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Bob Aaron bob@aaron.ca

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Check mover's insurance well before leaving for new home

Make list of all items transported, before departing, not after

Check own coverage and take most valued possessions with you

It's moving day. Everything you own is packed into a moving truck. The moving company is hired to store your belongings for two weeks while the new house undergoes some renovations.

The trailer containing all your worldly possessions pulls away from your house and you never see it, or your belongings, again.

You later discover that the moving company had put the trailer on a public street in Mississauga and one night it simply disappeared.

It takes you three weeks to prepare a detailed 65-page list of contents and articles of particular value. Included on the list are pieces of art, wedding photographs, antique furniture, needlepoints, carvings, records, CDs and books.

You sue the movers, who are no longer in business, and their insurers. Your own insurance company kicks in some of the loss. Five court hearings follow in the next six years, with another one scheduled for the new year, and still you don't have any money from the movers or their insurers.

The story may sound bizarre, but unfortunately, it's true.

The odyssey started out in February 1999 when Stuart and Gayle hired Kennedy Moving Systems to manage their move from one Toronto residence to another in the city.

A few days later, the Kennedy trailer disappeared with all their possessions, valued at $750,000.

The couple sued Kennedy Moving Systems, which defended the action on the basis that the couple had signed a standard contract limiting the mover's liability to 60 cents a pound or a total of $7,000. In December 2001, a trial court awarded judgment to Stuart and Gayle and tossed out the 60-cent limit.

The mover appealed the order to the Court of Appeal in December 2002, but the court upheld the trial decision. The following year Kennedy unsuccessfully applied for leave to appeal to the Supreme Court of Canada.

In September 2003, the parties agreed at a settlement conference that the damages for the lost goods were $437,500 and the original trial judge signed an order awarding the couple $503,000, including interest to 2001, plus almost $111,000 in legal costs. By January of this year, the movers owed more than $725,000.

But the purse strings were still knotted shut. Although Kennedy Moving Systems was out of business, its insurers were on the hook for the damages. Kennedy had an insurance policy with Lloyd's Underwriters and an excess, or umbrella policy, with what is now Allianz Canada.

At this point the insurers started fighting with each other over who was responsible for paying the claim. The Lloyd's policy had a $500,000 limit for transportation, but a $1-million limit for warehousing, and the court had to decide which limit applied, and whether Allianz had to contribute to the payment under its excess policy.

The matter was further complicated by the fact that the missing trailer also contained the goods of another couple whose lawsuit against Kennedy has not yet proceeded to trial.

The case went to court again in April of this year, but the parties were now two couples and two insurance companies, represented by a total of nine lawyers.

The court decision was published last month by the Law Society of Upper Canada in *Ontario Reports*, a weekly journal of recent court cases.

Stuart and Gayle were awarded the full amount of their claim without any deduction for the pending claim of the second couple. Lloyd's was ordered to take the full brunt of payment on the basis of its warehousing policy limit. It was also ordered to pay all the costs and interest owing from 1999.

When I read the story of Stuart and Gayle, it initially appeared that they had finally triumphed and would be receiving just compensation. Then I heard from Thomas Donnelly of Toronto's Cassels Brock law firm, which acted for Stuart and Gayle.

Donnelly advised that the case has been appealed and is scheduled to go before the Ontario Court of Appeal for the second time next February, six years after the date of the original move.

It boggles the mind that a couple who lose all their possessions in a move from one house to another have to spend six years in litigation with no resolution in sight and no money. I estimate that the combined legal fees of all the parties to date exceed several hundred thousand dollars.

Last week I attended a conference of the directors of the Law Society of Upper Canada. A judge of the Ontario Superior Court was speaking to us about public access to justice and commented that despite his generous salary, he wouldn't be able to afford to fund a lengthy court case.

It's a sad commentary that litigation in this province is rapidly becoming a sport for only the wealthiest in our society.

A number of lessons can be learned from the saga of Stuart and Gayle:

●During a house move, take your treasured personal photographs, computer and mementoes yourself.

●Make a list of every item being moved before the move, not after.

●Take pictures of the household contents and carry them with you.

●Check your own insurance policy to see what the coverage is for your possessions while in transit.

●Get references from your mover before you sign the contract.

●Ask to see the mover's insurance policy. If the claim is limited to 60 cents a pound, get excess insurance if it's available, or delete the limitation.

●If your goods are going to be put in storage for any period of time, make sure the moving contract is very specific about where and how the goods will be stored, and how they will be protected from fire, theft and other risks. Inspect the storage warehouse personally.

●If you are inclined to believe in a Supreme Being, it certainly wouldn't hurt to ask for a little protection for your worldly goods until the move is over.

Bob Aaron *is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the column archives at http://www.aaron.ca.*

The 3 Court decisions in reverse chronological order ...

COURT FILE NO.: 04-CV-272027CM1
DATE: 20050408

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
STUART SOLWAY and GAYLE AKLER	)	*Vernol I. Rogers, Thomas J. Donnelly* and *David Fine,* for the applicants Solway and Ackler
Applicants	)	
	)	
- and -	)	
	)	*Patrick J. Monaghan* and *Neil D. Gill*, for the respondent Lloyd's Underwriters
ATTORNEY IN FACT IN CANADA FOR LLOYD'S UDERWRITERS, ALLIANZ INSURANCE COMPANY OF CANADA, RENE BERTRAND, and ELAINE BERTRAND	)	
	)	
	))))	*Rui Fernandes* and *Ramon Andal* for the respondent Allianz Insurance Company of Canada
	)	
	)	
Respondents	))	
		Bernard Gasee and *Deborah Stewart,* for the respondents Rene Bertrand and Elaine Bertrand
	)	**HEARD:** January 26 and March 1, 2005

STINSON J.

[1] Monday, February 1, 1999 was moving day for Stuart Solway and Gayle Ackler. On that day all of their belongings were loaded into a moving truck owned by Kennedy Moving Systems. They never saw their belongings again. The truck and all their possessions were stolen and never recovered. Thus began a six-year legal odyssey in which Mr. Solway and Ms. Akler have attempted (so far unsuccessfully) to recover compensation for their loss from Kennedy.

[2] Kennedy is now out of business. It had two insurance policies, however: a primary policy issued by Lloyd's of London and an excess coverage policy issued by what is now Allianz Insurance Company of Canada. Both insurers agree that the Solway-Ackler loss is covered; they disagree about how much each of them should pay. That dispute has brought these parties before the court in this application.

The facts

[3] In early 1999 the applicants, Stuart Solway and Gayle Akler, were planning to move house. (For ease of reference I will refer to the applicants as the Solways.) They had purchased a new dwelling and had also signed an agreement to sell their old one. The deals were scheduled to close on the same day, February 1, 1999. Because they planned to do some renovations in the new house, they arranged to stay at Mr. Solway's mother's house and to have their belongings placed in storage for approximately two weeks.

[4] The Solways hired Kennedy Moving Systems to move and to store their belongings, temporarily. On the appointed day, Kennedy loaded the Solways' belongings onto the trailer portion of a tractor-trailer moving truck. Subsequently, Kennedy left the trailer parked on a public street, unattended. In addition to the Solways' belongings, the trailer also contained property owned by the respondents, Rene and Elaine Bertrand. On or about February 10, 1999, the trailer owned by Kennedy containing the goods of the Solways and the Bertrands was stolen. None of the goods was ever recovered.

[5] The goods owned by the Solways had been given to Kennedy under a bill of lading. The goods owned by the Bertrands had been given to Kennedy under a separate bill of lading.

[6] The Solways issued a statement of claim against Kennedy (the "Solway Action"). Kennedy's primary insurer, Lloyd's, elected to defend Kennedy in the Solway Action. The main issue in the Solway Action was the applicability of a limitation of liability clause contained in the Solway-Kennedy bill of lading. The Solway Action proceeded to trial before Himel J. in November and December 2001. In reasons for judgment released December 19, 2001 (reported as *Solway v. Davis Moving & Storage Inc.* (2001), 57 O.R. (3d) 205 (S.C.J.)), Himel J. granted judgment in favour of the Solways against Kennedy, and referred the quantification of damages to a master.

[7] Kennedy appealed the decision of Himel J. to the Court of Appeal for Ontario. In a decision released December 12, 2002 (reported at 2002 CanLII 21736 (ON C.A.), (2002), 62 O.R. (3d) 522 (C.A.)) that court upheld Himel J.'s decision in favour of the Solways and awarded them costs of $13,000

payable by Kennedy.

[8] Kennedy sought leave to appeal to the Supreme Court of Canada. On May 29, 2003, that court dismissed the leave application, with costs (see [2003] S.C.C.A. No. 57 (S.C.C.)).

[9] The quantum of damages payable under Himel J.'s original judgment was agreed upon and consented to in the amount of $437,500 for damages and $66,195.55 for prejudgment interest. Accordingly, Himel J. issued a supplemental judgment dated September 3, 2003 ordering Kennedy to pay the Solways the sum of $503,695.55, inclusive of prejudgment interest. Himel J. also ordered Kennedy to pay costs to the Solways in the fixed amount of $110,789.94. She also ordered post-judgment interest on these amounts at the rate of 6 percent, commencing December 19, 2001 (the date of her original decision on liability). Finally, she ordered Kennedy to pay $2,500 plus post-judgment interest of 5 percent with respect to the costs of the damage quantification hearing.

[10] In 2004, the Solways instructed the sheriff to execute a writ of seizure and sale against Kennedy, in order to collect their judgment (the "Solway Judgment"). The sheriff was unsuccessful. Having found that there were no exigible assets, the sheriff issued a certificate of *nulla bona*.

[11] Taking into account the awards of costs and the accrual of post-judgment interest, by the time this application was argued (in January 2005) Kennedy's liability to the Solways under the Solway Judgment exceeded $725,000. In addition, Kennedy remains liable to pay the Solways the costs awarded against it by the Court of Appeal and the Supreme Court of Canada.

[12] For their part, the Bertrands also commenced an action (the "Bertrand Action") against Kennedy with respect to the goods that they owned and which were stored in the trailer at the time of the theft. That action has not yet proceeded to discovery. In their action, the Bertrands are seeking damages of $450,000.

The insurance policies

[13] Kennedy was insured under Policy No. 1245-P066 issued by Lloyd's (the "Lloyd's Policy"). Lloyd's admitted coverage under its policy to the extent of $500,000. It brought an application, without notice, for permission to pay the $500,000 into court, pursuant to s. 141 of the *Insurance Act*. That order was granted and on May 13, 2004 Lloyd's paid $500,000 into court to the credit of the Solways and the Bertrands. Those funds remain in court and no amount has been paid to either the Solways or the Bertrands under the Lloyd's Policy.

[14] Kennedy was also insured under an excess commercial umbrella policy, No. 20085605 (the "Allianz Policy") issued by the Canadian Surety Company, which has since amalgamated with Allianz Insurance Company of Canada.

[15] There is a dispute between Lloyd's and Allianz as to how much each is liable to pay to satisfy the Solways' claims against Kennedy. In view of that dispute and the (potentially) competing claim by the Bertrands against the same insurance money, no amount has been paid to either the Solways or the Bertrands by Kennedy or its insurers.

The Solways' application

[16] This application is brought pursuant to s. 132(1) of the *Insurance Act*, which provides as follows:

> 132. (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person s liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[17] The Solways' claim against Lloyd's and Allianz, therefore, is founded on their unsatisfied judgment against Kennedy. Having received a *nulla bona* return from the sheriff, the Solways have a statutory right to pursue their claim for payment on the judgment directly as against Kennedy's insurers. In effect, for purposes of this application, the Solways have stepped into the shoes of Kennedy in order to seek indemnity under the insurance policies with respect to the liability of Kennedy for the Solway Judgment.

[18] The Solways' position is relatively straight-forward: they assert that one or both of Lloyd's and Allianz is liable to pay their judgment, depending upon the policy limit and interpretation of the Lloyd's Policy.

[19] As between Lloyd's and Allianz, Lloyd's asserts that coverage under its policy is limited to $500,000 and thus Allianz is liable for the balance due to the Solways pursuant to the excess policy issued by Allianz. For its part, Allianz asserts that the Lloyd's Policy limit is $1,000,000 and that there is no coverage under the Allianz Policy for the Solways' claims.

[20] The specific relief sought by the Solways in their application is as follows:

(a) As against Lloyd's

(i) a declaration that they have a cause of action pursuant to s. 132(1) of the *Insurance Act* against Lloyd's for the proceeds of the Lloyd's Policy;

(ii) a declaration that Lloyd's is required to indemnify them for the amount of the Solway Judgment, subject to the applicable limit of liability contained in the Lloyd's Policy;

(iii) a declaration that the applicable limit of liability for the claims of the applicants under the Lloyd's Policy is at least $500,000 or alternatively $1,000,000, inclusive of prejudgment interest, but exclusive of the costs payable under the Solway Judgment and exclusive of post-judgment interest;

(iv) an order that Lloyd's pay them at least the sum of $500,000 plus the amount of post-judgment interest on that amount awarded in the Solway Judgment, plus the costs awarded in the Solway Judgment;

(v) in the alternative, an order that the sum of $500,000 paid into court be paid out to them, and that Lloyd's pay them the amount of post-judgment interest on that amount awarded in the Solway Judgment, plus the costs awarded in the Solway Judgment.

(b) As against Allianz:

(i) a declaration that they have a cause of action pursuant to s. 132(1) of the *Insurance Act* against Allianz for the proceeds of the Allianz Policy;

(ii) a declaration that any amount of the Solway Judgment that is not payable by Lloyd's shall be payable by Allianz;

(iii) an order that Allianz pay to them the difference between the amount of the Solway Judgment and the amount payable by Lloyd's.

(c) As against the Bertrands, a declaration that the sums referred to in paragraphs (a)(i) to (a)(v) above be paid to them without any proration with respect to the claims of the Bertrands.

The Bertrands' "cross-application"

[21] On the date that this matter was first argued before me, January 26, 2005, counsel for the Bertrands served and filed a document entitled "notice of cross-application" seeking relief as against Lloyd's and Allianz. He also sought an adjournment of the Solways' application pending the final disposition of the Bertrand Action.

[22] The Bertrands' adjournment request was not vigorously pressed by their counsel, and I declined to grant it. I did so on two grounds. Firstly, the Solways' notice of application was issued and served more than six and one-half months prior to the date of argument. Counsel for the Bertrands gave no indication prior to the morning of the scheduled argument that he would seek an adjournment. Counsel for all other parties had prepared for and were ready to proceed with the substantive argument before me. Secondly, that six and one-half month window provided ample opportunity for the Bertrands to press forward with their claim against Kennedy. Although there was some suggestion that informal requests for discovery had been made, the Bertrands had taken no formal steps to move their case forward.

[23] I therefore concluded that it would be unfair to the Solways to defer indefinitely the resolution of their claim against the insurers pending the outcome of the Bertrand Action. I was also conscious of the fact that the outcome of the Bertrand Action is not necessarily predetermined by the successful outcome of the underlying Solway Action. The information before me was insufficient to conclude that a finding of liability in favour of the Bertrands was a forgone conclusion.

