Date: 20040416
Docket: CI 01-01-25382
(Winnipeg Centre)
Indexed as: 3764525 Manitoba Ltd. v. CGU Insurance Company of Canada
Cited as: 2004 MBQB 95

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

3764525 MANITOBA LTD., o/a ROADSHOW SOUND, o/a MIDNIGHT SOUND,	)	Appearances:
	)	
	)	DAVE HILL and
plaintiff,	)	FARON TRIPPIER
	)	for the plaintiff
- and -	)	
	)	
CGU INSURANCE COMPANY OF CANADA,	)	MICHAEL G. FINLAYSON and
	)	LISA SUMKA, student-at-law
defendant.	)	for the defendant
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	APRIL 16, 2004

WRIGHT J.

INTRODUCTION

[1] At approximately 2:47 in the afternoon on Monday, April 2, 2001, an explosion occurred in the warehouse section of the building at 469 Henderson Highway. Fire resulted effectively destroying the warehouse and its contents.

[2] The entire premises at 469 Henderson Highway ("469 Henderson") were occupied by the plaintiff, a music and sound business.

[3] The defendant insured the plaintiff for fire loss and for business interruption and other incidental coverage. The plaintiff has brought this action

for recovery of its loss, pursuant to the terms of the insurance policy. The defendant has denied liability on a number of grounds, including arson committed by or on behalf of the plaintiff, false or dishonest claims for indemnification, breaches of statutory and policy conditions, and a failure to act with the utmost good faith in its dealings with the defendant. The defendant denies the plaintiff suffered damages as claimed.

[4] Liability and damages, therefore, are in issue.

[5] If a finding of arson is found against the plaintiff, the defendant will be entitled to a judgment dismissing the claim, and that will end the matter.

[6] Accordingly, I will first address the arson issue.

[7] That question involves determining:

1) whether arson has been proved; and if it has

2) whether the court can conclude the plaintiff or its representative(s) are responsible.

If arson has not been established, then, of course, there is no need to proceed to the second question of the involvement (or not) of the plaintiff, and the defendant will not have succeeded in its denial of liability on the arson defence.

LAW RE PROOF OF ARSON

[8] The onus and burden of proof in relation to both 1) and 2) lies with the defendant who must satisfy the court by the standard of a balance of probabilities.

[9] Although proof beyond a reasonable doubt is not required, the law does emphasize that before the court can find the plaintiff liable because of arson, it must be satisfied with a degree of certainty or cogency commensurate with the seriousness of the allegation. The following excerpts from only a few of the many authorities confirm this statement and enlarge on the nature of the assessment that should be made when applying the civil standard of proof in cases where a defence involves an allegation of arson or other criminal offence.

[10] In ***Dzikowicz (c.o.b. T.H.C. Enterprises) v. Dominion Insurance Corp.***, [1985] M.J. No. 95 (Man. Q.B.), Kroft J. (as he then was) summarized the position of an insurer denying liability for purported criminal acts. He said (at paragraph 6):

> The authorities dealing with insurers' denials based on purported criminal acts have been clear and consistent in defining the onus to be discharged. Proof beyond a reasonable doubt of the participation or complicity of the plaintiff is not required. Nonetheless, the inference of his participation must be established with a degree of certainty or cogency which is commensurate with the seriousness of the allegation: Hanes v. Wawanesa Mutual Ins. Co., [1963] S.C.R. 154; Bernardi v. Guardian Royal Exchange Assurance Co., [1979] I.L.R. 1-1143; Rockwood Enterprises Ltd. v. Grain Ins. & Guarantee Co. (1980), 10 Man. R. (2d) 227, affirming (1979), 6 Man. R. (2d) 299; Continental Ins. Co. v. Dalton Cartage Ltd., 25 C.P.C. 72; Olynyk v. Advocate Gen. Ins. of Can. (1984), 32 Man. R. (2d) 171; Gannon & Associates Ltd. v. Advocate Gen. Ins. Co. of Can. (1984), 32 Man. R. (2d) 1; Northwinds Service Station & Restaurant Ltd. v. Northern Union Ins. Co. (1983), 1 C.C.L.I. 256.

[11] Some eight months earlier in ***Gannon and Associates Ltd. (c.o.b. Barnacle Pete's) v. Advocate General Insurance Co. of Canada***, [1984] M.J. No. 81 (Man. Q.B.), Simonsen J. cited specific passages from two of the cases relied on by Kroft J. as follows (at paragraph 4):

Undoubtedly the burden of proof of policy violations was upon the defendants. The standard of proof, when criminal or quasi criminal conduct is alleged, was established in Hanes v. Wawanesa Mut. Ins. Co., [1963] S.C.R. 154. A lucid discussion on the subject may also be found in an unanimous decision of Court of Appeal of Ontario, Bernardi v. Guardian Royal Exchange Assur. Co., [1979] I.L.R. 1-1143 at pp. 387-88 as follows:

> "I propose to review the governing legal principles and their application to this case. The learned trial judge, in my opinion, correctly instructed himself on the applicable law by following the Supreme Court of Canada decision in Hanes v. The Wawanesa Mutual Insurance Company, [1963] S.C.R. 154. That case settled the rule that in a civil action, where the defence depends upon the proof that the other party has committed a criminal offence, the burden is discharged by proof of the fact in issue by a balance of probabilities and not the proof beyond reasonable doubt required in a criminal prosecution. The Court adopted the view of Lord Denning in Bater v. Bater, [1950] 2 All E.R. 458 at 459 that, even though the standard of proof was not as high as in a criminal charge, the degree of probability had to be commensurate with the gravity of the offence.
>
> These principles were recently applied by this Court in Karadimas v. Gilbraltar General Insurance Company, [1978] I.L.R. 3372 in a case like the present where the defence of arson was raised against a claim under a fire insurance policy. There, Martin, J.A., at p. 3374, described the degree of proof appropriate for an alleged criminal offence in a civil action in the following language:
>
> > 'The more unlikely or improbable the allegation required to be proved the more cogent is the evidence required to overcome the unlikelihood or improbability. Professor Cross in his well known work on evidence, after referring to the observations of Lord Denning in Bater v. Bater, supra, says:
> >
> > > "These words must not be taken to mean that there is an infinite variety of standards of proof according to the subject-matter with which the court is concerned, but rather that this latter factor may cause variations in the amount of evidence required to tilt the balance of probability, or

> to establish a condition of satisfaction beyond a reasonable doubt.
>
> As certain things are inherently improbable, prosecutors on the more serious criminal charges and plaintiffs in certain civil cases have more hurdles to surmount than those concerned with other allegations." ' (Cross on Evidence, 4th ed. at pages 98-99.)

I take this to be an accurate statement of principle."

[12] Just two weeks before the ***Gannon*** judgment, Scollin J. delivered a judgment in ***Olynyk v. Advocate General Insurance Company of Canada***, [1984] M.J. No. 80 (Man. Q.B.) (aff'd on appeal [1985] M.J. No. 91), a case also involving allegations of arson, and commented (paragraph 3):

> The authorities dealing with claims under fire insurance demonstrate a high level of tolerance for the improbable, but I am bound to assess the evidence on the basis that, although proof beyond a reasonable doubt of the complicity of the plaintiff in arson is not required, the inference of her participation must be established with a cogency commensurate with the seriousness of the allegation that she was a party to a criminal offence.

