for the physical damage that had already occurred would not go up at the same time. Scotia can no more increase the exposure of the insurer after the occurrence of an insured occurrence by increasing the amount of its loan than GCAN can be discharged of its indemnification obligation by reason of Scotia subsequently receiving payment of its loan.

Subsequent events such as these have no bearing on the amount of the loss that was fixed at the time of the occurrence of physical damage. The insured's right to indemnity crystallized at that time and does not fluctuate in amount at the mercy of subsequent events.

[40] As secured lender, Scotia has an interest in *all* property subject to its security even if it is limited to receiving the amount of its loan from the proceeds of any or all security. The right to insurance proceeds simply substitutes one element of security with another of equal value and the obligation of the secured creditor to account for *all* security held continues to apply.

[41] Section 4 of Section A of the policy provides that "the intention of this insurance is in the event of loss to place the Insured, notwithstanding that the Insured may be the financier of the Property and/or Interest Insured covered herein, in the position of that of absolute owner of the Property and/or Interest covered". The insurance policy covered "ALL RISK of direct physical loss or damage". The property covered was quite clearly the physical building, not the intangible loan obligation for which the property stood as security. Scotia's position that it was unable to make a claim until it realized on its security is inconsistent with being placed in the position of absolute owner despite being financier.

[42] The procedure for filing a proof of loss (s. 6 of the Statutory Conditions) requires a proof of loss to be filed, but contains no obligation to be in possession. There was simply no reason why a proof of loss could not have been filed and processed shortly after the fire whether or not Scotia was in possession. The trigger for coverage was the occurrence of the physical damage to property, not the completion of further steps towards realization.

[43] It is also noteworthy that Scotia, as claims administrator pursuant to Endorsement 3 of the policy, was required to file a proof of loss with itself. The decision to pay or reject a claim also lay with Scotia. In its capacity as claims administrator, it was delegated "to receive notice of claims and other loss information…supervise the adjustment of all claims… [and] provide the Insurer on a quarterly basis, with a listing of all claims paid and for which indemnity is sought". Section 12 of the Statutory Conditions provides that the claim is payable within 60 days after completion of the proof of loss and is not conditioned upon entry into possession, sale of the mortgaged property or even completion of repairs.

[44] Upon receipt of insurance proceeds it failed to ask itself to pay, Scotia was obliged to apply them in one of the ways stipulated by s. 12 of the Standard Charge Terms. While Scotia had discretion as to which of the options it chose, each of the available options would have seen the proceeds of the insurance directly or indirectly benefitting the plaintiff either by reduction of his obligations to Scotia, by increase in the value of the property as a result of improvements made to it through repairs or by direct receipt of payment. The "none of the above" option was not open.

[45] Scotia's submits that Mr. Wilson has no standing to ask that the insurance proceeds be paid to Scotia. I disagree. Scotia had contractual obligations to Mr. Wilson under s. 12 of the Standard Charge Terms, including obligations of good faith and honesty in its administration of the insurance policy it elected to acquire pursuant to s. 12 of the Standard Charge Terms, the

premiums for which it has charged (and continues to charge) to Mr. Wilson's account. I find that Scotia was entitled to prove a loss and to receive compensation for the value of the physical damage to the property over which it held security whether or not it chose to go into possession or completed realization upon its security. It follows that its failure to do so was a breach of its obligations to performance its contractual duties including those pursuant to s. 12 of the Standard Charge Terms in good faith.

[46] Scotia could not elect to do nothing consistent with its duties of good faith. Section 12 of the Standard Charge Terms required Scotia to apply the insurance proceeds directly or indirectly for the benefit of Mr. Wilson. I conclude that Mr. Wilson has standing to enforce Scotia's obligations to him under s. 12 of the Standard Charge Terms and to require Scotia to account for the claim it ought to have made and damages he has suffered as a result. Scotia's motion to dismiss his claim must therefore be dismissed.

[47] While Mr. Wilson did not make his own cross-motion for summary judgment, it is now well-established that he is not required to do so if the record permits me fairly to dispose of the claim: *Kassburg v. Sun Life Assurance Company of Canada*, 2014 ONCA 922 (CanLII). Providing the court is able to make a determination of the issues placed before it by the moving party having regard to the principles established in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) and Rule 20.04(2.1) of the *Rules of Civil Procedure*, the determination made has the force of *res judicata* and is binding for all purposes of the proceeding. If findings made in connection with the motion are sufficient to dispose of the claim of the responding party to the summary judgment motion, then the court ought to do so in the interests of justice.