[24] On March 1, 2005, when the argument of the Solways' application resumed and was completed, counsel for the Bertrands brought a motion for judgment against the defendants in the Bertrand Action on the issue of liability and for judgment for damages or an order for a speedy assessment of damages. Counsel for Lloyd's (who acts for Kennedy in the Bertrand Action) and counsel for Allianz both opposed the motion arguing that the issues in the Bertrand Action were not necessarily identical to those in the Solway Action, and the court was not in a position to resolve the questions of liability or damages raised by the motion. In effect, it was a motion for summary judgment brought with insufficient supporting material and inadequate notice. I agreed with those submissions and declined to entertain the Bertrands' motion for judgment.

[25] With respect to the Bertrands' so-called "cross-application", I note that, strictly speaking, such a proceeding is not contemplated by the *Rules of Civil Procedure*. Although rule 38.03(4) is entitled "Counter-Application", that rule provides that a respondent to an application may bring a second application with a new court file number, naming the original applicant (and potentially others) as respondents, returnable at the same time and place and to the same judge as the original application: see *Norbett & Associates Inc. v. 1434267 Ontario Ltd.* 2003 CanLII 22650 (ON S.C.), (2003), 63 O.R. (3d) 477 (S.C.J.). The Bertrands' "cross-application" did not comply with this procedure, nor was it issued, or served upon any of the other parties, prior to the hearing.

[26] The relief sought by the Bertrands in their "cross-application" was in large measure modelled on the relief sought by the Solways in their application. The Bertrands sought the following relief:

(a) As against Lloyd's

(i) a declaration that they have a cause of action pursuant to s. 132(1) of the *Insurance Act* against Lloyd's for the proceeds of the Lloyd's policy;

(ii) a declaration that Lloyd's is required to indemnify them for the amount of their judgment against Kennedy (a judgment that does not yet exist), subject to the limit contained in the Lloyd's Policy and subject also to the Solways' claim for indemnity;

(iii) a declaration that the applicable limit of liability for the Bertrands' claims under the Lloyd's Policy is at least $500,000 or alternatively $1,000,000, inclusive of prejudgment interest, but exclusive of the costs payable under the Bertrands' judgment and exclusive of post-judgment interest under the Bertrands' judgment and the Solway Judgment;

(iv) an order that Lloyd's shall pay the Bertrands their pro-rata proportional share of at least the sum of $500,000 plus post-judgment interest on that amount, plus the costs awarded in their judgment;

(v) in the alternative, an order that the $500,000 paid into court by Lloyd's be paid out to the Solways and the Bertrands on a pro-rata basis proportionally.

(b) As against Allianz:

(i) a declaration that the Solways and the Bertrands each have a separate and distinct cause of action pursuant to s. 132(1) of the *Insurance Act* against Allianz for the proceeds of the Allianz Policy; and

(ii) a declaration that any amount of the Solway Judgment and the Bertrand judgment that is not payable by Lloyd's shall alternatively be payable by Allianz on a pro-rata proportional basis.

[27] As I have previously noted, the Bertrand Action has not yet proceeded to discovery. The Bertrands have not been awarded a judgment against Kennedy and thus they have not had an execution against Kennedy in respect of a judgment returned unsatisfied. As a consequence, the Bertrands have no right of action under s. 132(1) of the *Insurance Act* as against either Lloyd's or Allianz at present.

[28] Despite the foregoing and despite the technical deficiencies in the Bertrands "cross-application", the issue of proration as between the Solways' claim and the Bertrands' claim was already raised in the Solways' application. Accordingly, while I do not propose to deal with the Bertrands' claim for s. 132(1) *Insurance Act* relief as against Lloyd's and Allianz, I will deal with the matter of proration.

Issues and analysis

[29] The disputes raised by the Solways' application and the positions taken by the parties require the resolution of the following issues:

1. What limit in the Lloyd's Policy is applicable to the Solways' claim?

2. Which of the following items are included or excluded from that limit:

   (a) prejudgment interest that was included in the judgment of Himel J.;

   (b) post-judgment interest that is accruing on the judgment of Himel J.;

   (c) costs that were awarded against Kennedy and in favour of the Solways by Himel J., the Court of Appeal and the Supreme Court of Canada?

3. Are the claims of the Solways to be paid without any proration with the claims of the Bertrands?

4. Is there coverage for the Solways' claim under the Allianz Policy?

Issue 1 - What limit in the Lloyd's Policy is applicable to the Solways' claim?

[30] Lloyd's position is that it was agreed as between insurer and insured (Kennedy) that any losses that occurred during a move, or during storage incidental to moving of up to ninety days' duration, would be covered under the transportation section of the Lloyd's' Policy, with an applicable coverage limit of $500,000. The position of Allianz is that this claim does not fall under the transportation coverage provided in the policy, and thus the $500,000 limit does not apply. Instead, Allianz submits that the relevant policy limit is that specified under the policy's warehouse and storage coverage, which is $1,000,000.

[31] The task at hand, therefore, is to examine the Lloyd's Policy in order to determine which coverage responds to the Solways' claim.

[32] The normal rules concerning the construction of insurance contracts lead firstly to a search for an interpretation which, from the whole of the contract, advances the true intent of the parties at the time the contract was entered into: *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888. As was said by McLachlin J. in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.,* 1993 CanLII 150 (S.C.C.), [1993] 1 S.C.R. 252 (at 268-269):

> In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:
>
> (1) the contra proferentum rule;
>
> (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
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> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[33] The Lloyd's Policy is entitled "Movers and Warehousemen's Insurance Policy". It includes standard automobile coverage (Coverage 1), commercial general liability coverage (Coverage 2) and property insurance coverage (Coverage 3). Coverage 3B concerns Customers' Goods Insurance. According to the policy declarations, the amount of insurance provided for Transportation Insurance is $500,000; the amount of insurance provided for Warehouse Insurance is $1,000,000.

[34] The relevant provisions of the Lloyd's Policy concerning Customers' Goods Insurance are as follows:

> COVERAGE 3B - CUSTOMERS GOODS INSURANCE
>
> TRANSPORATION & STORAGE
>
> 1. PROPERTY INSURED
>
> The insurance provided by this policy applies with respect to property of any description, the property of others, from the time such property comes into the care, custody or control of the Insured or its authorized agents for the purpose of transportation or storage including all handling incidental thereto.
>
> 2. SCOPE OF INSURANCE
>
> The Insurer agrees to pay:
>
> A. As respects property under a Bill of Lading, similar shipping document or agreement under which the Insured has agreed to provide Declared Valuation Protection, for direct loss, destruction or damage (including General Average and Salvage charges) of the Property Insured occasioned by all risks, except as hereinafter excluded, provided such loss, destruction or damage occurs while in due course of transit, including handling for packing and unpacking, or while in storage incidental to transit for a period not exceeding 90 days.
>
> B. As respects property under a Warehouse Receipt or similar document under which the Insured has agreed to provide insurance to protect the interest of the owner(s) of the Property Insured while in storage in any location(s) described in the Schedule of this policy, including while in transit thereto or therefrom in or on trucks or trailers operated by the Insured or his authorized representative, for direct loss, destruction or damage (including General Average and Salvage charges) of the Property Insured by all risks except as hereinafter excluded.

C. To the extent that such is not provided for under sub-paragraphs A or B above, all sums which the Insured shall become obligated to pay by reason of the liability imposed by law upon, or assumed under agreement by, the Insured as a private or common carrier or warehouseman.

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4. LIMITS OF LIABILITY

The insurer shall not be liable under this policy for more than:

(a) As respects claims made under sub-paragraphs A and B of Scope of Insurance the amount of insurance or Declared Valuation agreed between the Insured and the Owner(s) of the Property Insured.

(b) As respects claims made under sub-paragraphs A and C combined, in no event for more than the Limit Of Liability expressed in the Schedule as applicable to Transportation Insurance in any one occurrence.

(c) As respects claims made under sub-paragraphs B and C combined, in no event for more than the Limit of Liability expressed in the Schedule as applicable to Warehouse Insurance in any one occurrence.

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GENERAL CONDITIONS

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2. DEFENCE COSTS

The Insurer further agrees to defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the Insured on account of such property damage, which costs shall be in addition to the applicable limit of liability stated elsewhere herein.

3. ADMISSION OF LIABILITY AND ACTION

(a) The Insured shall have the right to settle any claim not exceeding the deductible amount without prior reference to the Insurer.

The insured shall not otherwise admit any liability and as respects claims under C of Scope Of Insurance the Insurer hereby reserves the right to compromise or contest at its option, on behalf of and in the name of, but with no expense to the Insured, any and all claims made against the Insured in respect of liability covered by this Policy.

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6. VALUATION

Except where clause 8 - Replacement Cost - applies, as respects claims made under paragraph A or B of Scope Of Insurance of this policy the Insurer agrees to pay not exceeding the actual cash value or cost of repair of property lost, damaged or destroyed, nor exceeding as respects any one in transit or in storage lot the value declared in the applicable Bill of Lading, Warehouse Receipt or similar document.

As respects claims made under paragraph C of Scope Of Insurance under this policy, the Insurer agrees to pay all sums for which the Insured is legally liable subject to the limits of liability of the Transportation and Storage Sections.

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[35] Lloyd's submits that the Solways' claim falls within Scope of Insurance 2A. It submits that the Solways' goods were property under a bill of lading and that the loss occurred while the goods were in storage incidental to transit for a period of less than 90 days. With respect to the limit of liability, Lloyd's submits that limit 4(a) is not applicable, because there was no amount of insurance or declared valuation agreed between Kennedy and the Solways. Rather, Lloyd's submits that limit 4(b) applies, because it is a claim under Scope of Coverage 2A. As a result, the policy limit applicable to Transportation Insurance ($500,000) governs.

[36] For its part, Allianz submits that the claim does not fall within paragraph 2A of the Scope of Insurance, because Kennedy did not agree to provide declared valuation protection. Similarly, Allianz submits, Coverage 2B is inapplicable, because Kennedy did not agree to provide insurance to protect the Solways' property while it was in storage. Instead, the argument continues, because it is outside 2A and 2B, the Solways' claim falls within Scope of Insurance 2C. The relevant policy limit is found in the General Conditions, paragraph 6, which references the limits of liability of the Transportation and Storage Sections. Since Kennedy's liability to the Solways was for breach of a storage agreement, the storage limit ($1,000,000) governs.

[37] The first point to determine, therefore, is whether Kennedy's entitlement to payment under the Lloyd's Policy falls within Scope of Insurance 2A, 2B or 2C. As I noted early in these reasons, the Solways gave their goods to Kennedy pursuant to a bill of lading. That document contained the following provision (which was at the heart of the *Solway v. Kennedy* litigation):

> Unless value is declared and additional protection is requested, carrier's liability is limited to $0.60 per pound per article including contents, whether such loss or damage is arising out of storage, transportation, packing, unpacking or handling. If additional protection is requested, the carrier's liability is limited in the case of loss or damage of the entire shipment to the amount of the declared value. In the case of partial loss or damage, it will be limited to the portion of such loss and damage which such declared value bears to the true market value of the entire shipment.

No declared valuation was inserted in the Solway bill of lading and the goods were released to Kennedy at a value of $0.60 per pound per article.

[38] It may thus be seen that the Solway-Kennedy bill of lading did not include or provide for protection for the owner of the goods based upon a declared valuation. Lloyd's submits, however, that the words "Declared Valuation Protection" in Scope of Insurance 2A apply only to the words "agreement under which

the insured has agreed to provide Declared Valuation Protection" and do not apply to the words "Bill of Lading" in the opening phrase of that paragraph. I disagree, for several reasons.

[39] Firstly, the references to "Bill of Lading" and "Declared Valuation Protection" in Scope of Insurance 2A cannot be viewed in isolation. For example, in General Condition 6 Valuation, the insurer's liability is limited to "the value declared in the applicable Bill of Lading". This is consistent with the limit found in Limits of Liability paragraph 4(a), which is stated to be the "Declared Valuation agreed between the Insured and the Owner(s) of the Property Insured" for claims made under Scope of Insurance 2A. The scheme of the policy, therefore, contemplates that where the insured has agreed to provide declared valuation protection (which can be provided under a bill of lading, similar shipping document or other agreement) and a loss occurs, the insurer agrees to indemnify the insured for the amount of the declared valuation. To somehow isolate the opening phrase of paragraph 2A, as Lloyd's submits, is illogical and inconsistent with the scheme of the policy.

[40] Secondly, the interpretation for which Lloyd's contends is a restrictive one. It conflicts with the principle that coverage provisions should be construed broadly, as well as the *contra proferentum* rule. From a grammatical point of view, the words "under which the Insured has agreed to provide Declared Valuation Protection" contained in paragraph 2A can fairly be read as referring to "property under a Bill of Lading, similar shipping document or agreement".

[41] It follows that Coverage 2A is applicable to property under a bill of lading only where the insured has agreed to provide declared valuation protection. The Solway- Kennedy bill of lading did not provide for that protection. I therefore conclude Coverage 2A is inapplicable.

[42] The coverage provided by Scope of Insurance 2B extends to "property under a Warehouse Receipt or similar document under which the Insured has agreed to provide insurance to protect the interest of the owner(s) of the Property Insured while in storage". It is common ground that no warehouse receipt was provided nor did Kennedy agree to provide insurance to protect the Solways' interest in their belongings. It follows that Coverage 2B is inapplicable.

[43] Scope of Insurance paragraph 2C provided insurance to Kennedy for liability that might be imposed upon it by law as a private or common carrier or warehouseman, to the extent not provided under 2A or 2B. Liability has been imposed by the judgment of Himel J. Neither Coverage 2A nor Coverage 2B is applicable. It therefore follows that Kennedy's rights to indemnity under the Lloyd's Policy arise under Coverage 2C.

[44] I turn now to the policy limit issue. The insurance limits under Coverage 3B for Transportation and Storage are found in two locations. Firstly, paragraph 4 entitled "Limits of Liability" contains in separate sub-paragraphs limits for (a) "claims made under sub-paragraphs A and B of Scope of Insurance"; (b) "claims made under sub-paragraphs A and C combined"; and (c) "claims made under sub-paragraphs B and C combined".

[45] Secondly, under General Condition 6 "Valuation" another limit of liability is expressed, as follows:

> As respects claims made under paragraph C of Scope Of Insurance under this policy, the Insurer agrees to pay all sums for which the Insured is legally liable subject to the limits of liability of the Transportation and Storage Sections.

[46] For the reasons previously expressed, Kennedy's claim for indemnity in respect of the Solway judgment does not fall within sub-paragraph 2A or sub-paragraph 2B of the Scope of Insurance; rather it falls exclusively under Coverage 2C. As such, limit of liability 4(a) is inapplicable. Since the Kennedy claim for indemnity is not combined with a claim under Coverage 2A or Coverage 2B, it is neither a claim made under sub-paragraphs 2A and 2C combined nor under sub-paragraphs 2B and 2C combined. As a result, the limits of liability expressed in paragraphs 4(b) and 4(c) have no application. The only remaining limit of liability that could be applicable is the one contained in General Condition 6 and I conclude that it is.