[13] Finally, McDermid Co. Ct. J. put it well in ***Campbell v. Waterloo Mutual Insurance Co.***, [1983] O.J. No. 910, when he described the standard of proof necessary for defendants to succeed on a defence of arson. He said (at p. 2, para. 4):

> In order for the defendants to succeed on this issue, they must adduce cogent evidence which, having been carefully scrutinized, leads the court to conclude that it was more probable than not that the fire was started intentionally by one or both of the plaintiffs, always bearing in mind the serious nature of such an allegation.

[14] I have followed the principles and approach identified in these cases in my assessment of the evidence relative to the arson issue in the present action.

[15] I propose to apply the standard of proof as set out in these authorities.

BACKGROUND FACTS

[16] It is not in issue that Kyriakos Vogiatzakis (who will be referred to as "Kyriakos" in these reasons) was the sole owner and guiding mind of the plaintiff at all material times. For purposes of the claim, Kyriakos and the corporate plaintiff can be regarded as one.

[17] Kyriakos is 31 years old and lives with his parents. He has no criminal record. In or about 1990, he graduated from a technical high school, having taken courses in radio and television broadcasting. He worked at first for his brother, Michael, who operated a company trading as "Midnight Sound", a music company providing music systems with disc jockeys and rental of music equipment for various functions, including weddings, anniversaries and socials. In 1994 he became the manager of this company.

[18] The uncontradicted evidence at trial reveals that in 1995 a break-in occurred at the Midnight Sound premises then located on Thames Avenue, in Winnipeg, resulting in the theft of all the business inventory, sound, and lighting equipment. Michael claimed $193,000 from his insurer and was paid in December 1995. Michael testified that most of the proceeds were used to purchase necessary replacement inventory.

[19] Also in 1995, Michael purchased the 469 Henderson property and moved his business to that location.

[20] In January 1998, Michael's business was incorporated to allow Kyriakos to buy it with a newly incorporated company of his own, the plaintiff in the present action.

[21] Kyriakos paid $70,000 for the assets of Michael's business, which included all inventory. He paid this from a $50,000 loan from his mother (who did not testify at the trial) and a $20,000 promissory note back to his brother. The promissory note apparently was paid off before April 2, 2001, from revenues of the newly incorporated company.

[22] The deal also involved the land and premises at 469 Henderson, which were sold to Kyriakos solely on the basis of Kyriakos (through the plaintiff) taking over an existing mortgage, which, at the time, stood at $102,000. The payments were $2,171.30 per month and thereafter were paid by Kyriakos out of revenues from the continuing business, now owned and operated by Kyriakos using the names "Roadshow Sound" and "Midnight Sound". For simplicity, I will refer to both these names together as "Roadshow Sound". By the time of the fire loss, this mortgage had been reduced to approximately $51,000.

[23] As well, Kyriakos bought a house in Winnipeg on which he obtained a mortgage loan with payments of $1,520 per month. The court was told by counsel for Kyriakos that these payments also were paid out of revenues from the Roadshow Sound business.

[24] Kyriakos acknowledged that, as of April 2, 2001, there were four judgments registered against 469 Henderson totalling $45,783.97 (including a Revenue Canada judgment in the name of his brother Michael for $36,286.57) all registered in 1999 or 2000. Title was never transferred from Michael to the plaintiff, and although no particular explanation was provided, by the time of trial it was not argued the state of title affected the insurance claim.

[25] Beyond this it was admitted on behalf of Kyriakos and the plaintiff that as of April 2, 2001 there were outstanding business debts totalling $133,775.54.

469 HENDERSON

[26] Before reviewing details relating to the incident itself, I will first describe the premises at 469 Henderson, based on the evidence of a number of objective witnesses.

[27] To assist, I am attaching to this judgment a document "A", which is a copy of a not-to-scale plan of the site filed without opposition as an exhibit at trial. I am satisfied it accurately reflects the layout of these premises. North is indicated to the left of this document; Henderson Highway is to the west.

[28] At the time of the plaintiff's loss, the building was composed of three separately constructed but united parts. At the front facing the west and Henderson Highway was a one-storey building constructed with cinder blocks/masonry stucco, and decorative bricks on the Henderson Highway side. Back of this was a two-storey structure also of masonry and stucco construction. Behind this was a combination garage/warehouse/storage area, which for easier

description throughout this judgment I will continue to referred to as the warehouse.

[29] The front single storey was composed of a reception area, offices, three small bathrooms, and the stairs that led to the second storey of the two-storey section. The main floor of the two-storey section contained a bathroom, as well as a furnace room and storage rooms. The second floor was described alternatively as unoccupied rental premises or a combination staff/conference area. There was also a basement under this part.

[30] The roofs of these two front portions of the premises were conventional built-up asphalt.

[31] The warehouse had cinder block masonry walls on the south and west sides. The west wall abutted the east masonry wall of the two-storey building. The north and east sides of the warehouse were of studded wood plywood with exterior stucco. The roof was an open wood "A" frame ceiling with asphalt shingles. The floor was concrete.

[32] The interior of the south, north, and east warehouse walls was composed of 2x4 wooden studs with exposed fibre glass insulation in between. The west wall had no insulation or studding and the cinder blocks were entirely exposed.

[33] There were three normal means of entry or exit for the warehouse. A steel overhead door sufficient for a vehicle to pass through was located on the east wall just next to the north wall. Just to the south of this, also on the east wall, was a man-door (the term witnesses used to describe a normal doorway).

Centrally located and on the west wall of the warehouse was another man-door leading into the ground floor of the two-storey section.

[34] The only other means of entry or exit to or from the warehouse was a window on the north side wall covered with plywood.

[35] Entry from the front of the premises off Henderson Highway was by a man-door that led through the reception area to a second door without locks of any kind; that door led, straight ahead, to a third door with a combination lock that opened into the two-storey building. Straight ahead from this door was the man-door into the warehouse. I will say more relative to the locks on this door later in these reasons.

[36] To the left of the combination lock door upon entry through it to the two-storey building, a furnace room was located. The west and east walls of this room were the masonry walls of the two-storey building. The east wall was the wall that abutted the west wall of the warehouse. The north and south walls were wood stud construction with drywall covering. In the southwest corner a gas water tank was located. Immediately next to this on the west wall stood a hot air furnace. Both units were operated from natural gas.

[37] Immediately next to the furnace, along the west wall, was a sump pit with a hinged metal cover that was not sealed or airtight. There was a small space between the cover and the floor frame on which it rested.

[38] The furnace room otherwise contained stored items, including cardboard boxes.

[39] The sump pit had a drain from it leading to a basement sewer. It also had an entry drain that came from two grilled catch basins in the warehouse. The two catch basins were located along the north wall of the warehouse about 10 feet apart and a short distance away from that wall. They were connected by a four inch drain pipe that in turn connected via a downward slope to the sump pit.

[40] The warehouse was heated by a suspended gas heater located in the northwest corner.

[41] Two additional gas furnaces were situate in the basement of the two-storey section and were the primary source of heat for most of the non-warehouse areas. It was accepted that neither have relevancy to the matters in issue in this action.

[42] The natural gas line entered the premises through a regulator and meter located on the exterior of the north wall of the warehouse near the intersection with the east wall. The gas line entered the warehouse about halfway up the wall via a one-inch pipe. Inside the warehouse the line remained exposed and took a 90° turn upwards changing as it rose to a two-inch pipe. The line then took another 90° turn to run west along the upper north wall to the warehouse attic area. From there it continued west and into the furnace room where it eventually connected to the first floor furnace and water heater. Before the natural gas line left the warehouse, a tributary line left the main line to connect

with the suspended gas heater. Exhibits 55, 57 and 58 are helpful diagrams that trace the interior gas line route.