[48] Determining as I have that Mr. Wilson had enforceable rights in Scotia's administration of the policy is not, however, sufficient to enable me to dispose of the entire action. The record before me does not permit me fairly to determine the damages arising. That determination will have to be the object of a subsequent process. Rule 20.05 permits and the directions of Karakatsanis J. in *Hryniak v. Mauldin* requires that I remain seized of this matter if at all possible with a view to resolving the matters that cannot be resolved fully on the motion for summary judgment. I shall consider this matter further below.

(b) Should the plaintiff's claim be dismissed as against Scotia or GCAN?

[49] GCAN's motion for dismissal is more narrowly focused than that of Scotia. GCAN has denied that it has any contract with the plaintiff. If it can be concluded on the evidence before me that there is no nexus between the plaintiff and GGAN then it ought to be released from the action and its motion granted.

[50] The situation is not so simple however. As a Named Insured, Scotia had the undoubted right and I have also found that it had a duty to file a proof of loss and to seek payment for it within a reasonable time. The precise amount that should have been paid has not yet been determined. It may well be that Mr. Wilson's claim against GCAN could become moot.

[51] The plaintiff contends that s. 12 of the Standard Charge Terms provides it with a contingent right to receive payment of the insurance proceeds. That contingent right, the

plaintiff submits, amounts to a contractual entitlement to indemnity under the policy and qualifies the plaintiff as an "Additional Insured" with standing under the policy to claim payment directly from GCAN if Scotia neglects or refuses to do so.

[52] Given my findings in relation to Scotia's obligations under s. 12 of the Standard Charge Terms, I do not find that it is necessary *at this time* to conclude whether or not Mr. Wilson qualifies as an "Additional Insured" as it is highly likely that this claim will become moot. The focus of argument at the hearing was in relation to the ability of Scotia to make a claim on the policy.

[53] I have decided that it would not be fair to make a final ruling on the "Additional Insured" point since neither party addressed the matter at length in argument before me because of the way the argument evolved. I am therefore adjourning CGAN's motion until further order. I shall also stay the action of the plaintiff as against GCAN until further order. As and when the residual issues between Scotia and Mr. Wilson are sorted, it will be possible to determine whether the claim as against GCAN should be permanently stayed, proceeded with or dismissed.

(c) Should Scotia's counterclaim be allowed in whole or in part?

[54] Scotia's counterclaim seeks possession of the property for the purpose of pursuing its stalled power of sale proceedings. The amount claimed by Scotia is either the full amount owing pursuant to the mortgage or, in the alternative, the amount provided for in the Settlement Agreement. Scotia's Notice of Motion simply asks for the relief claimed in the counterclaim.

[55] There is no dispute that Scotia is entitled to something. The question is what and when. Is Scotia entitled to claim the full amount of the original mortgage or the compromised amount agreed in the Settlement Agreement?

[56] It is clear that I cannot grant Scotia judgment as asked under the original mortgage. The enforcement proceedings under that mortgage are pending in a different action and Mr. Wilson raised a number of issues by way of defence, none of which I am in a position to rule upon here. However, I have concluded that the Settlement Agreement remains alive and enforceable and judgment under it can and should be granted.

[57] The Settlement Agreement was clearly intended to represent a full and final resolution of *all* issues. The Settlement Agreement does *not* provide that it becomes void if the agreement is not closed within the 90 day period stipulated for payment. Ms. Nagy was released from the mortgage and the action and her name was taken off title at that time. The Settlement Agreement permits Scotia to bring an action to enforce it "and/or to otherwise exercise its legal rights in connection therewith". It also contemplates that the amount payable by Mr. Wilson shall include additional property tax or insurance premiums from the date of execution to the date of payment. There is no allegation that the Settlement Agreement has been repudiated by Mr. Wilson or is void. It would not be inequitable to hold Scotia to that settlement given that the primary cause of the six year stand-off that has persisted has been Scotia's desire to avoid processing an insurance claim – a position that I have found was fundamentally misguided. All of these considerations

lead me to the conclusion that the Settlement Agreement is still alive despite the passage of the 90 days.