[47] General Condition 6 references "the limits of liability of the Transportation and Storage Sections". Leaving aside limits applicable to situations involving declared valuations or agreements by the insured to provide a specified amount of insurance, there are two limits of liability referenced in the "Transportation & Storage" section of the policy: one that is applicable to "Transportation Insurance" (as mentioned in paragraph 4(b)) and another that is applicable to "Warehouse Insurance" (as mentioned in paragraph 4(c)). According to the policy declarations, these limits are $500,000 for Transportation Insurance and $1,000,00 for Warehouse Insurance.

[48] Although the policy declarations specify $1,000,000 as the amount of "Warehouse Insurance", Coverage 3B "Customers Goods Insurance" is subtitled "Transportation & Storage". The term "storage" is also used in subparagraph 2B with reference to goods held by the insured under a warehouse receipt. It thus appears that the terms "warehouse" and "storage" are used in the policy interchangeably. I therefore conclude that a claim founded on a breach of a storage contract would be subject to the Warehouse Insurance limit.

[49] The determination of which policy limit is applicable thus comes down to the proper characterization of the claim in respect of which Kennedy seeks indemnity under the policy, namely, the Solway Judgment. In turn, the Solway Judgment is founded upon the reasons for decision of Himel J. Excerpted below are the relevant findings contained in that decision (found in the indicated paragraphs):

> [81] I find that the plaintiffs [the Solways] arranged to have their goods stored in the trailer for the two week period. I do, however, find as fact that Ms. Akler and Mr. Kennedy [*sic*] were given assurances that their goods would be secure.
>
> [83] I also find that it was intended that the storage be on the Kennedy parking lot. I find that at no time, were the plaintiffs advised that their goods would be stored in a trailer parked unattended on a public street nor did they consent to such an arrangement.
>
> .
>
> [90] The central question in this case in whether the plaintiffs must bear the loss because of a limitation of liability clause in the contract or whether that clause does not apply ad the defendant [Kennedy] is responsible.
>
> .
>
> [92] The contract between the parties was for carriage and storage of goods. That contract was partly written and partly oral consisting of the proposal, the oral arrangements and the bill of lading. Under the terms of the contract, failure to deliver the goods is a breach and the defendant is liable.
>
> .

[95] This question can only be resolved by determining the terms of the contract with respect to security. I am satisfied on a balance of probabilities that the parties agreed that the plaintiffs' goods would be placed in a trailer for the two-week period. I find that trailer storage was a term of the contract.

[96] As to the type of security it is agreed that Kennedy was to provide safekeeping of the plaintiffs' belongings by parking the trailer in the parking lot, removing the landing gear, and locking the trailer. The plaintiffs relied upon that term of the agreement when it [*sic*] entered into the contract with the defendant.

.

[98] It was always intended and the plaintiffs never were told otherwise that their belongings would be stored on a trailer parked on the Kennedy premises. When they moved the trailer to the street, Kennedy did not provide any surveillance. The area was quiet and deserted at night. The trailer could have been watched or at least, moved back to the parking lot as soon as the ploughing was complete rather than left overnight on the street. Steps could have been taken to exercise care in protecting the property that was in their possession.

[99] In cases where loss results because of the acts of a third party, the issue is which party should bear the loss? The plaintiffs argue that they entered the contract with Kennedy because they were assured of security of their belongings.

[100] In my view, it is the defendants who should bear those losses which were attributable to the breach of the contract between the parties [and] they cannot rely on a limitation of liability clause where it would be unreasonable to enforce it in the circumstances.

[50] It may thus be seen that the basis of the finding of liability imposed by Himel J. was a breach of the term of the contract between the Solways and Kennedy regarding the security to be provided while the goods were stored in the Kennedy trailer. As such, liability was founded upon a breach of the parties' oral agreement concerning the storage of the Solways' goods, and was not founded upon a breach of the contract for their transportation.

[51] In my opinion, by reason of the fact that liability was imposed upon Kennedy for breach of a contractual term relating to the storage of a customer's goods, the policy limit relating to claim arising from the transportation of customers' goods is not applicable. I am alert to the closing words in Scope of Insurance paragraph 2A, which refer to losses "while in storage incidental to transit for a period not exceeding 90 days". Those words only come into play, however, for claims that fall within the scope of paragraph 2A. For reasons previously articulated paragraph 2A has no application to the present claim.

[52] I therefore conclude that the appropriate policy limit is that applicable to warehouse and storage claims. Pursuant to the policy declarations, the amount of Warehouse Insurance is $1,000,000. In my opinion that is the limit in the Lloyd's Policy that is applicable to the Solway claim.

Issue 2 - Which of the following items are included or excluded from that limit?

[53] In light of my conclusion that the applicable policy limit under the Lloyd's Policy is $1,000,000 and the total amount due by Kennedy to the Solways inclusive of claim, pre- and post-judgment interest and costs is within that limit, strictly speaking I need not rule on these points. Because they were argued before me, because my analysis of these issues may assist the parties in the ultimate resolution of the Bertrands' claim, and because an appellate court may disagree with my conclusion on the policy limit issue, and recognizing that these comments are *obiter dicta*, I propose to offer my conclusions on these points.

(a) Prejudgment interest that was included in the judgment of Himel J.

[54] It was conceded by the Solways that, pursuant to undisputed case law, the policy limit is inclusive of prejudgment interest.

(b) Post-judgment interest that is accruing on the judgment of Himel J.

[55] The Lloyd's Policy is silent as to whether post-judgment interest is included or excluded from the policy limit.

[56] In my view, post-judgment interest is payable in addition to the policy limit. Pursuant to s. 129 of the *Courts of Justice Act*, R.S.O., 1990 c. C.43, post-judgment interest accrues automatically unless the court exercises its discretion under s. 130 to disallow interest. Once a final judgment has been rendered against an insured, the insured becomes a judgment debtor and is required to pay the amount of the judgment. Any delay by the insurer in paying the judgment pursuant to its obligation to indemnify the insured, results in the accrual of post-judgment interest which the insured is required to pay to the judgment creditor.

[57] In the absence of any express contractual provision, I can see no good reason for post-judgment interest to be included within the policy limit. This can be illustrated by positing the situation where a judgment is granted against an insured for an amount equal to or greater than the policy limit. In such a situation, if post-judgment interest was included in the policy limit the insurer could (theoretically) delay payment with virtual impunity by, for example, prosecuting an unmeritorious appeal, since its exposure to its insured would be capped at the policy limit. Meanwhile, post-judgment interest would continue to accrue. In light of the insured's obligation to pay post-judgment interest once a claim has been crystallized into a judgment, it makes sense to impose a like obligation on the insurer, regardless of the policy limit.

(c) Costs that were awarded against Kennedy and in favour of the Solways by Himel J., the Court of Appeal and the Supreme Court of Canada

[58] Lloyd's argues that these costs are included in the policy limit. It points to the absence of express language in the policy obliging it to indemnify the insured for costs awarded against the insured on top of the policy limit. Lloyd's refers to language contained in the Commercial General Liability portion of the policy (Coverage 2) in which the insurer expressly agreed to pay costs awarded against the insured and further agreed that those payments would not reduce the limits of insurance. No such express language is contained in the Customers Goods Insurance (Coverage 3) portion of the policy.

[59] I do not accept the foregoing submission. Article 2 of the General Conditions of Coverage 3B provides that: "The Insurer agrees to defend at the cost of the Insurer any civil action which may be brought against the Insured on account of such property damage, which costs shall be in addition to the applicable limit of liability ." General Condition 3 entitled "Admission of Liability and Action" includes the following language:

> as respects claims under C of Scope Of Insurance the Insurer hereby reserves the right to compromise or contest at its option, on behalf of and in the name of, but with no expense to the Insured, any and all claims made against the Insured in respect of liability covered by this Policy.

[60] In the present case, Lloyd's elected to defend the Solway Action. As a result of that unsuccessful defence, on top of Kennedy's liability for the Solways' loss and prejudgment interest on that sum, Kennedy stands exposed to an adverse costs award for more than $110,000.

[61] Applying the principles of broad construction of coverage provisions, narrow construction of exclusion clauses and the *contra proferentum* rule, I

conclude that the correct interpretation of the words "with no expense to the Insured" in General Condition 3 is that the insured is not to be called upon to bear any expense arising from the defence of a claim, whether payable to its own solicitors or to the opposite party. It is well known that, almost invariably, one of the expenses involved in litigation is that incurred by an unsuccessful party who is ordered to pay costs to a successful adversary.

[62] I acknowledge that in another portion of the policy the insurer chose to address this topic with more specific language. That provision, however, related to different coverage. In relation to the coverage that is responsive to the Solways' claim against Kennedy, however, the court must have regard to the language that the insurer chose to include as part of the general conditions applicable to this specific coverage.

[63] Since I have concluded that the costs of defending the Solway Action, including any award of costs made by the court in favour of the Solways ought not be borne by Kennedy, it follows that it is my opinion that any costs awarded against Kennedy and in favour of the Solways should be excluded from the policy limit.

Issue 3 - Are the claims of the Solways to be paid without any proration with the claims of the Bertrands?

[64] As I have previously observed, the Bertrand Action has yet to proceed to discovery and thus the Bertrands do not yet have a claim against the insurers under s. 132 of the *Insurance Act*. While both Lloyd's and Allianz are on notice of the Bertrands' potential claim against the insurance monies, the question arises whether that potential claim can or should hinder full payment of the Solway Judgment now.

[65] The potential requirement for an insurer to ascertain all claimants under a policy before paying any of them was considered in *Laidlaw Inc. Re* (2003), 46 C.C.L.R. (3d) 263 (S.C.J.) (at paras 13 and 14) where Farley J. he said:

> I do not see that there is any provision in the subject Policies which would allow or require [the insurer] to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined. To impose a requirement on [the insurer] (and a restriction on a successful claimant's direct right) which would oblige [the insurer] to defer payment (and the claimant collection) until such time as all claims and potential claims under the subject Policies are known and finally determined would constitute an unwarranted rewriting of the subject Policies. See *University of Saskatchewan v. Fireman's Fund Insurance of Canada*, [1998] 5 W.W.R. 276 (Sask. C.A.) at p. 289; leave to appeal to the Supreme Court of Canada refused [1997] S.C.C.A. No. 641.
>
> It seems to me that at common law as discussed in *Cox v. Bankside Members Agency Ltd*., [1995] 2 Lloyd's Law Reports 437 (C.A.) that the "first past the post" or "first come, first served" principle was determined to be appropriate and in the interests of overall fairness. See Sir Thomas Bingham M.R.'s view, especially at pp. 457-60. He stated at p. 457:
>
> > It was inherent in the Judge's approach that he considered chronological priority to be the basic rule, from which any departure must be justified. This approach was not challenged, and is plainly correct. In the absence of a stay, a successful plaintiff may enforce his judgment against the defendant as soon as it is given, and if an insured defendant is insolvent he may seek to be indemnified (subject to the terms of the policy) directly by the insurer. There must be some good reason for departing from the basic rule that a successful plaintiff is entitled to the fruits of his judgment.
>
> Saville, L.J., added at pp. 466-7:
>
> > I can see no reason why equity should intervene to require that those first to call on the policy should have to share their recoveries with later claimants if and when the insurance became exhausted.

Farley J. further observed (at para. 16):

> I have found nothing in the *Ontario Insurance Act* which would require a deviation from the first past the post principle.

[66] Counsel for the Bertrands submits that his clients' circumstances warrant a departure from the prevailing principle that I have quoted above. He argues that, as a matter of judicial economy, his clients refrained from litigating their claim while the Solway Action proceeded more or less as a "test case". He submits that it would be contrary to the policy of encouraging economy and efficiency in the application of judicial resources to, in effect, penalize the Bertrands for being patient while the underlying legal principles were determined in parallel proceedings. To hold otherwise would be to force parties such as the Solways and the Bertrands to engage in competing and sometimes duplicative litigation with a view to becoming the first party to secure a final judgment and collect the insurance proceeds.

[67] In my view, the Bertrands' circumstances do not warrant a departure from the prevailing principle articulated by Farley J. To begin with, there is no evidence before me reflecting any express agreement among any of the parties that the Solway Action would proceed as a test case or that the rights that normally accrue to a successful plaintiff would not be enjoyed by the Solways. Likewise, there is no evidence to indicate a willingness on the part of the Bertrands to help to underwrite the costs of the Solway Action or to assist in the payment of any adverse order as to costs that might have been made against the Solways should their proceeding have been unsuccessful. I mention these factors because, in my view, they are relevant to deciding whether equity should intervene to provide the Bertrands with a share of the fruits of the Solways' labours.

[68] With respect to the matter of judicial economy, I note that the underlying liability issue in the Solway Action was finally determined on May 29, 2003 when the Supreme Court of Canada dismissed Kennedy's leave application. Notwithstanding that event and the subsequent passage of some twenty-one months, the Bertrands have taken no formal steps to advance their own claim, apart from the notice of cross-application served on January 26, 2005 and the notice of motion brought on March 6, 2005. In these circumstances I do not consider that equity requires a departure from the standard "first past the post" rule. Indeed, in my view, it would be inequitable to deprive the Solways of their entitlement to make first claim against the available insurance monies.

[69] I therefore conclude that the claims of Solways should be paid without any proration with the claims of the Bertrands.

Issue 4 - Is there coverage for the Solways' claim under the Allianz Policy?

[70] In light of the conclusions that I have reached above, the Solway Judgment and all subsequent costs awards in favour of the Solways will be covered by the Lloyd's Policy. I therefore do not need to address this issue.

Conclusion and disposition

[71] For the foregoing reasons, I conclude that the policy limit in the Lloyd's Policy applicable to the Solways' claim under s. 132 of the *Insurance Act* is

$1,000,000. An order shall therefore issue:

(a) declaring that the Solways have a cause of action pursuant to s. 132(1) of the *Insurance Act* against Lloyd's in respect of the proceeds of the Lloyd's Policy;

(b) declaring that Lloyd's is required to indemnify the Solways for the full amount of the Solway Judgment, including the costs payable thereunder and accrued post-judgment interest;

(c) directing that the funds paid into court by Lloyd's on May 13, 2004, together with all accrued interest, be paid out to the Solways in partial satisfaction of Lloyd's liability to them under (b) above;

(d) ordering Lloyd's to pay to the Solways directly the remaining sum due to them after deducting the amount received by the Solways under (c) above; and

(e) declaring that the sums payable to the Solways pursuant to (b), (c) and (d) above shall be paid to them without any proration with respect to the claims of the Bertrands.

[72] If the parties are unable to resolve the issue of costs, they should arrange a conference telephone call with me for purposes of determining a suitable process for the resolution of that issue. That process should also extend to the payment of the costs of the settlement conference attendances before Wilkins J. that took place pursuant to the directions given by me on January 26, 2005.

_____

Stinson J.