PHOTOGRAPHS

[43] Before proceeding further I will note that multiple colour photographs were taken by various persons at various times depending on when they attended the scene. The photographs cover from the day of the fire up to a month or more later. Some are duplicates, but I am satisfied that all relevant photographs have been made available and are filed as exhibits, usually as appendages to the various expert or general investigative reports. I will record at this point that the photographs have been very helpful in understanding and appreciating the reports and testimony relative to what happened when the fire loss occurred.

WAREHOUSE CONTENTS PRIOR TO FIRE LOSS

[44] The warehouse was the storage area for music equipment used in the plaintiff's business, which included multiple large wood encased speakers, and amplifiers, audio visuals and cassette decks, housed in wooden boxes, set on three-inch wooden platforms placed on the warehouse concrete floor. For the most part these were located along the interior warehouse walls but some were stacked in an east-west line in the approximate centre of the warehouse. A metal frame structure with wooden shelves was also located in this central area and contained various other audio components, parts, and supplies.

[45] On the north side of the warehouse and directly in line with the overhead door (at the east end) were two vehicles, normally used in the business. They filled the space between the east and west walls in this area.

[46] The most westerly vehicle, which had been backed into place, was a Chrysler mini van. The second more easterly vehicle was a truck-like van in appearance, described in testimony as a cube van. It had been parked with its front end facing the front end of the mini van. The front of the mini van was just above one of the drain catch basins. The right side of the cube van was very close to the speaker boxes stacked next to the north wall.

ADMITTED FACTS RELATED TO ARSON ISSUE

[47] Two statements of agreed facts were filed as trial exhibits. I will summarize those admissions that are directly relevant to the arson issue as follows (there may be some limited repetition of evidence I have already identified or will refer to later):

1) Mike Rygel, an employee, arrived at work on April 2, 2001 in the morning, claiming illness, and Kyriakos drove him to St. Boniface Hospital where he dropped Rygel off about noon. Rygel did not return to 469 Henderson that day.

2) Ryan Harriott, a relative of Kyriakos who helped out from time to time, changed the door handle and associated locking mechanism on the man-door between the warehouse and the business/office section of the premises. This work was completed around noon. Harriott left this man-door locked and gave the only three keys to that lock to Kyriakos. Those keys were still in the possession of Kyriakos at the time of the explosion(s) and fire.

3) Shortly before the door handle and lock were changed, Harriott partially unloaded the cube van.

4) All the doors of the warehouse were locked and secure at the time of the explosion(s) and fire. The doors on the exterior of the warehouse could only be locked from the inside.

5) When the firefighters arrived at the fire, all the doors of the warehouse were locked and the windows were secured and unbroken. The windows were of a type which did not open.

6) On entering the warehouse, the firefighters discovered a five gallon gas can on the warehouse floor near the south side rear of the cube van in line with the rear tire on the driver's side, about five feet from the truck.

7) The five gallon gas can was found by the firefighters in the area where Ryan Harriott had been working earlier that day.

8) Neither of the vehicles stored in the warehouse was connected to the origin or cause of the fire or explosion(s).

9) At all material times between the arrival of the fire commissioner's representatives at the scene of the fire and the release of the scene, the scene was secured by police and private security personnel. During that time period, there was no alteration of the fire scene by persons not involved in or acting on the instructions of persons involved in the investigation of the fire.

10) In the course of his investigation, Ken Swan from the Fire Commissioner's Office ("the FCO") cut pieces of fabric from the tops of speakers which had been in the warehouse at the time of the fire. Those samples or exhibits and any others sent by Ken Swan or his office to the R.C.M.P. laboratory for analysis were not altered in any way between when they were taken by Ken Swan or the respective fire investigator and when they were received by the R.C.M.P. chemist who performed the analysis.

11) Richard Kooren, a fire investigator consultant hired by the defendant, cut pieces of fabric from the tops of speakers which had been in the warehouse at the time of the fire. Those samples or exhibits and any others sent by Richard Kooren to the chemist, Dale Sutherland, for analysis, were not altered in any way between when they were taken by Richard Kooren and when they were received by the chemist who performed the analysis.

12) There was no natural gas leak outside or upstream of 469 Henderson. The odour intensity of natural gas supplied to 469 Henderson at the material time was normal.

APRIL 2, 2001

[48] Kyriakos testified that when the explosion occurred at 2:47 p.m. on a normal business day, there were several others present with him in the office section of the building. He said he was with a salesman, Rodney Blanchette, who had arrived around 1:00 p.m. and who was described as a multimedia person who did video promotions. They were in Kyriakos's office having a meeting. Kyriakos testified that his manager, Carlos Fontes, was in his own office, either alone or with another salesperson who was selling perfume and cologne. Kyriakos said his brother Peter was also present somewhere in the front part of the premises. He believed the salesman had sold Peter a couple of bottles of cologne during the ten minutes or so the salesperson had been present before the explosion. He said Peter had come in on his way to see his lawyer whose office was located nearby.

[49] Otherwise, there were no others present.

[50] Kyriakos testified that earlier, in the later morning, a cousin of his, Ryan Harriott, who was an electrician, had come in and Kyriakos had enlisted him to install a new breaker in a fuse box in the back part of the office/business section of 469 Henderson. As well, Harriott had also partially unloaded the cube van in the warehouse and, on Kyriakos's direction, he had also purchased a new

doorknob and lock for the man-door between the warehouse and the office/business area which he installed before leaving around noon.

[51] Harriott testified very briefly as to these facts, having been called by the defendant. When unloading the cube van he said he noticed no unusual smell in the warehouse and had not observed a gasoline container sitting next to the cube van. He said he was 20 minutes to one-half hour in the warehouse, which I take to have been in the late part of the morning.

[52] Kyriakos also said he called in an employee, Michael Rygel, to finish unloading the cube van. However, Rygel was not feeling well and Kyriakos took him to the hospital around noon where Rygel remained thereafter. Kyriakos said he himself got back to the premises by 12:45 and did not leave until after the explosion.

[53] Around this time Kyriakos said a former manager, Joe Gallo, came in and visited for about 20 minutes but left some 40 or more minutes before the explosion.

[54] Lastly, at the commencement of the trial, Kyriakos revealed that another brother, Nick, had been present in the offices that afternoon, he thought, to pick up mail. He believed Nick had left before the explosion.

[55] Of all the people identified as being present that day, only Kyriakos and Harriott testified at the trial.

[56] At trial Kyriakos confirmed again that he had received the only three keys for the new lock from Harriott. He also stated that he had been in the

warehouse that day only when Harriott was unloading the cube van and had not noticed a smell of gasoline.

[57] Kyriakos was not able to explain the presence of the gasoline container in the warehouse after the fire.

[58] Kyriakos described the explosion as loud. At first he said he headed toward the back of the office part of the building but then decided to get out via the front door. He thought Carlos had phoned the fire department from his office. He remembered meeting Peter near the front door.

OBSERVATIONS AND INVESTIGATIONS FOLLOWING THE EXPLOSION(S) AND FIRE

[59] Although no firefighters were called to testify, it is evident from the evidence of Ken Swan, who took over the main responsibility of the FCO for the necessary investigation, that the first firefighters arrived at the scene around 2:51 and were pouring water on the fire by approximately 3:00 p.m., only 13 or so minutes after the explosion. The flow of natural gas in the gas line leading to the interior of the premises was cut off approximately 30 minutes later.