[58] Mr. Wilson has not alleged that Scotia is not entitled to enforce the Settlement Agreement. Scotia has sought to do so (although in the alternative) on this motion. Mr. Wilson has put forward no argument or evidence to dispute its continued validity. In my view, Scotia *is* entitled to judgment under the Settlement Agreement.

[59] Clearly, I am not in a position to reduce Scotia's claim to judgment under the Settlement Agreement in terms of dollars and cents without resolving the question of what interest rate applies after the expiry of the 90 days. Argument will be needed to establish what rate of interest ought to apply to payments made after April 27, 2010 since the Settlement Agreement is silent on the point.

[60] As well, I will be required to determine how to treat the insurance proceeds – as to both amount and timing.

[61] Both of these issues will need the benefit of a further hearing. Accordingly, I am reserving to myself to be heard at a subsequent time:

a. What interest rate is applicable to the amounts payable by Mr. Wilson under the Settlement Agreement after April 27, 2010?

b. The amount, if any, by which the payments due by Mr. Wilson should be reduced to reflect insurance proceeds received or that ought to have been received had Scotia properly discharged its obligations to Mr. Wilson under s. 12 of the Standard Charge Terms and its obligations of good faith?

[62] While I am not in a position to settle the precise amount of Scotia's counterclaim, I am satisfied that Scotia is entitled to judgment enforcing the Settlement Agreement as claimed with the quantum thereof to be finalized following the hearing referenced above and I so order.

[63] I am also satisfied that it is time to break open the log-jam that has seen this property remain derelict for six years. I appreciate that Scotia's failure to process the insurance claim has created a bit of a chicken and egg problem. Lack of financial capacity of Mr. Wilson however cannot be a perpetual excuse for failure to deal with the issue. It is plain and obvious that Mr. Wilson either lacks the resources or the inclination to cause the property to be repaired while the amount of the insurance claim (that he is the indirect or possibly direct beneficiary of) is being resolved. That process will require further time – likely a matter of several months by the time the issues are fully settled and a hearing schedule is established.

[64] I am of the view that Scotia is entitled to an order of possession to enable it to cause the necessary repairs to be made and to start the process of getting this property prepared for sale at the soonest possible date. This needs to begin to happen now.

[65] Mr. Wilson has indicated an interest in redeeming the mortgage after the insurance proceeds are applied to reduce the debt or the house is repaired/rebuilt. He retains the right to redeem the mortgage at any time up until a binding agreement of purchase and sale is entered into without my help. I see no need to enhance his rights beyond that since doing so would potentially reduce the sales proceeds available. The pool of purchasers willing to put their highest and best offer forward would be smaller if the suggested right of first refusal were granted and that in turn could have the effect of reducing the sale price – an undesirable outcome.

Disposition

[66] In summary, I have found as follows:

a. Scotia was required to perform its obligations under s. 12 of the Standard Charge Terms in good faith by making a claim for the replacement value of the house as a whole or those parts of it that were damaged by the fire if it is practicable to repair the damage;

b. GCAN's motion for summary judgment is adjourned and the action against it stayed until further order;

c. Scotia is entitled for judgment for the amount due under the Settlement Agreement; and

d. Scotia is entitled to an order for possession of the property in order to effect repairs and cause it to be sold at the earliest time.

[67] Each of these findings is likely to require further assistance from the court if the parties are unable to work out the details. As far as is reasonably possible, my intention is to see that these remaining issues are resolved consensually where possible and in writing where not. However, should any party be of the firm view that an oral hearing is required for any matter where I have called for written submissions to be made to me, their written submissions shall make that request and provide me with brief reasons why a hearing appears to be necessary or desirable.

(a) Claim under insurance policy

[68] With respect to the process of adjusting the insurance claim and dealing with the proceeds thereof, I am making the following dispositions and observations.

[69] Firstly, this is not going to be a GCAN/Scotia show where Scotia as claims administrator tells Scotia as insured how much it is willing to pay itself. Scotia is simply too conflicted at this point to be given the unilateral right to sort out what the insurance claim will be. The plaintiff must have a right of consultation, input and, if necessary access to a dispute resolution process.

[70] There are two possible avenues that may be followed at this point. The property may either be sold "as is" or Scotia may actually effect the repairs first before selling it. In either event, the plaintiff will receive the indirect benefit of the insurance as the insurance proceeds will either be applied pursuant to s. 12 of the Standard Charge Terms or the property will be increased in value by reason of the repairs and the plaintiff's interest in the proceeds of sale of the property after repayment of Scotia's secured claim will also be improved.