DATE: April 8, 2005

COURT FILE NO.: 04-CV-272027CM1
DATE: 20050408

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

STUART SOLWAY and GAYLE AKLER

Applicants

- and -

ATTORNEY IN FACT IN CANADA FOR LLOYD'S UDERWRITERS, ALLIANZ INSURANCE COMPANY OF CANADA, RENE BERTRAND, and ELAINE BERTRAND

Respondents

REASONS FOR JUDGMENT

Stinson J.

Released: April 8, 2005

Solway et al. v. Davis Moving & Storage Inc. c.o.b. as Kennedy Moving Systems et al.*

62 O.R. (3d) 522
[2002] O.J. No. 4760

Docket No. C37568

Court of Appeal for Ontario,
Carthy, Labrosse and Gillese JJ.A.

December 12, 2002

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs May 29, 2003 (McLachlin C.J., Bastarache and Deschamps JJ.). S.C.C. File No. 29606. S.C.C. Bulletin, 2003, p. 887.

APPEAL and CROSS-APPEAL from a judgment of Himel J. (2001), 57 O.R. (3d) 205 (S.C.J.) in an action for damages for loss of goods and loss of income.

David E. Fine and Robert B. Cohen, for respondents. Patrick J. Monaghan, for appellants.

LABROSSE J.A. (GILLESE J.A. concurring):

[1] The appellant, Kennedy Moving Systems, appeals from the judgment of Himel J. which held that Kennedy Moving was not permitted to rely upon a limitation of liability clause contained in a bill of lading for the move and storage of the respondents' goods. The appellant also appeals the award of damages per quod servitium amisit in favour of Sparkplug Marketing & Communications Inc. and Pen Station Inc., two corporations owned by the individual plaintiffs/respondents. The respondents cross-appeal from the finding that Sparkplug Marketing and Pen Station were not entitled to damages for loss of income.

[2] The plaintiffs, Akler and Solway, entered into a contract with Kennedy Moving to have their household goods removed from their house, stored briefly, and delivered to their new house. While being stored in a trailer, the trailer was parked overnight, unattended on a public street overnight. The trailer with the plaintiffs' goods was stolen.

[3] The plaintiffs claimed for the replacement cost of their possessions. They also claimed income loss for their corporations as a result of the time spent on the fallout from the theft. The defendant, Kennedy Moving, admitted liability for the loss of the goods, but only to the extent of the terms of the bill of lading and Regulation 1088 passed pursuant to the Truck Transportation Act, R.S.O. 1990, c. T.22. The bill of lading and the Regulation would limit the claim to $0.60 per pound, for a total of $7,089.60.

[4] The trial judge found that the plaintiffs were aware of the limitation of liability clause when they entered into the transaction and that they had taken steps to obtain additional insurance coverage with their own insurer.

[5] The plaintiffs had initially contacted Kennedy Moving because they had been satisfied with its performance in an earlier move. Although they had obtained a quotation from a competitor, they opted to go with Kennedy Moving because of both their past experience and because it seemed so professional. Akler testified that Kennedy Moving's affiliation with Atlas Van Lines, which was a household name, gave them comfort and assurance. [page526]

[6] The plaintiffs testified that Kennedy Moving had represented that their goods would be secure during the move. Kennedy Moving would provide safekeeping of their goods by parking the trailer in the Kennedy Moving yard, removing the loading gear, locking the trailer, and locking the air brakes. Akler testified that she did not tell anyone at Kennedy Moving the value of her goods, but did emphasize the importance of certain items. It was clearly important to the plaintiffs that their goods be secure. The trial judge found that they were given assurances to that effect.

[7] There was good reason for the plaintiffs to be concerned with security. The household goods that were stolen included rare and valuable artifacts and antiques collected by the plaintiffs throughout their marriage while travelling in Canada, the United States, South America, Europe and Australia. The plaintiffs' 65-page list of the contents and particulars that were stolen included pieces of art, wedding photographs, antique furniture, needlepoints, carvings, recordings, compact discs and books.

[8] Mr. Peterson, a member of Kennedy Moving's sales staff, attended at the plaintiffs' house to provide corporate literature and review the contents of the house. Akler claimed that Peterson commented that they had many nice antiques and a lot of furniture. Peterson did not recall visiting with the plaintiffs in their home. The trial judge found that Peterson had a selective memory. Although she accepted his evidence as to general practices or procedures, she did not find his evidence reliable with respect to the specific recollection of events. Since Peterson did attend at the plaintiffs' home, he was likely aware that their possessions were not simply ordinary household goods.

[9] Although the trailer in which the plaintiffs' goods were stored was locked, its landing gear was put down and it was detached from the truck, the trailer was not stored on the Kennedy parking lot. Instead, the trailer was left on the street to enable snowploughing to be done on the lot. The trailer and its contents were stolen from that location.

[10] The trial judge found that the plaintiffs were never advised that their goods would be left in a trailer, parked unattended on a public street. The trial judge accepted that Akler was devastated when she learned of the theft of the goods. More specifically, Himel J. referred to the evidence of the plaintiff that "she was completely overwhelmed as virtually everything they owned was gone, including items of sentimental value. She said she felt violated.

[11] The trial judge found that Kennedy Moving had given false assurances that the goods would be secured that had induced the plaintiffs to agree to the limitation clause. [page527]

[12] In considering whether or not Kennedy Moving should be permitted to invoke the limitation of liability clause, the trial judge relied on the decision of the Supreme Court of Canada in Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321.

[13] In Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496 (C.A.) at p. 8 O.R., this court reviewed the decision in Hunter Engineering and noted that, in that case, the Supreme Court of Canada was unanimous in holding that, while limitation of liability provisions, prima facie, were enforceable according to their true meaning, a court was empowered in limited circumstances to grant relief against provisions of this nature. The Supreme Court of Canada, however, was evenly divided on the question of the test to be used to determine when or in what circumstances the power to grant relief should be exercised.

[14] In Hunter Engineering, Chief Justice Dickson, writing for himself and La Forest J., rejected the doctrine of fundamental breach and the uncertainty that was related thereto. As an alternative, he adopted a more direct approach to dealing with potentially unfair contracts. He stated, at p. 462 S.C.R., p. 342 D.L.R.:

Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded. The courts do not blindly enforce harsh or unconscionable bargains . . . Explicitly addressing concerns of unconscionability and inequality of bargaining power allow the courts to focus expressly on the real grounds for refusing to give force to a contractual term said to have been agreed to by the parties.

(Emphasis added)

[15] By way of contrast, Wilson J., writing for herself and L'Heureux-Dub J., adopted an approach first accepted by the Ontario Court of Appeal and then by the Supreme Court of Canada in Beaufort Realties (1964) Inc. v. Chomedey Aluminium Co. Ltd., [1980] 2 S.C.R. 718, 116 D.L.R. (3d) 193. In explaining this approach at p. 510 S.C.R., p. 376 D.L.R., Madam Justice Wilson was of the view that courts need "to determine whether in the context of the particular breach which had occurred it was fair and reasonable to enforce the clause in favour of the party who had committed the breach" (emphasis in original).

[16] McIntyre J., the other member of the court, did not address this issue.

[17] Robins J.A., speaking for this court, reconciled these two approaches in Fraser Jewellers, at p. 10 O.R., as follows:

[W]hether the breach is fundamental or not, an exclusionary clause of this kind, in my opinion, should, prima facie, be enforced according to its true [page528] meaning. Relief should be granted only if the clause, seen in the light of the agreement, can be said, on Dickson C.J.C.'s test, to be "unconscionable" or, on Wilson J.'s test, to be "unfair or unreasonable". The difference in practice between these alternatives, as Professor Waddams has observed, "is unlikely to be large": Waddams, The Law of Contract, 3rd ed. (1993), at p. 323.

See also Carleton Condominium Corp. No. 32 v. Camdev Corp., [1999] O.J. No. 3448 (Quicklaw) (C.A.).

[18] In this case, the plaintiffs' goods were highly valuable, both in monetary and sentimental terms. As such, they took special care to choose a moving company that would provide the security they felt was essential. Based on their past experience with Kennedy Moving, its apparent professionalism, and its affiliation with Atlas Van Lines, the plaintiffs made what they thought was an informed decision to opt for Kennedy Moving.

[19] Despite Kennedy Moving's assurances to the contrary, the plaintiffs' goods were not, however, kept in secure conditions. The trailer containing their goods was left overnight on the street with no surveillance. As the trial judge noted, Kennedy Moving should have anticipated that a theft might occur if the trailer was left unattended overnight on a public street. The plaintiffs were never advised that their goods would be stored in these conditions, and they certainly never agreed to such an arrangement.

[20] In deciding not to enforce the limitation clause, the trial judge appears to have equated the words, "unconscionable" and "unreasonable" as these terms were discussed in Hunter Engineering. In our view, on the facts as found by the trial judge, to limit the loss of the plaintiffs to $7,089.60 would, in the words of Dickson C.J.C. be "unconscionable", or in the words of Wilson J. be "unfair or unreasonable". This is one of those cases where relief should be granted.

[21] The conclusion of the trial judge is amply supported by the evidence. It also accords with principles of contract law. We see no basis to interfere.

[22] With respect to the corporate plaintiffs, the trial judge noted the lack of privity of contract between the corporations and Kennedy Moving. She concluded that the requirement of sufficient proximity was not met and the corporations were not entitled to damages arising out of the breach of contract of Kennedy Moving. We see no error on the part of the trial judge in this respect.

[23] However, the trial judge did award compensation to replace the services of the individual plaintiffs in the amount of $8,000 for Sparkplug and $2,500 for Pen Station. A claim for per quod servitium amisit was not pleaded and there was no evidence that the plaintiffs spent any money replacing their services. [page529] Moreover, in light of the findings of the trial judge with respect to the claims of the corporations for loss of income, there was no basis to award these damages.

[24] The appeal is allowed in accordance with these reasons and paras. 6 and 7 of the judgment dated December 19, 2001 are set aside. Paragraph 9 is varied to provide prejudgment interest in accordance with s. 128(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43.

[25] In all other respects, the appeal is dismissed. The cross-appeal is also dismissed. Although success of the appeal and cross-appeal is divided, the disposition of the appeal largely favours the respondents. The costs to the respondents are fixed at $13,000.

[26] CARTHY J.A. (dissenting): I agree with my brother Labrosse J.A. as to his disposition of the claims on behalf of the corporations, but respectfully disagree with his conclusion that the individual respondents should recover damages on the basis of fundamental breach of contract.

[27] The trial judge found that the homeowners were intelligent and sophisticated business people, that they knew of the limitation of liability provision in the contract, and that they arranged their own insurance (said now to be insufficient) to protect against loss during the move. The household goods were to be held for three days in a trailer to be locked down on an unfenced lot adjacent to the mover's warehouse. The trailer was moved to the street in front of the premises over one night to permit snow removal [on] the lot. It was appropriately locked down, but somehow thieves managed to haul it away and the contents were never found. In almost 30 years in the family business of household moving, the personnel of the appellant had never experienced or heard of such a theft.

[28] In my view that description is of a loss which is clearly covered by the statutory limitations of liability embodied in the contract with the appellants and should have limited the liability to $7,089.60.

[29] The trial judge analyzed a long series of authorities including Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 and concluded with these findings [at paras. 95-100]:

. . . I am satisfied on a balance of probabilities that the parties agreed that the plaintiffs' goods would be placed in a trailer for the two week period. I find that trailer storage was a term of the contract.

As to the type of security, even on the defence evidence, it is agreed that Kennedy was to provide safekeeping of the plaintiffs' belongings by parking [page530] the trailer in the parking lot, removing the landing gear, and locking the trailer. The plaintiffs relied upon that term of the agreement when it entered into the contract with the defendant.

The trailer storage facilities of Kennedy involved parking the trailer in its yard with the landing gear down, the air brakes locked and the trailer locked. There were no fences, no cameras and no monitoring.

It was always intended, and the plaintiffs were never told otherwise that their belongings would be stored on a trailer parked on the Kennedy premises. When they moved the trailer to the street, Kennedy did not provide any surveillance. The area was quiet and deserted at night. The trailer could have been watched or at least, moved back to the parking lot as soon as the ploughing was complete rather than left overnight on the street. Steps could have been taken to exercise care in protecting the property that was in their possession.

In cases where loss results because of the acts of a third party, the issue is which party should bear the loss? The plaintiffs argue that they entered the contract with Kennedy because they were assured of security of their belongings.

In my view, it is the defendants who should bear those losses which were attributable to the breach of the contract between the parties they cannot rely on a limitation of liability clause where it would be unreasonable to enforce it in the circumstances.

[30] Before going further, I would be critical of these reasons, if on no other account, for reliance on evidence that the consignors were given assurance of security of their belongings. That assurance must be implicit in every contract for carriage of goods and cannot weaken a limitation of liability clause that contemplates claims where security breaks down and a loss occurs. I would also point out in passing that there is no reason to conclude that the trial judge meant "unconscionable" when she said "unreasonable".

[31] My major disagreement with the trial judge's reasons is with her application of the reasons in Hunter. It is generally considered that there is little room remaining for setting aside an exemption provision on the basis of fundamental breach following Hunter. See per Finlayson J.A. Kordas v. Stokes Seeds Ltd. (1992), 11 O.R. (3d) 129, 96 D.L.R. (4th) 129 (C.A.), leave to appeal to S.C.C. refused [1993] 2 S.C.R. viii, at p. 135 O.R. Yet here we find what I would consider a minor transgression in the performance of the contract justifying just that.

[32] Hunter is the seminal decision of the Supreme Court on the subject of exemption or exception provisions faced by claims of fundamental breach, albeit that a five-person court divided itself on this subject between reasons delivered by Dickson C.J.C. and Wilson J. with one judge supporting each, and McIntyre J. expressing no view on the issue of fundamental breach.

[33] Hunter involved the sale of gear boxes which were serviceable for some time and then broke down due to design defects [page531] after the contracted warranty period. The contract excluded statutory warranties and the purchaser sought to avoid that exclusion by asserting fundamental breach.

[34] Both Dickson C.J.C. and Wilson J. reviewed and recognized the uncertainties and complexities that have resulted from seeking to use such an undefinable instrument as fundamental breach to relieve against unfairness.

[35] The Chief Justice summarized his view in these words at p. 455 S.C.R., p. 337 D.L.R.:

I am inclined to adopt the course charted by the House of Lords in Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, and to treat fundamental breach as a matter of contract construction. I do not favour, as suggested by Wilson J., requiring the court to assess the reasonableness of enforcing the contract terms after the court has already determined the meaning of the contract based on ordinary principles of contract interpretation. In my view, the courts should not disturb the bargain the parties have struck, and I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable.

And at p. 462 S.C.R., pp. 341-42 D.L.R.:

In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate, to deal explicitly with unconscionability. In my view, there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of "fundamental breach". There is little value in cloaking the inquiry behind a construction that takes on its own idiosyncratic traits, sometimes at odds with concerns of fairness. This is precisely what has happened with the doctrine of fundamental breach. It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded.