[60] Swan was the first investigator to arrive (3:00 p.m.) followed by a colleague in the FCO, Roger Gillis (3:15 p.m.). A little later, Victor Pao, of the Manitoba Department of Labour investigative arm, joined them. From that time on, over the remainder of the day and in the next ensuing few days, these investigators examined the entire premises but particularly the warehouse and the furnace room. Each testified, and that evidence and their reports are all

before the court. They consulted with each other and with other representatives of the FCO who participated in various ways, often with specific responsibilities (i.e. Brian Monkman tested the warehouse area for evidence of gasoline using a pragmatic hydrocarbon detector, as a result of which the samples referred to in the agreed facts that were subsequently forwarded to the R.C.M.P. laboratory were obtained). They also consulted and participated with representatives of Centra Gas, in particular Kevin Leathwood, who testified at the trial, and other independent consultants, in what I am prepared to accept involved a careful analysis and examination of the interior natural gas line that ran through the warehouse and into the furnace room.

[61] Swan and Gillis described the effects of the explosion(s)/fire from their observations. When they first attended, the south half of the warehouse roof had collapsed. The central portion of the south wall was collapsed outward. The contents of the warehouse were effectively destroyed by the fire. The Chrysler mini van was virtually burned up. The passenger side of the cube van cargo box was more heavily burned than the driver's side. The damage was more to the top and was progressively less moving toward the bottom. There was a notable absence of low burning in the warehouse generally. Either the same day or the next morning the investigators found evidence of an explosion in the lower part of the gas furnace in the furnace room but no sign of fire damage. The furnace was bent out of shape. The interior of the blower portion was distorted. The gyp rock on the south stud walls were blown outwards and the furnace fan door

was on the other side of the room. A piece of furnace ductwork was embedded in a nearby cardboard box.

[62] The investigators observed the cold air return ductwork was missing. They were satisfied this was the state prior to the fire loss. In consequence, when the furnace called for air, it would pull in air from wherever it could get it in the furnace room (or from the sump pit), thereby creating a negative air pressure in the furnace room area.

[63] The hinges on the sump pit cover were bent out of shape. A gasoline smell could be detected coming from the sump pit. A more noticeable gasoline odour was noted in the warehouse on April 3rd, when it was possible to walk through the debris.

[64] Aside from the furnace room damage the non-warehouse sections of the premises were undamaged, except for smoke and water damage.

[65] A natural gas leak was initially regarded as the most likely cause of what happened if it could be assumed the cause was accidental. The investigators thoroughly reviewed this possibility but soon (within three or four days) concluded leakage of natural gas was not a factor. Their combined evidence shows that after the fire the interior natural gas line leaked at piping connection points in six locations, four in the warehouse and two in the furnace room. They determined these leaks arose in consequence of the explosion(s) and fire. In the warehouse either the heat of the fire, the roof collapse or inadvertent movement of the gas line in the late afternoon of the date of the fire by Imrie Demolition, a

contractor who had been engaged to remove dangerous parts of the roof that had not entirely collapsed, or a combination of these causes were identified as the explanation for the leaks found in that part of the building. In the furnace room, the investigators came to the conclusion the explosion in the furnace had caused the gas line leading to the furnace to lift and come apart or loosen in the two places.

[66] The investigation relating to the possibility of a natural gas leak in the warehouse also considered that if that were the cause, how might ignition have occurred. It was felt the only possible source would have been the unit heater. Accordingly, this heater was carefully examined to determine if its pilot light could have ignited an accumulation of natural gas (which all agreed is lighter than air) thereby causing an explosion of sufficient power to raise the roof of the warehouse resulting in its collapse and blowing out the south wall.

[67] The investigators found no significant damage to the unit heater that would be consistent with ignition having originated within its structure. Leathwood, with 18½ years of expertise with Centra Gas, indicated the pilot light would be the location where an explosion would "take off" yet he found nothing out of place there. He said there was no evidence of corrosion in the heater, or damage to the aluminum fan blades, which likely would have melted or shown signs of melting from the heat, if this unit were the source of ignition. Leathwood also testified that he noted the gas valve for the heater was in the

closed position. Aside from this observation, the evidence of whether the unit heater was in an operating mode or not was inconclusive.

[68] The investigators quickly ascertained that there was no problem with odourant placed in the natural gas leading to and into the building to allow for detection of any leak. The odour emitted was a rotten egg smell and was of a normal level when tested after the fire loss.

[69] It can also be recorded that the various investigators checked the electric system on the premises and determined it to be intact and not a cause of the explosion(s)/fire.

EVIDENCE OF THE TWO CHEMISTS

[70] As earlier noted from the agreed facts, Ken Swan, the lead FCO investigator, forwarded samples of the carpet fabric on the tops of burned speaker cabinets to the R.C.M.P. laboratory in Ottawa for analysis. Allan Cassista, a well-qualified chemist, conducted this analysis. His report and testimony is evidence at the trial. He found that the five samples, which Swan advised were taken the day of the fire loss, all revealed the presence of gasoline. A further sample taken the same date but inadvertently not forwarded with the others also contained gasoline. These six samples were taken from three speakers on the warehouse north wall, one on the west wall, one on the south wall, and one from a speaker the location of which was not identified.

[71] Also, again, as earlier noted, another set of carpet fabric samples from the tops of speakers was forwarded to Act Labs at Ancaster, Ontario, and analyzed

by Dale Sutherland, again a well-qualified and experienced chemist. The samples were obtained by Richard Kooren, a consultant retained by the defendant. The samples were taken within a few days of the fire loss. Sutherland completed his analysis on April 7, 2001. Kooren was not called to testify at the trial, but the report and testimony of Sutherland establish he received five samples and found gasoline in four, which had been identified to him as coming from three speakers on the north warehouse wall and from one on the west wall.

[72] Both chemists, who did not know each other, were cross-examined extensively, particularly as to the need for comparison samples which had not been provided to them. Both responded impressively that these were not needed in the context of the extent of gasoline found. Both men backed up their analysis with charts and graphs identifying the characteristics distinguishing gasoline from other hydrocarbons. Both Sutherland and Cassista had the benefit of excellent, up-to-date laboratories that permitted analysis using gas chromatography and mass spectrometry, described as important forensic techniques. In later correspondence to defendant's counsel, Sutherland said his analysis utilized the latest methods and instrumentation, and in relation to the four positive results he stated, "all the necessary ignitable liquids were easily observed in (the samples) and were so prevalent that the background profile of the burnt material could barely be observed".

[73] As I say, the evidence of Cassista and Sutherland was impressive and uncontradicted. It was not weakened by the absence of comparison samples nor by cross-examination based largely on the expert evidence of Richard Steinkey, as to which I will comment a little later in these reasons. Their evidence establishes the presence of gasoline in the samples forwarded, and that, I believe, permits the reasonable conclusion that other speakers from which samples were not taken, although not necessarily all, probably contained gasoline on their fabric tops.

[74] In the result, I have no hesitation in finding the evidence of the two chemists establishes, without question, the presence of gasoline on the tops of the speakers located as indicated in the warehouse. In the circumstances, this unexplained presence of gasoline alone is sufficient to conclude skullduggery was afoot shortly before the explosion and fire, and, at the very least, preparation for an intentional fire in the warehouse was in progress.

[75] When the lab analysis results were received, it is not surprising, then, that the investigators from the FCO, and, in particular, Swan and Gillis, as well as Pao (Department of Labour) and Leathwood (Centra Gas), all of whom I will refer to hereafter as "the investigators", confirmed their already existing belief that the fire loss was not due to natural gas escape or electrical failure, and now firmly concluded arson to be the cause.