[71] It may be determined that the property's highest and best value is to be sold as is, allowing an eventual buyer to decide how best to rebuild the property. This decision will in no way impact the question of insurance. The claim under the insurance policy is the full replacement cost of the damage to the building. There is not enough evidence before me to determine what that amount is. The proper procedure in such case would be to refer the matter to a Master on a reference to determine the value of the replacement cost of the repairs necessary as a result of the fire. Mr. Wilson should have full standing on such a reference to ensure he is heard when that value is determined.

[72] The amount so determined shall be deemed to have been received by Scotia at or about the time it would have been received had it processed the claim in a timely fashion – I find that 90 days from the date of the fire would be a reasonable time. That allowance assumes 30 days to assemble the information necessary for the claim and the 60 days provided for by the policy to pay it.

[73] Although I am ordering Mr. Wilson to deliver possession of the property to Scotia to start a sales process, he or his expert will need (and shall be granted) reasonable access to the property prior to its sale to gather such evidence as is needed for the purpose of informing his position on the amount of the insurance claim.

[74] The second possible avenue is to effect a full repair of the property. This will have the benefit of crystallizing the replacement cost of the repairs. It does not resolve the question of what damages the plaintiff may claim arise from the delay in getting to this point. I deal with that issue below. I do not want to have a *new* dispute about the scope of repairs. Mr. Wilson is to be consulted on the scope of repairs and to have access for the purpose of obtaining his own estimates. I will remain seized of any dispute about scope.

[75] It is reasonable to give Scotia a window of time to decide which road to take (repair or sell as is). Scotia shall have 45 days from the time of taking possession to make its election. Should Scotia elect to sell "as is" and Mr. Wilson disagrees with that election, Mr. Wilson shall have 7 days to make written submissions to me as to why repair prior to sale ought to be preferred and Scotia shall have 7 further days to respond thereto. This does not strike me as a decision needing a full hearing, but should either party be of the view that it does so require, they shall make the request and the reasons therefor in writing.

[76] If the decision is to sell as is, I shall receive written submissions as to the terms of the reference I have directed to quantify the insurance proceeds that should have been received. Scotia shall have 30 days from the date it notifies the plaintiff of its decision to provide a draft of

the proposed terms of the reference. The plaintiff shall reply to same within 14 days. A short Chambers Appointment to finalize the terms may be called by me if the matter is not able to be resolved in writing.

[77] If the decision is to repair and there is a dispute about scope of repairs, I shall resolve the dispute based on *written submissions* only unless I determine that brief oral submissions are needed. Mr. Wilson shall be treated as the moving party and Scotia as respondent. Mr. Wilson shall deliver his materials within 15 days of Scotia providing a detailed estimate of the repair work it proposes to have performed (which shall be done within the same 45 day window to determine whether to repair or sell as is); Scotia shall have 15 days to respond.

[78] I leave open a third avenue to deal with the property. Secure in the knowledge that he will receive the indirect benefit of the insurance policy whether the property is repaired or sold as is, Mr. Wilson may succeed in raising sufficient funds to redeem the mortgage. In such case, he shall pay into court the amount due under the Settlement Agreement which funds shall be treated as if the proceeds of a sale *mutatis mutandis*. If there is dispute as to the amount to be paid to redeem the security, a short hearing shall be held to resolve the question. I am not inclined to lay out the precise conditions in advance and in detail when it may prove to be entirely hypothetical.

(b) GCAN motion for summary judgment

[79] The motion of GCAN and Mr. Wilson's claim against it have been stayed pending further order. It is fully expected that the claim as against GCAN will become moot as a result of the other rulings being made hereby. The parties are encouraged to agree among themselves when it is appropriate to have a consent order dismissing the action in its entirety after it has become moot. Either side may apply to lift the stay of proceedings (or reschedule the motion for a hearing) after the balance of this order has been substantially complied with. I cannot foresee how or why this would be necessary given the other dispositions made, but crystal balls are in short supply and I ought not to foreclose relief that future events may make relevant.

(c) Judgment under Settlement Agreement

[80] There are three impediments to finalizing a judgment for a sum certain under the Settlement Agreement.