[36] Wilson J.'s view is more complex in appearance. She states at pp. 510-11 S.C.R., p. 377 D.L.R.:

Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given

their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. Whether the courts address this narrowly in terms of fairness as between the parties (and I believe this has been [page532] a source of confusion, the parties being, in the absence of inequality of bargaining power, the best judges of what is fair as between themselves) or on the broader policy basis of the need for the courts (apart from the interests of the parties) to balance conflicting values inherent in our contract law (the approach which I prefer), I believe the result will be the same since the question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause?

[37] She would leave room to relieve on grounds arising out of the breach of the contract on policy grounds "to balance conflicting values in our contract law".

[38] Wilson J. found there had been no fundamental breach of the contract. The vendor delivered a product of poor design, but it was the product the buyer intended to purchase. She states at p. 500 S.C.R., p. 369 D.L.R.:

It seems to me that this exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing bargained for has not been provided.

[39] Even if she had found a fundamental breach she would have enforced the exemption. The following excerpt gives some suggestions as to what she meant by "policy grounds to balance conflicting values" (pp. 517-18 S.C.R., pp. 381-82 D.L.R.):

Turning to the case at bar, it seems to me that, even if the breach of contract was a fundamental one, there would be nothing unfair or unreasonable (and even less so unconscionable, if this is a stricter test) in giving effect to the exclusion clause. The contract was made between two companies in the commercial marketplace who are of roughly equal bargaining power. Both are familiar and experienced with this type of contract.

. . . . .

There is no evidence to suggest that Allis-Chalmers who seeks to rely on the exclusion clause was guilty of any sharp or unfair dealing. It supplied what was bargained for (even although it had defects) and its contractual relationship with Syncrude, which included not only the gears but the entire conveyer system, continued on after the supply of the gears. It cannot be said, in Lord Diplock's words, that Syncrude was "deprived of substantially the whole benefit" of the contract. This is not a case in which the vendor or supplier was seeking to repudiate almost entirely the burdens of the transaction and invoking the assistance of the courts to enforce its benefits. There is no abuse of freedom of contract here.

[40] It isn't necessary to my reasoning to choose between these two approaches. If it were, I would favour that of Dickson C.J.C. There is no need for an undefined discretion in the enforceability of exclusion clauses. Contracting parties, insurers, business persons and litigants are all better served by the certainty of standards. And it must be kept in mind that this debate is not about fundamental breach as it may excuse continuing performance under a contract. As pointed out by Dickson C.J.C. at p. 463 S.C.R., p. 342 D.L.R., [page533] that is a distinct subject from the use of fundamental breach to defeat an exclusion clause.

[41] Turning to the facts of this case, Dickson C.J.C. would not take a moment to conclude that there was no unconscionability in the terms of this contract. The liability clause was imposed by statute, and in this case upon knowledgeable and sophisticated persons. Wilson J. would have looked as well at the outcome, but surely would have concluded that all policy concerns pointed to enforcement of a provision born in legislation which itself was driven by policy.

[42] That legislation is the Truck Transportation Act, R.S.O. 1990, c. T.22. Regulation 1088 thereunder sets forth a lengthy schedule of conditions that are deemed to be a part of every contract for the carriage for compensation of household goods. One condition imposes absolute liability on the carrier for loss or damage to goods accepted for carriage, with some noted exceptions that have no present relevance.

[43] Condition 9 reads in part:

9. Valuation

Subject to Article 10, the amount of any loss or damage for which the carrier is liable, whether or not the loss or damage results from negligence of the carrier or the carrier's employees or agents, shall be the lesser of, . . . [60 cents a pound]

[44] The policy concerns addressed by this legislation are longstanding and widespread. For at least 200 years, a carrier of goods has been absolutely liable at common law for their safekeeping. The policy for this sweeping liability is summarized by John McNeil, Q.C. in his text Motor Carrier Cargo Claims, 3rd ed. (Toronto: Carswell, 1997) at p. 3 in these terms:

[T]he cargo owner's separation from his cargo involves relinquishment of any opportunity to protect it; the carrier's exclusive possession gives the carrier exclusive access to all evidentiary considerations in the event of a loss; the ability of the owner to prove a cause of action based on fault would be completely illusory; and imposing liability without fault on the carrier would encourage his diligence and care in the safeguard of the cargo.

[45] Eventually it was found that commercial realities required a limit to that liability. The carrier has no means of knowing the value of the goods and, even if it did, the cost of insurance for the most valuable of goods in a cargo would impose prohibitive charges on the consignor of lesser valued goods. Thus statutes or regulations emerged maintaining the concept of absolute liability but limiting that liability to a declared value or, more often, to a value measured by weight. In this fashion the consignor can either insure the goods or bear the risk of their loss or damage, knowing the value of such goods. The carrier also bears some risk, which will act [page534] as an incentive to act prudently, while knowing that the extent of liability is tied to the weight of the goods being transported.

[46] Provisions similar to those under our Truck Transportation Act are found in each of the provinces and extend internationally in treaties such as the Warsaw Convention, 1929, applying in Canada to international carriage by air, and the Hague-Visby Rules in respect of international carriage by water.

[47] Thus we have a legislative policy that has developed over many years, permeates all facets of the transportation of goods industry and is based upon a sensible business and commercial rationale. I see no policy basis for not applying the limitation provision against the respondents in the present case. To the contrary, allowing the respondents' claim opens the door to every imaginable complaint of misfeasance and would undermine the entire structure built up under this longstanding policy.

[48] In Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496 (C.A.), this court dismissed a claim by a householder for losses suffered in a robbery allegedly because an alarm company failed to respond to a signal. The contract contained an exclusion clause and the court was not persuaded that there were any features of the relationship between the parties or the contract to justify avoiding the exemption. The case does not involve a statutory provision, but the policy issue I have been discussing is aptly expressed by Robins J.A. at p. 12 O.R.:

Having regard to the potential value of property kept on a customer's premises, and the many ways in which a loss may be incurred, the rationale underlying this type of limitation clause is apparent and makes sound commercial sense. ADT is not an insurer and its monitoring fee bears no relationship to the area of risk and the extent of exposure ordinarily taken into account in the determination of insurance policy premiums. Limiting liability in this situation is manifestly reasonable. The clause, in effect, allocates risk in a certain fashion and alerts the customer to the need to make its own insurance arrangements. ADT has no control over the value of its customer's inventory and can hardly be expected, in exchange for a relatively modest annual fee, to insure a jeweller against negligent acts on the part of its employees up to the value of the entire jewellery stock whatever that value, from time to time, may be.

[49] The incident that gave rise to the present litigation fits precisely within the policy and the wording of condition 9 of the regulation. The appellants were in the course of performing a common carriage and a misadventure occurred which, at most, could be found to be caused in part by their negligence. It was the manner of performance, not the failure to perform which was the subject of complaint. On their part, the householders recognized the burden of risk and sought out their own insurance, armed [page535] with knowledge of the goods' value that was essential to that task and not reasonably available to the moving company. The movers did know how many pounds they were carrying and thus could readily cover themselves with insurance to meet the statutory limit. In my view, this was how the regulation was intended to work in facilitating carriage of goods and it would be totally disruptive of its purpose if carriers are to be exposed to liability for undetermined amounts whenever, in the trial judge's words, "it would be unreasonable to enforce [the exemption]" or some standardless variation on those words.

[50] In direct response to the reasons of Labrosse J.A., I do not agree that the standard of care is affected by the fact that the cargo was not "ordinary household goods". Movers should treat all belongings alike. If the goods were of special value then the consignors should have purchased a corresponding amount of insurance.

[51] The fulcrum of Labrosse J.A.'s argument seems to be that the respondents were induced to accept the limited liability by false assurances that their goods would be secure. I made the point earlier that assurances that the goods would be kept secure are superfluous in a contract of bailment. That is so because a carrier's obligation to keep their consignment secure is implicit in every contract of carriage of goods. The assurances did not need to be made explicit. Aside from being superfluous, there was nothing false about the assurances. The overnight storage on the street was not anticipated. It was, at the highest, a negligent performance of the duty to keep the goods secure. Finally, there was no inducement because the limitation of liability was mandated by statute.

[52] I would therefore allow the appeal and dismiss the action, subject to the claim for $7,089.60, with costs of the appeal to the appellant. I would want to hear submissions as to the costs of the trial.

Appeal allowed in part; cross-appeal dismissed.

Solway et al. v. Davis Moving & Storage Inc. c.o.b. as Kennedy Moving Systems et al.

57 O.R. (3d) 205
[2001] O.J. No. 5049
Docket No. 99-CV-170847

Ontario Superior Court of Justice
Himel J.

December 19, 2001

Robert B. Cohen and David E. Fine, for plaintiff. Patrick J. Monaghan and Barry Cox, for defendants.

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[1] HIMEL J.: When Stuart Solway and Gayle Akler planned the move to their new home, they hired Kennedy Moving Systems to provide moving services and storage. Unfortunately, after the move, all their household contents were stolen from the trailer in which they were being stored by Kennedy. The plaintiffs now sue for damages for loss of their home contents, loss of income, punitive damages and interest. Their own insurer joins them in the action. The action against Atlas was discontinued on August 24, 2001. The defendant Kennedy relies on a limitation of liability clause in a bill of lading signed by the plaintiffs on moving day.

A. Factual Background

[2] Gayle Akler and Stuart Solway were married in June 1987. They have one child who was born in 1997. Ms. Akler received a university education in fine arts and arts, and took courses in marketing, advertising, business management and strategic planning. From 1981 until 1995, she worked in the advertising field and moved up the corporate ladder to senior management positions. In 1995, she started her own creative advertising company, Sparkplug Marketing & Communications. She carried on that business out of her home. At the same time, Ms. Akler taught an advertising course part-time at Ryerson University. She also took courses in woodworking and furniture construction.

[3] Mr. Solway has a Bachelor of Arts degree in Sociology and a Bachelor of Commerce degree. He furthered his education in marketing and international business and received his Masters of Business Administration in 1981. He also took courses in fine arts, photography, film and music. Mr. Solway worked in the advertising field for different firms as an account manager and then moved to the area of creative writing. He decided to start up his own business, Pen Station, in 1993. His business is also operated out of the home. Mr. Solway and Ms. Akler's financial positions continued to improve over the years.

[4] During their marriage, the plaintiffs did a great deal of travelling. They travelled throughout Canada, the United States, South America, Europe and Australia and throughout their travels acquired handmade art and wood artifacts as well as tapestries. They collected folk art and primitive Canadian furniture. As well, they enjoyed pottery, rugs, needlepoint, music and books. Their clothing was professional attire but with a creative flair to fit their vocation. Some clothing was purchased during their travels.

[5] In June 1997, their son was born. Ms. Akler took a maternity leave for a few months to be with her son. Recognizing that she could not take on new projects, she did not approach clients at the time and her company's revenues fell from March 1997 until the fall of 1997.

[6] In September, Ms. Akler hired a full-time nanny and returned to work. She made presentations on projects and retained her husband's company to provide writing and creative work.

[7] Prior to having a child, the parties lived at 304 Wychwood Avenue in Toronto. In 1994, they decided to move to 123 Colin Ave. They hired Kennedy Movers to do the move. They found its principal, Nigel Coffen, to be very professional and helpful. The move went well. Only one thing was damaged and it was repaired and the cost covered by Kennedy. The contents of the house had to be stored for one week. Ms. Akler made the arrangements for the storage to be in a trailer owned by Kennedy. There were no problems with the move.

[8] After they had a child, and hired a full-time nanny, and with both parties working out of their home, the Colin Ave. home became crowded. They decided to look for a larger home in the same neighbourhood. In October 1998, they bought a house at 57 Lascelles Blvd., and sold Colin Avenue in November 1998.

[9] Ms. Akler was responsible for making the move arrangements. The closing dates of the transactions were both scheduled for February 1, 1999. Because they planned to do some renovations in the new house, the parties arranged to stay at Mr. Solway's mother's house and have their belongings placed in storage for approximately two weeks.

[10] Ms. Akler contacted Kennedy Movers because of her satisfaction with their performance on the earlier move. She left a message for Nigel Coffen and he had one of his staff, Greg Peterson call her back. They arranged to meet and he came to the house in late November. At the meeting, he provided some corporate literature and reviewed the contents of the house. According to the plaintiffs, he commented that they had a number of nice antiques and a lot of furniture. Mr. Peterson does not recall meeting with the plaintiffs when he came to the house initially to assess the contents but says he was let into the house by a housekeeper. He spent the time reviewing each room and noting the amount of furniture to determine the size of truck and the number of movers that would be needed and to quote a price. When Mr. Peterson spoke to Ms. Akler on the telephone, he says she requested short-term storage at as economical a price as possible. He claims he reviewed the options of warehouse and trailer storage but focused on trailer storage because it was for such a short term.

[11] Ms. Akler also spoke with a competitor, Movemaster, and received a quotation. However, they decided to go with Kennedy once they negotiated a better price, and when Kennedy agreed to provide boxes at no cost, Ms. Akler testified that the affiliation of Kennedy with Atlas Van Lines, which was a household name, gave them comfort and assurance.

[12] Ms. Akler says that during their meeting, Mr. Peterson talked of the storage facility as being modern, with 24-hour security and climate control. She wanted to ensure that her articles were safe. Mr. Peterson discussed the question of insurance and advised it could be arranged either through Kennedy or through their own insurer. In his testimony, Mr. Peterson stated that insurance is only available with storage in the Kennedy premises and that trailer storage requires self-insurance. The plaintiffs decided to arrange insurance with their own insurer. Ms. Akler called their own insurance broker, advised that they were moving to a new and bigger house and that they required insurance during the move and for their contents once they were in the new house. Ms. Akler discussed the value at which the goods should be insured for her house and established a replacement cost of $170,200. That was the estimate her broker came up with based upon the size of the house.

[13] Although Kennedy was to provide boxes for packing, Ms. Akler says she had difficulty obtaining the boxes, and when she called Mr. Peterson, he was belligerent with her. By January 20, the plaintiffs were becoming concerned. Mr. Solway even called Movemaster to see if they could do the move on short notice. However, he then spoke with Nigel Coffen, complained about Mr. Peterson and demanded that the boxes be provided by the next day.

[14] As a result of the call, the parties were satisfied that the company was taking them seriously. The boxes were delivered the next day. Nigel Coffen says he recalls that he received a telephone call from Mr. Solway who was concerned about the timing of the delivery of the cartons. He does not recall discussing any problems concerning Mr. Peterson nor does he recall discussing security measures that would be in place for their goods.

[15] February 1, 1999 was moving day. Four movers arrived. While they were packing the truck, Ms. Akler questioned them and was told that the household contents would be stored on the truck for the two-week period. This surprised Ms. Akler as, based on what she was told and the literature she received, she says she believed that the goods would be stored in a temperature controlled area with 24-hour security in the Kennedy premises. However, she felt she had no choice and the move proceeded. A few items were delivered to the new home but the bulk of the contents were taken to storage. Ms. Akler testified that she had not been advised in advance that she would be required to pay the movers on the day of the move. After some discussion, she provided a cheque at the agreed upon price. She signed a document, a bill of lading, which acknowledged the time spent and the rate. It also contained a clause which read as follows:

5. Unless value is declared and additional protection is requested, carrier's liability is limited to $0.60 per pound per article including contents, whether such loss or damage is arising out of storage, transportation, packing, unpacking or handling. If additional protection is requested, the carrier's liability is limited in the case

of loss or damage of the entire shipment to the amount of the declared value. In the case of partial loss or damage, it will be limited to the portion of such loss and damage which such declared value bears to the true market value of the entire shipment.