[76] Despite the testimony and expert opinion of Richard Steinkey, whose evidence I have fully considered and as I have said, I will comment on in a moment, I can record that I am entirely in accord with that conclusion.

[77] The finding that gasoline was poured on the tops of many of the speakers in the warehouse is, of course, powerful support for the conclusion natural gas or electric sources were not the cause of the fire loss and that that loss was not an accident.

[78] However, even if the unlikely coincidence of the presence of gasoline and a natural gas leak at the same time could be overcome, I would be satisfied, in any event, on a balance of probabilities, that natural gas as a factor can be excluded. This conclusion arises from my assessment of the previously reviewed testimony and reports of the expert witnesses relied on by the defendant whose observations and tests effectively remove natural gas as a possible cause.

[79] That natural gas was not a factor is reinforced by the evidence of Kyriakos himself that he did not notice the distinctive and pungent odour of escaping natural gas when he was present in the warehouse for a short time on April 2nd, when the cube van was being unloaded. It is reasonable to infer from this that no natural gas was escaping at a time not very long before the explosion(s).

[80] In the context of these facts, the investigators came to essentially the same opinion or theory as to how ignition occurred. I adopt their theory as the most likely and reasonable explanation and summarize it, as follows:

> There were two explosions at a minimum. The first of a relatively low level, that occurred in the furnace room and emanated from

> the lower part of the furnace. The second, a much greater explosion in the warehouse that lifted the roof, causing or contributing to its collapse, and blowing out a substantial portion of the south wall. In the immediate aftermath, a significant fire resulted that had the effect of demolishing whatever remained of the warehouse contents following the second explosion.
>
> These explosions were caused by gasoline vapours that originated as a result of gasoline having been poured on the tops of wood encased speakers stored in the warehouse. The vapours being heavier than air, fell into the catch basins and then flowed into the sump pit in the furnace room. From there the fumes seeped into the lower levels of the furnace and were ignited by an arc or spark related to the start up of the furnace fan motor. The flow of the gasoline vapours was significantly aided by the furnace demands for cold air from its entire surroundings due to the absence of proper cold air ducting. The ignition and explosion in the furnace then caused a flame front that flashed back through the floor drain to the warehouse igniting the gasoline vapours collected there and resulting in the major explosion and fire. The gasoline soaked fabric on top of the speakers then contributed to fueling the fire.

[81] Swan opined the likelihood of a third explosion, immediately following the first, in the sump pit as the flame front returned to the warehouse. This could explain the evidence as to the bent hinges on the sump pit cover. However, I do not believe it is necessary to make a definitive finding here. Whether an explosion in the sump pit occurred or not does not change the basics of the investigators' theory of how the fire loss occurred.

[82] The combination of the elimination of other possible causes, the existence of the gasoline as described, the unexplained presence of the gasoline container in the warehouse after the fire when it was not there less than three hours before, the evidence of the smell of gasoline in various parts of the warehouse noted by the investigators as they examined the debris, and my acceptance of

the theory of the investigators relative to ignition, overwhelmingly establishes arson.

PLAINTIFF'S EVIDENCE RE THE ARSON ISSUE

[83] The evidence introduced by the plaintiff does not weaken the foregoing findings.

[84] Kyriakos simply denied knowledge of any arson, or of the existence of gasoline in the warehouse, or of any explanation for its presence. His testimony, even if accepted, provided no help to the plaintiff on the arson issue. Aside from Kyriakos' evidence, the only witness called by the plaintiff who gave evidence related at all to this question was Richard Steinkey. As my reasons thus far indicate, I have had no difficulty in easily determining from all the other evidence before me that arson has been proved.

[85] The plaintiff's position against a finding of arson then depended on Steinkey's evidence. That evidence has not affected the conclusion I otherwise have reached.

[86] Although I found Steinkey to be a man of integrity whose testimony and reports could be relied on as truthful and honest, I was unable to accept his capacity and reliability as a professional witness in this case to be sufficient to match or weaken the expertise of the many others who conducted investigations here. I stress the words "in this case" because in other circumstances he might prove to be a competent and dependable witness. In this case, however, he was faced with a very late start, he did not have the same resources available to

other investigators, and he did not avail himself of the information and consultation that I am satisfied was available to him from those other sources. Most importantly, I did not feel his own experience compared favourably with that of the other investigators. Steinkey gained his experience through a military background and from 1989 to 1996 as fire inspector of grain elevators for an insurance company. I have concluded he has engaged in consulting work since then, although this was not identified. Relative to the daily fire investigation activity of the other investigators – at least in recent years – Steinkey's opportunities to gain practical experience appeared to be considerably less. He relied on American standard guidelines and a text that although of value and benefit, did not substitute for the more hands-on background of the others. The guidelines are a publication of the National Fire Protection Association 921 (NFPA 921) relating to fire and explosion investigation, and the text is entitled Kirks 5th edition, an American writer, on the same subject.

[87] Steinkey testified and reported as to his belief the fire loss was due to accidental cause arising because of a natural gas leak in the warehouse. He theorized the ignition point was the pilot light in the suspended natural gas heater. He believed that when the natural gas, being lighter than air, accumulated in the vicinity of this unit heater in sufficient quantity, the explosion in the warehouse occurred.

[88] Steinkey challenged the opinions of the fire commissioner's representatives and Pao that gasoline could have been the cause, firstly because

he did not accept the presence of gasoline in the warehouse before the fire, and secondly because he felt that gasoline vapours being heavier than air would have sunk to floor level and upon being ignited would have left significant evidence of low level burning from the fire. Any low level burning that was observed, Steinkey believed, could be attributable to droppings from burning roof asphalt or melted plastic material from some of the equipment being stored. These materials, he also suggested, contained hydrocarbons that could be mistaken for gasoline, and thus faulty and mistaken analysis as to the presence of gasoline could arise. This problem, he believed, was accentuated by the failure to send comparison samples to the chemists.

[89] He argued that the absence of low level burning in the warehouse supported natural gas as the cause because the accumulation of the natural gas would be higher in the warehouse rather than lower and, therefore, the explosion resulting from the ignition would be in the upper levels.

[90] As to the first challenge, my acceptance of the evidence of the chemists and my finding that comparison samples were unnecessary means that the fact of the presence of gasoline has been satisfactorily established and, therefore, Steinkey's opinion is fatally weakened at the outset.

[91] As for Steinkey's second argument, I have concluded that the absence of low level burning is equivocal and that I would require much more in the way of expert evidence on this subject before I could come to a definitive finding one way or another. Swan offered an opinion to suggest an explosion from gasoline

fumes does not necessarily mean low level burning. Steinkey himself, in cross-examination, seemed to agree that this could happen in circumstances where the vapour at a lower level may be too rich to ignite and at a higher level too thin to ignite. From this it could be argued the in-between explosive range would not be located at the lowest level and thus could explain the absence of low level burning. Nevertheless, it is sufficient simply to decide that the second argument of Steinkey has not been sustained.

[92] Steinkey did not commence his assessment of the explosion(s)/fire until more than two weeks after the event. He did not have the opportunity of visiting the scene the day of the occurrence or within a few days thereafter as the other investigators had. He relied on photographs that were limited in what was viewed/compared to the direct examinations of the investigators. He arrived at his first two opinions as to cause without a full appreciation of the undisputed facts.

[93] For example, initially he did not appreciate that there had been an explosion at all in the lower interior of the furnace in the furnace room and attributed the damage he saw to be unrelated to the fire loss. Later he decided there probably had been an explosion in the furnace room but that it was in the gas line and due to escaping gas after a first explosion in the warehouse. Still later he decided the damage to the furnace resulted from a positive pressure wave created by the explosion in the warehouse that moved through the drain to the furnace room. In my opinion, none of these explanations fit the facts.