[81] The first is a minor one that is easily resolved. The Settlement Agreement provides for the payment of property taxes and insurance premiums up to the time of payment. This requires a simple accounting that can be resolved either on consent or by way of short written submissions. If the parties are unable to resolve the matter, I shall expect written submissions from Scotia within 30 days and response from Mr. Wilson within 15 days thereafter.

[82] The second issue is more substantive. The Settlement Agreement does not address explicitly the interest rate applicable on the amounts payable pursuant thereto after the 90 day period provided for payment has passed. The determination of that issue will be a question of law. I am directing the parties to direct written argument to me on the question of the applicable interest rate within the time frames stipulated in the preceding paragraph (i.e. Scotia within 30

days and Mr. Wilson 15 days thereafter). If either party is of the view that an oral hearing is required in the interest of justice, they shall so indicate in their reasons and indicate the reasons for the request.

[83] The third issue is the question of tying in the final disposition of the plaintiff's claim into the amount of the judgment. If the property is sold "as is", this will be a simple enough matter as I have directed that the insurance proceeds will be treated as if received 90 days after the fire. The claim of Scotia under the Settlement Agreement would be reduced *pro tanto* as of that date with interest on the balance running at the rate to be determined. The reference before the Master will determine the amount.

[84] If, on the other hand, the decision is made to effect the repairs now, the question of what damages, if any, flow from the six year delay in getting to that position remains undetermined. A number of potential issues come to mind. A trial of an issue will have to be directed if the parties are unable to resolve it.

[85] I see little point in trying to determine in advance what the procedure will be before I know whether it will be necessary and before the parties have had an opportunity to address me on the point. A short 9 a.m. Chambers Appointment may be booked via my assistant (co-operatively, having ascertained availability of the other side) to obtain directions on how to proceed with such a hearing. I would expect the parties to have exchanged written proposals defining the question to be answered with precision and stipulating the case timetable for hearing.

(d) Possession and Sale Procedures

[86] The following terms shall apply to the process of Scotia taking possession and the sales process:

a. The plaintiff shall deliver possession of the property at 110 Richardson Avenue to Scotia within 14 days of the date of release of these reasons;

b. Scotia shall have a period of 45 days to determine whether to cause repairs to the house to be made or to undertake an "as is" sale of the property as provided for above;

c. Within the same 45 day time frame, Scotia shall provide the plaintiff with a proposed sale plan outlining:

    i. The name of the real estate agent it proposes to retain and the terms of the proposed listing agreement; and

    ii. The procedure for determining whether to accept any offers received;

d. If there is disagreement on the sales procedure, the sale shall be referred to a Master on a reference with costs of that proceeding in the discretion of the Master (I shall resolve the terms of reference based on the parties' written submissions);

e. The proceeds of sale (net of sales costs) shall be paid into court to the accountant of the Superior Court of Justice; and

f. Scotia shall be entitled to apply for immediate payment out of court of the amount that is not in dispute, the balance shall be held in court pending resolution of the disputes provided for herein.

[87] Finally, there remains to be decided the question of costs. The plaintiff has been substantially successful in defending itself on these motions and is entitled to its costs even if Scotia has achieved a measure of success by being granted an order to go into possession and start the sales process. At the core of the dispute separating the parties has been Scotia's aggressive (and incorrect) interpretation of the insurance policy – on that issue, Mr. Wilson has been successful as against Scotia and should receive the costs that a successful party expects to receive.

[88] However, it is equally clear to me that Mr. Wilson remains a debtor of Scotia no matter how matters resolve themselves on the myriad of issues remaining to be resolved. How much he owes on a net basis I cannot now say, but I am confident that it will be quite a bit more than whatever amount he is entitled to by way of costs. Accordingly, I am ordering that Mr. Wilson shall be entitled to his costs of this motion the amount of which shall be deducted (as of today's date) from the amounts determined to be owing by Mr. Wilson to Scotia under the Settlement Agreement.

[89] The plaintiff shall provide a written Outline of Costs on the motion to the respondent Scotia and its submissions not to exceed three pages (cases need not be attached if available on line). Given the homework outstanding for all of the parties, this may be done any time within the next 60 days. Scotia shall have 14 days to respond (same length limitations). The amount of costs determined to be paid via offset as of today's date against the Settlement Agreement amount due to Scotia by Mr. Wilson.

S.F. Dunphy, J.

Date: November 14, 2016