[16] After the move, Ms. Akler received a telephone call from Mr. Peterson who requested more money and she paid him an additional $421. When the renovation did not progress as quickly as was hoped, she called Kennedy to arrange to extend the storage.

[17] On February 11, 1999, Ms. Akler received a telephone call from the office manager at Kennedy telling her that the trailer where the goods had been stored had been stolen. Ms. Akler said that she was in shock. Her husband called Nigel Coffen and was told that two of ten trucks had been stolen from the yard.

[18] Ms. Akler and Mr. Solway contacted their insurance broker who arranged for them to meet with Paul Gorjip, the insurance adjuster. They gave him a detailed proof of loss form and, ultimately, he recommended that the plaintiffs receive the full reserve of $170,200, the limit of the coverage.

[19] Ms. Akler described how she felt after learning of the theft. She said she was completely overwhelmed as virtually everything they owned was gone, including items of sentimental value. She said she felt violated. The insurance adjuster described them as visibly upset and scattered in their thoughts.

[20] Ms. Akler kept a diary and referred to it in her evidence in order to refresh her memory. It recorded certain events after February 11, 1999. Although the truck was later located, none of the household contents were recovered. For the next while, she spent hours trying to do an inventory of articles lost and obtain the replacement values for them. These lists were completed room by room. They also had to replace a number of items in order to live in the house.

[21] On February 18, Ms. Akler learned that the truck in which her belongings had been stored had been left on the street near Kennedy's premises because of snow in the parking lot of the mover's business. Apparently, Greg Coffen, the Operations Manager, had made the decision to move the trailer to the street so the parking area of the Kennedy premises could be ploughed after a snowfall.

[22] Mr. Gorjip attended at the Kennedy premises after the theft. He observed there was no fencing or secure compound. There was no evidence of surveillance or security equipment. Pictures taken of the scene at the time show trucks parked behind Kennedy Moving with no fence or security in sight.

[23] Kennedy Moving Systems is a family business which started in 1972. In 1982, Nigel Coffen and his brother Gregory Coffen joined their father in the business. The company became an agent for Atlas Van Lines in 1984. Nigel and Greg grew up in the business performing all kinds of jobs. Nigel was a helper, packer, salesman, warehouseman and driver. Greg also worked in a number of capacities as he, too, learned the business. After some years, Nigel became General Manager, responsible for the overall operation of the company and assisting in sales and marketing. Greg became Operations Manager which included responsibility for the warehouse operations. When they first took over the business, they acquired Davis Moving & Storage Inc., an existing moving company licensed to transport household goods within the province. It was a lengthy procedure obtaining the operating licence. They decided to use Kennedy Moving Systems as the name since that was what the family business had been called.

[24] When Ms. Akler and Mr. Solway retained Kennedy to do their move, the premises of Kennedy Moving Systems were located at 5960 Wallace Street, Mississauga, Ontario. This was a freestanding building in a highly industrialized and commercial area near Highway 401 and Hurontario Street. The building had its own yard and parking facilities. The company offered primary household moving including packing and storage for local, long distance and international relocations. Its affiliation with Atlas meant that its trucks had the Atlas logo but, in reality, Atlas was only involved in moves of 150 miles or more. Moves less than that distance were done by individual carriers using their own paperwork.

[25] Kennedy offered a variety of equipment depending on the size of the move and packing, moving and storage services. Storage consisted of either storage in the building or trailer storage where goods would be maintained in the trailer and the trailer would be parked in the compound at 5960 Wallace Street.

[26] Nigel Coffen testified that it was Kennedy's preference to sell storage services in their own building rather than on a trailer as they were paying rent for the facilities and trailer storage tied up trucks. However, if the storage was for a short period of time, it would be done in the trailer with the trailer kept at the back of the Kennedy premises, taken off the truck and locked and secured in the yard. The area around the premises was wide open modern space surrounded by commercial properties.

[27] It was Greg Coffen's responsibility as Operations Manager to ensure that the trailers were well protected by securing them with a locking system. On February 10, 1999, Greg Coffen moved the trailer containing the Akler/Solway belongings out onto the street in front of the Kennedy building so a contractor could clear the yard of snow. According to Nigel Coffen, it was Greg's practice to drop the trailer in front of the building, put on locks, and move it back to the yard once the lot was cleared. There was no night watchman monitoring the trailer while it was on the street.

[28] On the morning of February 11, Greg Coffen discovered that the trailer was missing and contacted the police and the insurance company. The trailer was eventually recovered hooked up to a tractor that did not belong to Kennedy but was also stolen. The entire contents were missing.

[29] Ms. Akler provided evidence of her income at the time of the loss and financial statements of her company for the preceding years. She commented that revenues of her company dropped for the 1998-1999 year which was the year of the loss. The financial year end of the company was July 31, 1999. Ms. Akler explained that they dropped in that fiscal year because she could not conduct business while she was consumed with the theft and replacing articles in her house. For example, Ms. Akler testified that she was told of a project that had to be done over a weekend in order to secure a larger project. Ms. Akler was unable to do the proposal and had to turn it down because she was too busy dealing with the theft. She spent a great deal of time preparing the schedule of proof of loss to get reimbursement from the insurance company. While the insurance company did not require verification of replacement cost of each item, Ms. Akler was careful to contact stores to determine accurate costs. As well, during that fiscal year, some time was spent selling the Colin Ave. house, buying the Lascelles house and packing up the house for the move. Sparkplug claims approximately $60,000 for the decline in revenues due to the theft.

[30] Sparkplug's claim for loss of income was supported by the evidence of Rubin Cohen, the company accountant. He had prepared the corporate financial statements which were produced as evidence at trial. He outlined his observations and commented upon a chart prepared by Ms. Akler summarizing information from the financial statements on revenue, expenses and net income. He noted the decrease in income for the 1998-99 fiscal year in income as compared to the previous three years and the two subsequent years. For the years 1995 to 2001, the total average income was $101,025. For 1998-99, the total income was $36,599.

[31] Mr. Cohen is not a forensic account[ant] and could not, of course, comment on the reasons for the decrease in income for the 1998-99 fiscal year. He knew Ms. Akler had a child in 1997; he did not know how many hours she worked nor could he say what factor the economy played in the income of Sparkplug for the 1998-99 fiscal year.

[32] Ms. Akler said that while she and her husband received moneys through their own insurer, that amount was limited to $170,200. She also testified that despite the provision in para. 5, they were not paid 60 cents per pound for articles lost by Kennedy. They have never received any compensation from Kennedy.

[33] Ms. Akler testified that she was primarily responsible for itemizing the contents of the house. That process went on for months. It involved listing items, obtaining replacement costs and then shopping for necessary items in the house. The couple decided that Mr. Solway would focus on his work while Ms. Akler would deal with the after-effects of the theft. He helped with itemizing articles from his office and checking what she noted. They made joint decisions about purchases.

[34] Mr. Solway did not keep track of the number of hours spent on theft-related matters. His estimate of time spent was five to eight hours in the first two weeks, two hours a day in the next month and one to two hours a day during the next two months. That would be a total of 130 to 160 hours or two to three weeks' work. Witnesses were called to corroborate the plaintiffs' assertion that business was lost by Pen Station as a result of the time spent on theft-related matters by Mr. Solway. Fransi Weinstein testified that Stuart Solway was approached in the spring of 1999 by her company to do work that would have generated between $10,000 and $25,000. Mr. Solway claimed he was unable to perform the job because of his commitments at home to deal with matters following the theft. Richard Toker, who had been Vice President of Communications at Bim Communications, an advertising company involved in direct marketing, knew of Mr. Solway as a skilled copywriter and attempted to hire him to do work on a direct mail package including a magazine, advertisement and website. Mr. Solway declined because he had to deal with theft-related matters. That contract would have provided $2,500 to Pen Station. Stephen Tannenbaum, a freelance copywriter in advertising, testified that he wanted to hire Mr. Solway in the spring of 1999 to work on a project that could have resulted in an $8,000 fee. Mr. Solway advised him that he was not available. Finally, Janet Rous wanted to hire Mr. Solway for some advice and would have paid him $400. He was unable to take the job because of commitments regarding the theft.

[35] Ms. Akler said that while she and her husband received moneys through their own insurer, that amount was limited to $170,200. She also testified that despite the provision in para. 5 of the bill of lading, they were not paid 60 cents per pound for articles lost by Kennedy. They have never received any compensation from Kennedy.

[36] The parties became concerned that they were not given sufficient funds to replace their household items. Ms. Akler was under stress, was unable to sleep and feeling quite depressed.

[37] Even three years later, the plaintiffs say their house is half furnished. They have not replaced books, records, compact discs, clothing and many other possessions. They have not, for example, bought a couch for their living room. They say they do not have sufficient money to replace their things.

[38] Ms. Akler and Mr. Solway commented upon the 65-page list of contents and articles of particular value to them. They included pieces of art, wedding photographs, antique furniture, needlepoints, carvings, records, compact disks and books. They said that their belongings had been in very good condition and that Ms. Akler threw out things that were not in good shape. Some additions were made to the list of stolen articles as the plaintiffs remembered what was missing. The final replacement value estimated was $750,000. Because they had valuable things, the plaintiffs say they took special care to hire a moving company that would provide security.

[39] A significant issue in this case is the nature of representations made to the plaintiffs by Kennedy prior to them agreeing to hire Kennedy to do the move and storage. The plaintiffs led evidence of Ren and Elaine Bertrand, another couple who hired Kennedy in February 1999 to move their belongings to their new house and to store their contents for ten days. The Bertrands said they hired Kennedy because they had received a flyer from them and because they were associated with Atlas Moving Company which they had used when they moved from Montreal to Toronto some years earlier. They contacted Kennedy and Greg Peterson came to their home twice. On the first occasion, he provided reference letters and literature from Kennedy including hints about moving. He looked around and did an analysis of their contents and told them about the services available. They negotiated a price on the telephone and then he faxed to them a proposal for moving which outlined the services and a quotation of costs. The written materials they received were similar to those received by the plaintiffs. Like the plaintiffs, they found Mr. Peterson to be very professional. Neither Ms. Akler nor Mr. Bertrand was told that their articles would be stored on the same trailer as those of another family.

[40] Because the Bertrands required storage of their belongings for only ten days, they understood that they would be kept on the truck. However, Mr. Bertrand says he was told they would be kept safe in a trailer which would be in a fenced in area of Kennedy's premises, with surveillance and with someone on site 24 hours a day. Mr. Bertrand says this was reiterated to him at both meetings with Mr. Peterson, and Mrs. Bertrand confirms that, at the initial meeting with Mr. Peterson they discussed the storage facilities and that where storage was for a short time, the goods would be maintained on the truck. She says they were assured the goods would be in a fenced-in area, with security cameras and a guard present 24 hours per day. She says they hired Kennedy to do the move because Mr. Peterson made them feel comfortable, he was professional and they had a sense their goods would be secure. Mr. Peterson denies telling the Bertrands that their articles would be kept on a trailer in a fenced-in compound monitored 24 [hours] a day.

[41] Mr. Bertrand says he was told that Kennedy would be responsible for loss at 60 cents per pound or they could obtain further insurance from Kennedy or through their own insurer. The Bertrands talked to their own insurer and arranged that they would be covered.

[42] On February 5, 1999, the day of their move, Mr. and Mrs. Bertrand were surprised to learn that the movers arrived with a trailer that had someone else's belongings already on the truck. There was an argument about this with the driver but Mr. Bertrand felt he had no choice at that point but to go along with the arrangement. When the movers packed the truck, they found they did not have enough room and had to put some of the Bertrands' articles on a second truck.

[43] Like Ms. Akler, Mr. Bertrand was required to pay for the move on moving day although he had not been told beforehand. The Bertrands also signed a bill of lading on the day of the move. It contained the same limitation of liability clause.

[44] Mr. Bertrand received a message at work on February 11, 1999 from the office manager at Kennedy that the truck in which his goods were stored had been stolen. He later learned the truck had been found and that a few of his articles were left in the truck. He went to the Kennedy premises to speak to the owner and, while there, observed the set-up. He was never told where the truck had been parked and how it was stolen. Through his insurer, he later learned that the truck had been parked on the street. He has never received any reimbursement from Kennedy. However, the Bertrands were satisfied with the

insurance coverage of their losses.

[45] Mr. and Mrs. Bertrand have litigation pending against Kennedy which was instigated by their insurance company. The Bertrands, like the plaintiffs, acknowledge that they were aware of the limitation of liability clause providing for coverage of 60 cents per pound and the need to arrange their own insurance coverage.

B. The Positions of the Parties

[46] The plaintiffs take the position that they are entitled to damages for breach of contract to compensate them for the loss of their home contents, loss of income, punitive damages and interest. They argue that the defendant cannot rely on the limitation of liability clause in the bill of lading signed on February 1, 1999 by Ms. Akler. That limitation clause provided that the defendant was responsible to compensate the plaintiff for losses at 60 cents per pound. Given the weight of the goods being stored, that would result in $7,089.60 owing to the plaintiffs. The plaintiffs take the position that as a result of negligent misrepresentation made by the defendant, the plaintiffs entered into the contract believing that the defendant would provide storage of their goods in the Kennedy premises rather than in a trailer and that they would be monitored on a 24-hour basis.

[47] The defendant argues that the plaintiffs were advised to obtain their own insurance for the move and that they are confined to recovery from their own insurance company for the losses. They submit that the limitation of liability clause in the agreement should be upheld in favour of the defendant.

C. Analysis and the Law

[48] The parties entered into a contract for moving and storage services. A theft took place on February 11, 1999 and the plaintiffs' belongings, which were being stored by the defendant, were stolen. The question is whether the defendant is liable for these acts of a third party.

[49] The defence takes the position that there is a limitation of liability provision in the contract which should be enforced against the plaintiffs.

[50] In a case similar in its factual context, Rose v. Borisko Bros. Ltd. (1981), 33 O.R. (2d) 685, 125 D.L.R. (3d) 67, affirmed at (1983), 41 O.R. (2d) 606n, 147 D.L.R. (3d) 191n (C.A.), the Ontario Court of Appeal upheld the High Court decision which found that the contract made by the plaintiff for storage in climate-controlled premises equipped with a modern sprinkler system was breached when the defendant placed the goods which included valuable antiques in premises without heat or sprinklers and they were destroyed by fire. The court held that the plaintiffs were not precluded from compensation by a limitation clause in that there had been a fundamental breach of contract since the facilities in which the goods were stored were so fundamentally different from those provided under the agreement. The court also held that, alternatively, there was liability in that the representations made by the defendant amounted to a collateral warranty which induced the plaintiffs to enter the contract and overrode the exculpatory clause.