[94] Steinkey did not consult with any of the other investigators before arriving at his initial opinions and instead awaited their reports. This despite Swan's testimony that the FCO was always willing to discuss the progress of their investigation if requested.

[95] I think the failure to interact with the investigators was a mistake and left Steinkey without complete knowledge or awareness of the facts – and indeed the theories advanced – relevant to provide the full picture for consideration in order to arrive at a final determination of the cause of the fire.

[96] When the investigators' reports did become available, Steinkey had to vary his opinions somewhat, although he remained steadfast in his view natural gas leakage caused the explosion and fire in the warehouse.

[97] Steinkey's criticisms of the conclusions of the investigators and chemists largely depended on his reliance on statements contained in the NFPA 921 Guidelines and Kirks 5th edition text, *supra*, to which he referred exhaustively in all his reports and his testimony. However, the information contained in those references does not question the capacity of the chemists to draw the conclusions they did as to the presence of gasoline. Nor did the references demonstrate any significant failures on the part of the investigators in the conduct of their investigations. The references encourage the importance of identifying and protecting the scene, and of not reaching premature conclusions as to cause. On both counts there can be no quarrel with the work and approaches of the investigators.

[98] Steinkey raised factors such as the absence of search for an ignition device or the absence of fire effect in the furnace room, or that the smell of gasoline could have come from hydrocarbon odours not connected to gasoline, all of which I cannot accept as reasonable grounds for rejection of the investigators evidence and opinions.

[99] Steinkey felt that a failure on the part of the investigators to test the gas line tributary connection to the unit heater for possible leakage should reduce or reject reliance on the investigators' opinions that no inside natural gas leak existed prior to the explosion/fire. I do not agree. The unanimous view of the investigators was that a test of this sort was unnecessary given that the connections were all examined as was the line itself and no problems were observed or suspected.

[100] Other weaknesses in respect of the evidence of Steinkey:

1) he was unable to explain why there would not be more physical damage to the unit heater, particularly to the aluminum fan blades, if, as he suggested, that was the likely point of ignition relative to his theory of a natural gas leak cause;

2) as late as the trial, Steinkey still did not believe the unexplained five gallon gasoline container was evidence for consideration on the issue of arson;

3) he admitted that within his first day at the scene, around April 17, 2001, he had decided arson was not the explanation of the

explosion(s)/fire, yet in the course of his reports and testimony otherwise he emphasized the importance of keeping one's mind open and not rushing to any conclusions;

4) although he had been critical of the investigators for not engaging in adequate reconstruction before commencing their investigation, at trial he agreed that when the investigators first attended everything was in the same position as when the fire was being extinguished and, therefore, no reconstruction was necessary;

5) under cross-examination, Steinkey agreed if it was determined gasoline was on the tops of the speakers, his natural gas escape theory could not explain that;

6) perhaps most significantly, Steinkey's early conclusion that the fire was accidental was reached without knowing where the suggested natural gas leak occurred (he never did make a definitive finding here), and without any information as to what steps had been taken by the FCO to test for gasoline and, therefore, whether there were or would be laboratory analysis results to consider;

7) Steinkey also agreed with defence counsel that he had arrived at wrong conclusions:

   (i) in having the interior gas line in the wrong location;

   (ii) in respect of the damage to the furnace;

(iii) in thinking the unit heater might have been struck prior to the fire by one of the vehicles; and

(iv) in deciding at first there was only one explosion;

8) in Steinkey's final written report of December 12, 2002 he makes two statements that effectively illustrate the weaknesses he revealed as an expert witness. In that report, long after the findings and reports of the chemists were available to him, Steinkey still argued that gasoline was not present in the samples they received. He acknowledged, however, that he himself was not a chemist and agreed that normally he would defer to their analyses. Despite this:

(i) he expressed an opinion that samples of carpet that had been subject to burning for over 40 minutes would not show gasoline as any gas remnant would be consumed very quickly and, therefore, it would be "impossible" to obtain gasoline sample results; and further

(ii) at one point he made the astounding statement, "There's not a shred of evidence to suggest an arson fire or criminal intent". Whether or not he accepted the evidence of the chemists, there was certainly a substantial basis from that source alone to suggest the possibility of arson.

The unqualified character and absolute certainty of these two statements in the face of the information Steinkey had before him when they were made reflects adversely on the entirety of his evidence;

9) Steinkey's initial, and apparently superficial, view of the damaged furnace and furnace room led him to think the damage was caused by someone who had disconnected the natural gas pipes. He said he "could find no evidence of heat or fire in that room so I eliminated that as part of an arson related fire". This failure to make a much better assessment of the furnace and furnace room, particularly on the assumption he was seeking to solve the cause and origin of the fire, again reflects badly on the quality of his overall investigation.

[101] For all the above reasons then, Steinkey's evidence is of no help to the plaintiff's case and I again confirm my conclusion that arson has been established.

THE SPEAKERS FOUND BLOCKING THE MAN-DOOR

[102] As I complete this part of my reasons for judgment I will briefly comment on the evidence that after the fire two speakers were found blocking the man-door leading from the warehouse to the other sections of the premises. The blockage was such that the man-door could only be opened from the office side a few inches into the warehouse without coming in contact with the speakers.

[103] On these facts it is not unreasonable to conclude that if human action was the cause of the position of these speakers it only could have occurred:

1) if someone in the garage had placed the speakers in the position in which they were found, and then exited by another means than the man-door; or

2) if someone on the office side of the door had managed to pull the speakers over with a sheet or blanket.

The #1 alternative can be eliminated because of the conclusive evidence that no other means of exit from the warehouse existed, given the state of the warehouse just prior to the fire. Of the two choices the most probable is #2, which, if any reliance were to be placed on it, is not at all helpful to the position of the plaintiff.

[104] Another possibility is that no human action was involved; rather that the explosion in the warehouse somehow moved the speakers or directly or indirectly caused them to be moved from another location. The photographs do reveal considerable disruption to many of the speakers from their relative orderly positioning prior to the explosion. If it were critical to this case to make a finding, I would likely decide against human activity as being involved, despite the absence of any expert evidence.

[105] Nevertheless, I believe it is unnecessary to resolve this question and because any explanation is unduly speculative, I came to no conclusion as to the reason for the position of the speakers by the man-door after the fire. This

means that evidence has not affected my determination of the arson issue, one way or another.

WAS THE PLAINTIFF OR ITS REPRESENTATIVE A PARTY TO THE ARSON?

[106] I find that the evidence conclusively establishes by the proper civil standard of proof the involvement of Kyriakos in a material way in the arson.

[107] After approximately 12:00 noon the man-door between the warehouse and the other sections of 469 Henderson was locked and Kyriakos had the only three keys. He retained possession of the keys from the time he received them from Harriott until after the explosion, and he did not return to the warehouse or unlock the man-door during that period.

[108] There was no other entry or exit to or from the warehouse available. The only way to enter or leave the warehouse was through the man-door, unless a person was in the warehouse and opened a door from the inside.

[109] When the explosion occurred, no one was in the warehouse nor was anyone in the warehouse when Kyriakos received the keys from Harriott.

[110] These are all facts clearly established from the evidence. Kyriakos does not take issue with them, but simply denies any knowledge of the presence of the gasoline in the warehouse and of his involvement.

[111] The only inference to be made from these facts and the findings I have made that gasoline was poured on the speaker tops is that Kyriakos was a principal participant.

[112] I am satisfied it can be inferred the gasoline was poured after Harriott locked up and gave the keys to Kyriakos. Harriott noticed no smell of gas, or the red gasoline container sitting in the open area, before this. Nor, for that matter, did Kyriakos who was also in the warehouse only shortly before.

[113] Someone had to have or be given access after Kyriakos received the keys and before the explosion. Only Kyriakos could provide that access.

[114] Whoever poured the gasoline clearly had the intention to commit arson. The close proximity in time of this action to the explosion(s) and fire and the direct linkage of the explosion(s) and fire to the gasoline vapours places liability on the person or persons who spread the gasoline and caused the vapours.

[115] The fact that the person or persons may not be directly involved in the ignition of the vapours was not argued in this civil trial – and rightly so. If, as I think most likely, the fire loss occurred somewhat prematurely, due, for whatever reason, to interruption of the arson preparations, the extent and nature of those preparations and all the surrounding circumstances clearly justify a finding of responsibility for the consequences of the introduction of the gasoline.

[116] If there were any question in this regard, I am satisfied, in any event, that the insurance policy clearly enough excludes a party found to be involved in this way. The policy says that coverage is excluded "for any dishonest or criminal act on the part of the insured or any other party of interest, employees or agents of the insured ..." caused "directly or indirectly" by any of those persons or parties.

[117] No other reasons are needed to support my finding implicating Kyriakos, but I will briefly refer to opportunity and motive and my impression of the credibility of Kyriakos.

[118] Both opportunity and motive should be recorded as not lacking here. Opportunity is self-evident. Kyriakos had the only keys and I conclude plenty of opportunity during the early afternoon to enter the warehouse or permit others to have access. As for motive, there is substantial evidence of the financial straights of the plaintiff's business as of April 2, 2001 to fairly conclude a fire loss insurance recovery would have been very beneficial for the plaintiff's continued operation. The agreed statement of facts contains the admission that much of the inventory claimed as lost in the fire was aged in the context of changing electronic music equipment needs. This somewhat antiquated condition of the plaintiff's equipment assets, the judgments against the real property, and the huge trade and business debts indicated a crying need for more investment capital. The losses suffered over the two preceding years reinforced this need. No evidence was presented to suggest any investment source existed; on the contrary I was left with the impression the only possible source was Kyriakos, whose testimony indicated he had nothing to contribute. The plaintiff was in a bankrupt state as the detailed and depressing report of the chartered accountancy reviewer, Grant Thorton, reported (filed as an exhibit and not disputed).

[119] That report covered a full review of:

(a) the financial statements of the plaintiff for the nine months ending September 30, 1998, for the year ending September 30, 1999, for the year ending September 30, 2000, and for the period October 1, 2000 to March 31, 2001;

(b) the tax returns of Kyriakos for 1996 through 1998;

(c) excerpts from an examination for discovery of Kyriakos; and

(d) certain agreed facts which included the outstanding debts of the plaintiff as of April 2, 2001.

[120] Grant Thorton's conclusions included the following:

(a) the business was operating at a substantial loss in the two year period prior the fire;

(b) after 1998 necessary financing of the business was by non-payment of trade accounts (which, as earlier noted, as of April 2, 2002 totalled $133,776);

(c) the losses the business was incurring were resulting in a growing deficit and a significant cash burn;

(d) new investment was required but no source for same could be identified;

(e) the fair market value of the business as at April 2, 2001 was nil;

(f) the business was insolvent by the time of the fire.

[121] Further in support of motive can be added to all the above the fact the plaintiff's business taxes were never paid by the due date in 1998, 1999, and

2000. In each year a distress warrant had to be issued by the City to collect these debts. That, in fact, reflected Kyriakos's business approach. He quite openly admitted that he financed the plaintiff both before and after April 2, 2001 by "juggling" creditors' claims and bookings and other business deposits.

[122] Kyriakos did not present himself as a credible witness. He made no attempt to explain how gasoline could have been poured on the speakers without his knowledge or involvement while he was in possession of the only keys giving access. I concluded his failure to make any effort here was due to the reality no valid explanation could be offered.

[123] He appeared unduly casual in the explanations he did attempt. He justified including in his insurance claim after the fire the costs of lost business from cancelled bookings that later were shown to be blatantly false, on the grounds that he and his manager, Carlos Fontes (who was not called to testify), were just confused. He claimed full recovery costs for furniture and equipment that a cleaning at the very most would have restored. This included faulty CDs that he did not identify as faulty and other CDs that remained safe and sound in his office after the fire. His explanation, "I don't know why I would have claimed for them ...".

[124] Kyriakos agreed that under the terms of his insurance policy he was bound to provide any information reasonably required for investigating or verifying his claim. Shortly after the fire, the insurer's representative asked Kyriakos to tell him everyone who was present at the premises the day of the

fire. Initially he did not mention the presence of his bother Peter. He failed to mention that his brother Nick was also there and did not provide this information until the start of the trial, years later. When asked for an explanation, Kyriakos said he felt this information was not relevant.

[125] The "Nick" factor had added significance when a police tape recording of a June 27, 2001 conversation between Kyriakos and Carlos Fontes, which revealed a statement by Carlos that "Nick popped in" prompted the reply from Kyriakos, "No they don't know about that. He just came along or whatever. They never even heard of him coming."

[126] Three weeks later, on July 16, 2001, there was another tape of a conversation when Nick called Kyriakos to tell Kyriakos that the arson department had called him (and left a message to call back). After discussion relative to Carlos's attendance earlier at the police office the following exchange occurred:

> K. VOGIATZAKIS: It's still like four months anyways man. It's but anyways, that's why the they were asking Carlos maybe that's what they're calling you about, you know what I mean?
>
> N. VOGIATZAKIS: Oh yeah.
>
> K. VOGIATZAKIS: Like you weren't there that day?
>
> N. VOGIATZAKIS: Uh I don't know now.
>
> K. VOGIATZAKIS: It's been uh like four months ago man.
>
> K. VOGIATZAKIS: As far as I'm as far as I'm concerned,
>
> N. VOGIATZAKIS: Mm hmm
>
> K. VOGIATZAKIS: I don't re- I don't remember you being there, but again that's four months ago.

N. VOGIATZAKIS: Yeah.

K. VOGIATZAKIS: You know what I mean.

[127] In cross-examination defendant's counsel effectively countered Kyriakos's suggestions that four months later Nick might not remember being at the premises "that day". Counsel put to Kyriakos the imaginary situation of Kyriakos being present at his brother Michael's funeral home on a day when it blows up and then asked:

> Q If you – if it blew up and you were there that day, do you think you'd be able to remember it four months later?
>
> A If I was in his funeral home?
>
> Q Yeah. And it blew up.
>
> A Would I remember that? I don't know.
>
> Q You don't know.
>
> A Depending on the situation, I guess.
>
> Q Explosions common in your family?
>
> A No.

[128] It is evident from these exchanges that Kyriakos was concerned that information as to the presence of Nick at 469 Henderson on April 2, 2001 not be revealed. At the trial, Kyriakos could offer no reasonable explanation for this concern. The end result is that all this has contributed to my general impression he had something to hide about the day's events on April 2, 2001.

DISMISSAL OF CLAIM

[129] Arson then having been proved against the plaintiff by virtue of the finding of involvement of Kyriakos as a party to the arson causing the fire loss, the plaintiff's claim against the defendant insurer is dismissed on that basis. It is, therefore, unnecessary to explore the other defences raised by the defendant insurer.