[51] Similarly, in Davidson v. Three Spruces Realty Ltd., [1977] 6 W.W.R. 460, 79 D.L.R. (3d) 481 (B.C.S.C.), the plaintiffs were given express assurances of the safety of their valuables being stored and the court found there had been a fundamental breach of contract because the defendant took no precautions for the safety of the items. Such conduct was not protected by the limitation clause.

[52] In Drake v. Bekins Moving & Storage Co. Ltd., [1982] 6 W.W.R. 640 (B.C. Co. Ct.), the court held that it was fundamental to the contract that the goods be safely maintained and that it would be inequitable to uphold a limitation of liability clause.

[53] The defence argues that the concept of fundamental breach has been virtually eliminated in Canada and the plaintiffs' authorities are suspect in light of Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321. There, the court upheld a limitation of warranty clause as enforceable but commented that such clauses may not be enforceable on equitable grounds. Chief Justice Dickson wrote at pp. 455-56 S.C.R., p. 337 D.L.R.: "I am inclined to replace the doctrine of fundamental breach with a rule that holds the parties to the terms of their agreement, provided the agreement is not unconscionable." In a thorough analysis of the doctrine of fundamental breach, the court commented on the shortcomings of the doctrine as a way of circumventing the effects of unfair contracts. "In light of the unnecessary complexities the doctrine of fundamental breach has created, the resulting uncertainty in the law, and the unrefined nature of the doctrine as a tool for averting unfairness, I am much inclined to lay the doctrine of fundamental breach to rest, and where necessary and appropriate to deal explicitly with unconscionability" (at p. 462 S.C.R., p. 341 D.L.R.). In a separate judgment written by Wilson J., she provided her view of the role of the courts in deciding whether to enforce an exclusion clause in the event of fundamental breach. Where the contractual term is unreasonable and the unreasonableness stems from inequality of bargaining power, equitable principles dictate whether the exclusion clause should be enforced.

[54] The defence argues that whether the approach taken is that of Chief Justice Dickson on the basis of "unconscionability" or that of Justice Wilson which supported the continuation of the concept of fundamental breach and that courts have a role in determining that an exclusion clause is ineffective where it is appropriate to do so, the plaintiff should not succeed in having the limitation clause set aside where parties of equal bargaining power enter into contractual terms.

[55] In his text, The Law of Contract in Canada, 3rd ed. (Toronto: Carswell, 1994), at p. 599, G.H.L. Fridman takes the view that the Ontario Court of Appeal in Kordas v. Stokes Seeds Ltd. (1992), 11 O.R. (3d) 129, 96 D.L.R. (4th) 129 (C.A.) seems to have adopted Justice Dickson's approach that there is not much life left in the concept of fundamental breach.

[56] The defence also argues that cases decided before Hunter Engineering may be overruled on the approach to fundamental breach. In Punch v. Savoy's Jewellers Ltd. (1986), 54 O.R. (2d) 383, 26 D.L.R. (4th) 546 (C.A.), the court held that a broadly worded limitation clause which included loss through "negligence or otherwise" does not extend to covering loss that may be caused by theft of an employee of the carrier. The court applied the doctrine of fundamental breach of contract and found that the clause did not apply.

[57] While that analysis may not be supported in light of Hunter, the facts are also distinguishable from the case at bar. The real question is whether the limitation of liability clause upon which the defence seeks to rely is unconscionable or whether it would be unreasonable to enforce it: Carleton Condominium Corp. No. 32 v. Camdev Corp., [1999] O.J. No. 3448 (C.C.); Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997), 34 O.R. (3d) 1, 148 D.L.R. (4th) 496 (C.A.).

[58] The application of the impact of fundamental breach to motor carrier cargo claims is discussed in John McNeil's text, Motor Carrier Cargo Claims, 3rd ed. (Scarborough: Carswell, 1997). The author reviewed several carrier cases where the courts have held that fundamental breach does not apply to a limitation of liability clause contained in a bill of lading which contemplates the possibility of loss of articles and a method to measure their value: "Thus, loss or damage to the

cargo itself cannot be a fundamental breach of contract where the contract itself provides for a measure of loss when such an eventuality occurs. The cargo claimant is more apt to have a successful argument against the carrier if its action can be framed as a case of deviation from the contract, remembering that, as has been discussed earlier, the concept of deviation relates to the manner of performance of the contract, and is not, it is submitted, measured by the result of performance" (at p. 121). In a case where the loss which occurred is the kind of loss contemplated by the limitation clause, a limitation clause by which the parties were bound by the statute will be held to survive a breach of contract: Bill Le Boeuf Jewellers of Barrie Ltd. v. B.D.C. Ltd., [1982] O.J. No. 1626 (C.A.).

[59] It is argued that, even on those grounds, it would be unconscionable and unreasonable not to strike down the limitation of liability clause in this case. The plaintiffs cite two cases of the English Court of Appeal as authority in support of their interpretation of the limitation of liability clause. In J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., [1976] 2 All E.R. 930, 120 Sol. Jo. 734 (C.A.), where the plaintiff received assurances about shipping of cargo, the court found there was a collateral warranty by the defendant shipper such that it could not rely on its limitation of liability clause. The court looked at the entire contract, the written agreement and the oral assurances and found a failure to perform according to the oral assurances given. Lord Denning struck down the limitation clause and held that the defendants could not rely on the exemption clause in the printed conditions where there had been a breach of an oral promise.

[60] Similarly, in an earlier decision, Mendelssohn v. Normand Ltd., [1969] 2 All E.R. 1215, [1970] 1 Q.B. 177 (C.A.), the Court of Appeal struck down an exception clause where the defendant made an oral promise to lock the plaintiff's car and the plaintiff's luggage was stolen. The court cited a number of authorities which supported the proposition that an oral promise or representation of fact takes precedence over a written condition because "the oral promise or representation has a decisive influence on the transaction -- it is the very thing which induces the other to contract -- and it would be unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation" (at p. 1218 All E.R.).

[61] The effect of a limitation of liability clause in a bill of lading was discussed in Fleet Express Lines Ltd. v. Continental Can Co. of Canada Ltd., [1969] 2 O.R. 97, 4 D.L.R. (3d) 466 (H.C.J.), where the court held that the bill of lading did not comprise the entire agreement and that the contract was intended to be the verbal terms agreed upon together with the conditions on the bill of lading.

[62] The defence has cited authority on the proof of evidence rule that if the language of the written contract is clear and unambiguous then no extrinsic oral evidence may be admitted to alter, vary, or interpret in any way the words used in the writing: see G.H.L. Fridman, supra, at p. 461. Relying upon Bauer v. Bank of Montreal, [1980] 2 S.C.R. 102, 110 D.L.R. (3d) 424, the defence takes the position that a collateral oral agreement may not stand if it is inconsistent with the written agreement.

[63] In the case at bar, the plaintiffs argue that there was an oral statement made regarding the type of security for storage of their belongings and that should oust the limitation of liability clause. The defence argues that there is nothing in the written agreement on security and that does not form part of the contract.

[64] The plaintiffs argue in any event that the limitation of liability clause relied upon by the defendant was not sufficiently clear to exclude consequential damages for loss of profits: see Monta Arbre Farms Inc. v. Inter-Traffic (1983) Ltd. (1989), 71 O.R. (2d) 182, 64 D.L.R. (4th) 533 (C.A.); Cathcart Inspection Services Ltd. v. Purolator Courier Ltd. (1981), 34 O.R. (2d) 187, 128 D.L.R. (3d) 227 (H.C.). In the case at bar, the plaintiffs submit that the limitation clause had no express exclusion from consequential damages and that failure of delivery of their belongings would result in loss of income as a natural consequence of the breach.

[65] The defence takes the position that it is the two corporate entities only which have made the claim for loss of income and that neither were parties to the agreement with the defendant. There is no evidence the defendants knew of their existence and a loss of profits claim would not have been foreseeable.

[66] In B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228, 26 D.L.R. (4th) 1, the facts were that a courier, unaware of the contents of an envelope, failed to deliver it on time. The third party refused to complete the transaction. The action was brought against the Crown and the courier. The court held there was no duty of care owed to the plaintiff.

[67] Estey J., writing for the majority, reviewed the principles applicable in economic loss cases and traced the growth of obligation in the law of negligence as to the nature of the interests protected and the range of potential plaintiffs. He referred to Donaghue v. Stevenson, [1932] A.C. 562, which involved physical harm caused by a negligently made product to a plaintiff not in privity of contract with the defendant manufacturer. In Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1963] 2 All E.R. 575, [1964] A.C. 465 (H.L.) the court dealt with a loss caused by a negligently made statement where the loss was purely economic. Estey J. commented upon the expansion of the principles concerning tort liability but recognized that the courts have remained aware of the need for reasonable limitations.

[68] In the case of B.D.C., the court found that there was careless performance of an undertaking by contract to perform services in a timely way but, because the courier had no knowledge of the existence of the plaintiff, nor of a class of persons whose interests depended upon timely transmission of the envelope, held that "[t]here was therefore no actual or constructive knowledge in the courier that the rights of a third party could in any way be affected by the transmission or lack of transmission of the envelope in question . . .": at p. 241 S.C.R. Thus, the requirements of proximity contained in principles set out in Hedley Byrne were not met. The court also went on to find that the damages were too remote and were not recoverable.

[69] Unless it can be shown that the defendant had actual knowledge of the special circumstances such that a reasonable person in the position of the courier would know that a failure to effect timely delivery would result in consequential lost profits, the defendant will not be liable: "It is clear therefore (there being no such communication), that if the parties had been in a relationship of contractual privity, the losses complained of would not have been foreseeable. They are no more foreseeable because the respondent sued in tort": at p. 246 S.C.R. In Thode Construction Ltd. v. Ross Brothers Cartage Ltd. (1959), 20 D.L.R. (2d) 227, [1960] I.L.R. 1-347 (Sask. C.A.), the court reviewed the principle in Hadley v. Baxendale that a plaintiff is entitled to the damages which may fairly and reasonably be construed as naturally arising from the breach of contract according to the usual course of things" (at p. 231 D.L.R.), and held that courts will be reluctant to allow loss of profits fo r failure by a courier to deliver goods since the matter depends on knowledge, actual or imputed, of the carrier and special circumstances known only to the shipper, cannot be attributed to the carrier.

[70] Whether the corporation as employer can claim loss of profits for loss of services of its employee was discussed in Genereux v. Peterson Howell & Heather (Can.) Ltd. (1972), [1973] 2 O.R. 558, 34 D.L.R. (3d) 614 (C.A.). The court outlined the nature of an action per quod servitium amisit which is based upon interference with the services given to a master by the servant. No extension of the basis of assessing the amount recoverable beyond the actual value of the services lost has been permitted. The loss of profit due to the interruption or interference of the servant's services is beyond the limits of foreseeability.

[71] In Vaccaro v. Giruzzi (1992), 93 D.L.R. (4th) 180 (Ont. Gen. Div.), a corporate plaintiff sued for loss of the services of an individual plaintiff for damages resulting from injuries sustained in a motor vehicle accident. The individual plaintiff was the sole shareholder of the company. The court allowed recovery of damages for the cost of services of a substitute of the injured servant but did not allow loss of profits due to the interruption of or interference with the servant's services.

D. Findings

[72] Both individual plaintiffs are obviously intelligent and reasonably sophisticated business people. They have worked hard and had acquired possessions which they had chosen carefully during their travels, at auctions and through their hobbies.

[73] On their move from Wychwood to Colin Avenue in 1994, they arranged storage with Kennedy knowing that their goods would be stored on the truck for a one-week period. They were aware that they had to obtain their own insurance coverage for loss or damage to the goods.

[74] When the plaintiffs made the moving arrangements in late 1998, they obtained two quotations but decided on Kennedy because it seemed to be so professional and because they had a good experience with Kennedy in the past. Ms. Akler says she did not tell anyone at Kennedy the value of their goods but emphasized the importance of certain items. She thought that this time storage would be in the warehouse for the two-week period. She believed the goods would be in a controlled area and under 24-hour surveillance. She based this on the literature received from Kennedy which discusses storage. However, that reference is to storage in the Kennedy facilities and not on a trailer. Mr. Solway says he received assurances from Nigel Coffen that their goods would be secure when they spoke by telephone on January 20. The contents of that conversation are disputed by the parties. However, I find that although they may not have discussed specifically where the articles would be stored, Mr. Coffen, in trying to retain the deal with Ms. Akler and Mr. Solway, provided them with assurances in order to preserve their confidence.

[75] Ms. Akler knew that the plaintiffs had to arrange their own insurance or buy special insurance from Kennedy. They decided to use their own insurer and relied on their own broker to value their goods and put adequate insurance in place. Ms. Akler read the bill of lading on the date of the move and says she understood it. The limitation clause in para. 5 was not a surprise to her since she knew she had to obtain coverage for the difference in the amount paid under the limitation of liability provision and the value of the goods. However, she says she signed this because she believed her property was secure. She admits that she signed, read and understood what she signed. While she was surprised to learn on moving day that her goods were to be stored on the trailer, she felt she had no choice. She was told that, for a short period of time, the goods would be kept on the truck and that it would be locked and on the Kennedy property. Based on what she was told and the literature received earlier from Kennedy, she believed that the goods would be stored securely in the warehouse.

[76] In reviewing the literature sent by Kennedy to prospective customers, it is clear that there is reference to storage in a climate controlled and monitored premises. There is no reference to storage on a trailer in the materials distributed.

[77] While the confidential moving proposal sheet sent to Ms. Akler by Kennedy makes reference to storage, it did not specify where. It is noted on internal documents in Kennedy's file that storage was to be for two weeks on the trailer. Storage in the Kennedy premises would have involved two moves of loading and unloading and was not contemplated for such a short-term arrangement. The cost of warehouse storage on pallets would have been at least double the cost of the price quoted.

[78] In that Ms. Akler and Mr. Solway were experienced in business, it is my view that they knew or ought to have known that their goods would be stored on the trailer. In fact, that was the type of storage they had arranged on the previous move. Moreover, given the cost of storage ($150 per week), it was unreasonable to expect that Kennedy was providing storage in their climate-controlled facility at such a low price. Finally, there is a copy of the Confidential Moving Proposal which the plaintiffs say they received from Kennedy and upon which Ms. Akler made handwritten notes. One notation made by her makes reference to "trailer storage" on the document faxed to her on January 15, 1999. I make this finding even though trailer storage was not specified to the plaintiffs in their meeting, in the correspondence containing the quotation or in their telephone conversations with Kennedy.

[79] In reaching these conclusions, I have considered the evidence of Mr. Peterson, whose memory I found to be selective. He testified about his usual practice and his "sales pitch" with customers while working for Kennedy. However, he was not able to remember a number of things that Ms. Akler and Mr. Solway and the Bertrands could recollect, most notably, with regard to the security of the storage facilities. On the other hand, he purported to recall certain events which were not recorded in the documentation, such as his advice to Ms. Akler about the availability of two types of storage or her selection of trailer storage. He also claims to have hand delivered to Ms. Akler a document with trailer storage specified which the defendant never produced. His memory of events differed in some areas from his recollection at the examination for discovery held in July 2000.

[80] He also acknowledged that he would see three to six customers a day and that he dealt with a number of potential clients and could not recall specific conversations. In summary, I accepted his evidence as to general practices or procedure but did not find his evidence to be reliable when it came to a specific recollection of events in this case.

[81] Accordingly, I find that the plaintiffs arranged to have their goods stored in the trailer for the two-week period. I do, however, find as fact that Ms. Akler and Mr. [Solway] were given assurances that their goods would be secure. They knew that Kennedy was affiliated with Atlas. Unbeknownst to them, Atlas was not involved in short-distance moves yet it permitted its name to be on the moving truck and on the written materials sent to the client. It was reasonable for the parties to believe that Kennedy's affiliation with Atlas gave the company certain professionalism and credibility. Furthermore, even Mr. Peterson, the salesman for Kennedy, says they discussed the attributes of trailer storage because it involved only one move of the goods and that would reduce cost and lessen the likelihood of damage. He says he described how their goods would be secure by being parked at Kennedy's facility, with landing gear put down, and all doors locked. Even accepting that there were no gates, no surveillance and no night watchman, there was the uncontradicted representation that the trailer would be parked on its parking lot with the landing gear down, the trailer removed from the truck, and the doors locked.

[82] Both Nigel and Greg Coffen testified that Kennedy had never had a theft either before February 11, 1999 or since that date. However, given their responsibility for important and valuable articles, they should have anticipated that a theft might occur if the trailer was left unattended overnight on a public road. They were entrusted with virtually all the household belongings of the plaintiffs and were required to take the steps necessary to ensure the security of their storage. It would not have been unreasonable to expect surveillance of the trailer for so long as it was parked on the street. In that this was a commercial area which would be quiet at night, some type of monitoring in addition to street lamps was called for.

[83] I find as fact that the trailer in which the plaintiffs' goods were stored was locked and its landing gear was put down, and that the trailer was detached from

the truck. However, I also find that it was intended that the storage be on the Kennedy parking lot. Greg Coffen moved the trailer to the street on February 10, 1999 to enable snowploughing to be done. I find, and it is undisputed, that at no time were the plaintiffs advised that their goods would be stored in a trailer parked unattended on a public street, nor did they consent to such an arrangement.

[84] The plaintiffs also did not consent to having their goods stored with those of another family. The plaintiffs claim that made the trailer more attractive for theft and is also a ground for breach of the contract with the defendant. I do not consider it unreasonable that the company would attempt to fill up its truck while it was being tied up with storage. So long as it could segregate the articles, it was acting reasonably in doing so. Furthermore, there was no evidence led at trial to support the plaintiffs' contention that having the belongings of two families on the trailer, made the trailer more attractive and subject to being stolen.

E. Conclusions

[85] The plaintiffs claim breach of contract and seek damages to compensate for the value of the goods which they estimate at a replacement cost of $600,000 to $700,000. At the beginning of the trial, counsel advised that the parties agreed to have the matter of damages referred to the Master if I found that there was liability on the part of the defendant. Accordingly, I do not comment upon whether the appropriate damages would be for replacement cost or actual cash value of the articles. That question, along with the necessary proof of damages, will be determined on the reference.

[86] Gayle Akler, who made all the arrangements with Kennedy and entered into the contractual relationship, admits that she was aware of the limitation of liability clause contained in the bill of lading document which she signed. In fact, she was aware of this type of exemption clause from the earlier move in 1994 and from the conversation she had with Mr. Peterson prior to the move in which they discussed getting additional insurance coverage.

[87] Ms. Akler and Mr. Solway entered into this transaction knowing about the limitation of liability clause and took steps to obtain insurance coverage for the difference with their own insurer.

[88] Generally, liability would be determined under the bill of lading and governing legislation and the person whose goods were being moved would be responsible for the difference. It is the consignor who knows the value of those goods, knows how much insurance coverage is necessary and is in the best position to protect itself.

[89] In this case, the plaintiffs elected to obtain their own insurance for the difference in the value of the goods and what they would be owed under the limitation of liability clause. Their insurance adjuster estimated a value of $170,200. The plaintiffs say they relied on this broker. The defendant takes the position that it is that the plaintiffs' failure to insure their belongings accurately which led to the financial loss and the mechanism for protection failed. Kennedy submits that it should not be the defendant who bears the loss where it was the fault of the plaintiff and/or its insurer for undervaluing the goods.

[90] The central question in this case is whether the plaintiffs must bear the loss because of a limitation of liability clause in the contract or whether that clause does not apply and the defendant is responsible.

[91] There is no question and the defence admits that the plaintiffs' loss as a result of the theft was significant. Although it has not paid what it says it owes under the limitation of liability clause, the defence admits that it owes approximately $7,000 to the plaintiffs.

[92] The contract between the parties was for carriage and storage of goods. That contract was partly written and partly oral consisting of the proposal, the oral arrangements and the bill of lading. Under the terms of the contract, failure to deliver the goods is a breach and the defendant is liable.

[93] The issue is whether such liability is limited to 60 cents per pound under the clause contained in the bill of lading or whether the defence is precluded from relying on that clause. Under the legislative framework, the carrier is liable but the limitation of liability is at 60 cents per pound: see Regulation 1088, Truck Transportation Act, R.S.O. 1990, c. T.22, s. 3. In Cornwall Gravel Co. Ltd. v. Purolator Courier Ltd. (1978), 18 O.R. (2d) 551, 83 D.L.R. (3d) 267 (H.C.J.) which involved different legislation, the court held that the conditions set out in the schedule of the Act were deemed to be part of the contract between the parties. In this case, the defence asserts that the obligations of Kennedy are prescribed by the legislation, and the conditions concerning limited liability are deemed to apply as they are authorized by the legislation and cannot be said to be unconscionable.

[94] Furthermore, where the terms of the exclusion clause are required to be included by legislation, the principle of contra proferentem does not apply to an interpretation of the clause: Madill v. Chu, [1977] 2 S.C.R. 400, 71 D.L.R. (3d) 295.

[95] This question can only be resolved by determining the terms of the contract with respect to security. As discussed above, while the only reference to storage in the defendant's literature is with respect to storage in the Kennedy warehouse, information on that service does not apply to this contract. I am satisfied on a balance of probabilities that the parties agreed that the plaintiffs' goods would be placed in a trailer for the two-week period. I find that trailer storage was a term of the contract.

[96] As to the type of security, even on the defence evidence, it is agreed that Kennedy was to provide safekeeping of the plaintiffs' belongings by parking the trailer in the parking lot, removing the landing gear and locking the trailer. The plaintiffs relied upon that term of the agreement when it entered into the contract with the defendant.

[97] The trailer storage facilities of Kennedy involved parking the trailer in its yard with the landing gear down, the air brakes locked and the trailer locked. There were no fences, no cameras and no monitoring.

[98] It was always intended, and the plaintiffs never were told otherwise, that their belongings would be stored on a trailer parked on the Kennedy premises. When they moved the trailer to the street, Kennedy did not provide any surveillance. The area was quiet and deserted at night. The trailer could have been watched, or at least, moved back to the parking lot as soon as the ploughing was complete rather than left overnight on the street. Steps could have been taken to exercise care in protecting the property that was in their possession.

[99] In cases where loss results because of the acts of a third party, the issue is which party should bear the loss? The plaintiffs argue that they entered the contract with Kennedy because they were assured of security of their belongings.

[100] In my view, it is the defendants who should bear those losses which were attributable to the breach of the contract between the parties. They cannot rely on a limitation of liability clause where it would be unreasonable to enforce it in the circumstances.

[101] As to the claim for loss of income, the evidence was that the plaintiffs were in turmoil for several months attempting to itemize their losses and purchasing necessities in order to live.

[102] Each individual plaintiff is the principal and sole director and driving force of a company. It is not surprising that each company would be affected by the work efforts made by their principals. However, there may have been other factors affecting production including responsibility for the house purchase and sale, the packing and moving, child rearing of a very young child, the economy and so on. It cannot be said that the theft of their belongings was the only contributing factor resulting in a decline in income for the relevant fiscal year. Nonetheless, the theft caused Ms. Akler to expend a significant effort in detailing losses and replacing goods. It was a major factor affecting her ability to work for a few months. Mr. Solway was also affected by the theft in terms of his productivity.

[103] I find that given the trend in the financial statements of Sparkplug from its inception in 1995 to 2001, and isolating the fiscal year of 1998-1999 when the theft occurred, there was a decline in income for Sparkplug of approximately $60,000.

[104] As to the losses experienced by Pen Station, it is admitted that Ms. Akler and Mr. Solway discussed the issue and decided Ms. Akler would concentrate upon dealing with the insurance adjuster and replacing items and Mr. Solway would concentrate on his work. However, Pen Station was also affected by the circumstances of the theft, particularly because the business was conducted in the family home. The evidence of projects available to Mr. Solway during the 1999 year which he had to turn down total approximately $34,850. There may well have been factors in addition to the theft which interfered with his ability to assume those responsibilities.

[105] However, there is a significant problem created by the fact that the claims for loss of income were made by the two corporations rather than the individuals. No amendment of pleadings was sought at trial. The defence submits that the corporations did not have a contractual relationship with the defendant. They were not parties to the contract and their losses were not contemplated by the parties at the time the contract was made. The only evidence that Kennedy was aware of the existence of the two companies is that the defendants' representative Greg Peterson surveyed the house prior to the move and noted furniture including what was in the offices in the home. I am not able to conclude on a balance of probabilities that Kennedy knew it was entering into a contract with the two companies or that it was foreseeable that losses to the company might occur as a result of a breach of that contract.

[106] The doctrine of privity of contract dates back to Tweddle v. Atkinson (1861), 1 B & S 393, 30 L.J.Q.B. 265 and received its approval by the House of Lords in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd., [1915] A.C. 847, [1914-15] All E.R. Rep. 333. In that decision, Lord Haldane L.C. stated at p. 853 A.C., "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

[107] In London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 97 D.L.R. (4th) 261, Iacobucci J. wrote [at p. 416 S.C.R.]: "On the one hand, it precludes parties to a contract from imposing liabilities or obligations on third parties. On the other, it prevents third parties from obtaining rights or benefits under a contract; it refuses to recognize a jus quaesitum tertio or a jus tertii. This latter aspect has not only applied to deny complete strangers from enforcing contractual provisions but has also applied in cases where the contract attempts, either expressly or impliedly, to confer benefits on a third party. In other words, it has equally applied in cases involving third party beneficiaries."

[108] The four justifications for the doctrine of privity are generally described as follows: (1) a contract is a personal affair, affecting only the parties to it; (2) it would be unjust to allow a person to sue on a contract on which he or she could not be sued; (3) if third parties could enforce a contract made for their benefit, the rights of contracting parties to rescind or vary such contracts would be unduly hampered; and (4) the third party is often merely a donee and a "system of law which does not give a gratuitous promisee a right to enforce the promise is not likely to give this right to a gratuitous beneficiary who is not even a promisee": Treitel, The Law of Contract, 8th ed. (London: Stevens & Sons, 1991) at pp. 527-28.

[109] It is also to be remembered that a corporation is a distinct, legal person, separate in law from its directors and shareholders. In law, it has its own, distinct personality: Salomon v. Salomon & Co., [1897] A.C. 22, [1895-9] All E.R. 33 (H.L.). The corporate plaintiffs in the case at bar have a distinct, legal identity from the two individual director/ shareholder plaintiffs.

[110] Further, there is no evidence to indicate that the personal plaintiffs were acting as agents of the corporate plaintiffs; there is no evidence to indicate that the personal plaintiffs made any representations to the defendant movers that the corporate plaintiffs were represented by the plaintiffs.

[111] Accordingly, it is my view that the corporate plaintiffs cannot sue for damages arising from the defendant's breach of contract because:

(1) the corporate plaintiffs were not privy to the contract -- they were strangers to the contract;

(2) agency principles are not applicable;

(3) consideration did not flow between the corporate plaintiffs and the defendant such that they could sue on the breach of a promise; and

(4) it was not a term, express or implied, that the corporate plaintiffs were third party beneficiaries under the contract.

[112] A further question is whether the plaintiffs are able to assert or claim in negligence for economic loss. For such a claim to succeed it must be established that there is a relationship of sufficient proximity: Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481. The corporate plaintiffs are seeking damages of economic loss arising from reliance on the negligent performance of a service for the personal plaintiff's benefit. On the facts of this case, the requirement of proximity is not met.

[113] In my view, there was no duty of care owed to the corporate plaintiffs by the defendant. The facts do not indicate that a sufficient relationship of proximity or neighbourhood existed between the corporate plaintiffs and the defendant, such that, in the reasonable contemplation of the defendant, its carelessness may likely have injured the corporate plaintiffs which could give rise to a claim for damages for economic loss. Kennedy had no knowledge of the existence of the corporate plaintiffs and that it was moving their property at the same time it was moving that of the individual plaintiffs. The defendant could not reasonably have known of the existence of a class of persons whose interests depended upon the safe transport of the property. There was, therefore, no actual or constructive knowledge that the rights of the corporate plaintiffs would in any way be affected by the move.

[114] The defence put forward an alternative argument that, while the companies may not be entitled to loss of profits, they may be entitled to a more modest

amount. An action made per quod servitium amisit is made out where someone injures an employee of a corporation and the corporation may claim in certain circumstances some compensation to replace the services of the injured person.

[115] An action per quod servitium amisit does not permit the corporate plaintiffs to recover loss of profits. The result is more modest compensation. An amount for the cost of replacement services of Sparkplug, in my view, would be two months of income at an average monthly income of $4,000. For Pen Station, two weeks of work at a monthly income of $5,000 would be justifiable. The amounts proposed by the defence were along these lines and I consider them appropriate in the circumstances.

[116] As to the plaintiffs' claim for aggravated and punitive damages, the law is clear that aggravated damages are awarded to compensate for intangible injuries in addition to normally assessed damages, and punitive damages are awarded in those rare cases to punish extreme conduct worthy of condemnation: see Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193.

[117] I find that the claim for aggravated damages is not made out and that the conduct of the defendant cannot be said to be deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature. The claim for damages on these heads is not proven on a balance of probabilities.

F. Result

[118] For the reasons outlined above, it is unreasonable to enforce the limitation of liability clause in the contract between the parties. There being a breach of contract, the plaintiffs Solway and Akler are entitled to damages for the loss of their home contents. The matter is referred to the Master to determine the value of the goods claimed. The subrogated claim of the insurer is allowed for moneys paid out under the policy to the plaintiffs. The claim for loss of income by Sparkplug and Pen Station is dismissed. However, they are entitled to recover a reasonable sum as compensation to replace the services of the two individual plaintiffs respectively in the amounts of $8,000 for Sparkplug and $2,500 for Pen Station.

[119] The claim for aggravated and punitive damages is dismissed. The plaintiffs are entitled to interest from the date the action was commenced in accordance with the Courts of Justice Act, R.S.O. 1990, c. C.43.

[120] If the parties are unable to agree on costs, they may contact my office to arrange for submissions to be made at a later date.

Action allowed in part.