[130] However, in passing, I will record that had it been necessary I would have rejected the plaintiff's claim on the ground of failing to exercise good faith in its dealings with the defendant following the loss. In a number of important areas, some of which are noted in these reasons, the plaintiff breached that obligation. Those breaches were substantive and cannot be excused by simply faulty paperwork or honest mistake, or inadvertence otherwise. Nor can they be remedied by any statutory remedial provisions. As I have already noted, the plaintiff had a legal responsibility to deal in good faith with the defendant. It did not do so.

DAMAGES

[131] Although there will be no award of damages, nevertheless I will record as well as I can from the evidence, the damages I would have awarded had I found the defendant liable under the insurance policy.

The Policy Coverage

[132] The policy is described as a composite mercantile policy providing extensive coverage for fire and/or explosion loss to real property, equipment,

and stock. The policy included supplemental coverage for specified matters up to certain limits.

[133] The policy also contained a replacement cost endorsement providing the insured with the right to choose between payment of the actual cost value ("ACV") for the loss of the property insured, or the replacement cost. The endorsement was subject to the usual terms, which included the requirement that replacement be effected with due diligence and dispatch by the insured on the same site as the loss location, before the insured was entitled to payment of the insurance monies. The endorsement did not cover stock and other specified contents but did apply to equipment.

Replacement Law Applicable

[134] The only question of law raised in relation to the damage has to do with the issue of replacement. That issue is identified in the decision of Scollin J. in ***Olynyk***, *supra*.

[135] In that case, the claim arose as a result of a fire loss. It was accepted that arson was the cause of the fire, but it was held the defendant insured had not proved to the required standard the involvement of the plaintiff. Therefore, the plaintiff was entitled to recover under the policy.

[136] The trial judgment was issued some three and one-half years after the date of the fire (there were actually two fires, one four days after the other). The question arose at that late date as to the plaintiff's rights for replacement of the destroyed house per the coverage to that effect in the policy. The insurer

argued that it should only have to pay the actual value ($23,000) versus replacement cost ($75,000 being the policy limits) because the plaintiff had not proceeded to rebuild with reasonable dispatch after the fire in accordance with the policy requirement that the plaintiff rebuild with due diligence. The plaintiff argued because the insurer had in effect repudiated the policy by denying coverage, the plaintiff should not be bound by this requirement.

[137] Scollin J. responded to these arguments by finding the plaintiff had not abandoned any intention to replace and, therefore, should be permitted to have 60 days from the date of the judgment to so elect; otherwise the actual value of $23,000 would be the plaintiff's total entitlement.

[138] Scollin J. reasoned (paragraph 17):

> However, an insurance company which wrongfully repudiates the contract and refuses to make any payment at all cannot defeat the claim of the insured to be indemnified against the costs of actual replacement simply because the insured has not exercised due diligence in getting on with the rebuilding. The breach by the insured is overshadowed by the much more basic breach by the insurer. In this case the repudiation by the insurance company, however understandable, turned out to be unjustifiable, and it is very much a smudged finger which the company points at the insured for delaying the decision to rebuild. It is not inequitable that an insured person who has paid the premium set by the company for replacement indemnity should be able, when the risk materializes, to have a fair opportunity of deciding what to do in the light of the funds which will be available. Complete repudiation by the insurance company cripples the anticipated freedom of action of the insured.

Scollin J. relied on:

- ***Donald A. Foley Ltd. v. Can. Indemnity Co.***, [1982] I.L.R. 1-1556;
- ***Jureidini v. National British and Irish Millers Insurance Company, Limited***, [1915] A.C. 499

- ***Jensen v. Grenville Patron Mut. Fire Ins. Company***, [1978] I.L.R. 1-1028;
- ***Gosselin v. State Farm Fire & Casualty Co.***, 41 O.R. (2d) 641, (varied at 46 O.R. (2d) 34).

The judgment of Scollin J. was sustained on appeal – [1985] M.J. No. 91.

[139] In ***Netzel v. Zurich Indemnity Co. of Canada***, [1994] M.J. No. 452 (Man. Q.B.), Duval J., having rejected the defendant's allegations of arson, granted a right of replacement although over four years had elapsed from the event. The issue raised in ***Olynyk*** was not specifically addressed but clearly Duval J. took the ***Olynyk*** route in similar circumstances.

[140] I, too, am prepared to accept this approach and, in fact, would enlarge somewhat on the reasons of Scollin J. and comment that there is in fact no breach at all by the insured of its policy obligation to exercise due diligence in getting on with rebuilding, in the face of a wrongful repudiation by the insurer. That obligation only comes into force when there exists, in the words of Scollin J. "a fair opportunity of deciding what to do in the light of the funds which will be available". That opportunity no longer exists in the event of repudiation. It is not a question then of a breach by the insured being overshadowed by a much more basic breach on the part of the insurer; rather, the unjustified repudiation is the only breach.

[141] In these circumstances, when the issue of damages arises for the unjustified repudiation, it is unreasonable to hold that the insured should not be

prevented from making the election it has not had the opportunity of making earlier. In that event, the failure of the insured to replace reasonably expeditiously after the loss cannot be argued as a failure to mitigate.

"As If" Damage Findings

[142] In the context then of this view of the law, I will now record my observations as to damages:

1) I would have permitted the plaintiff to exercise the option of choosing either to have the warehouse, as well as any equipment or furniture lost in the fire and properly entitled to be replaced, replaced at present day costs, or to accept an actual cash value (ACV) valuation as of the date of the fire with interest based on ***The Court of Queen's Bench Act***, S.M. 1988-89, c. 4 – Cap. C280 interest provisions, from that date to the date of payment. As in ***Olynyk***, I would have allowed the plaintiff 60 days from the date of judgment to make this election.

2) I find I am unable to arrive at any specific valuations relative to the loss of property subject to a replacement right:

   (a) insofar as the warehouse building is concerned if replacement cost were chosen, then the costs would depend on figures available when that election was made, which are not before me. If ACV were the election which would involve a market value assessment around the date of the

fire, the same problems exists. No information in that regard is contained in the evidence;

(b) as far as any personal property loss is concerned, which I have concluded would be the speakers and other equipment destroyed in the fire in the warehouse, there is cost information in the documentation filed, but the evidence does not adequately allow me to identity the specifics of the loss, e.g. what exactly was in the warehouse. The plaintiff is claiming a loss in excess of $300,000. If in fact there was equipment worth that amount, at today's prices, in the warehouse, I need to be supplied with reasonable proof that it existed. Given the very low valuations in the plaintiff's own financial reports for the sound equipment around $30,000 only, before the fire, admittedly after depreciation and capital cost allowance, I would need much more information and argument before attempting to value the warehouse contents, either on a replacement or on an ACV basis.

There is reference to the plaintiff's production #20 in the agreed statement of facts (para. 10) relative to the age of equipment identified therein. It is unclear to me whether this is intended to admit more than that or not, but without

additional explanation and evidence it is not sufficient itself for a valuation of warehouse contents.

3) It will be observed that I have indicated the replacement right may only be exercised in relation to what the policy terms permit to be replaced. This means that I would not have included the non-warehouse section of the building at 467 Henderson or any of its contents (except for the furnace) as eligible for replacement. There was no destruction here to justify a claim for replacement. Limited repairs and overall clean-up costs to deal with smoke and water damage were all that were required. Under the insurance policy terms, this claim then must be based on actual value around the date of the loss. The clean-up and repair costs as of June 19, 2001 were estimated by Winnipeg Building and Decorating Ltd., a firm retained by the defendant. Including removal of debris, this estimate of $49,814 reflects an acceptable measure of the costs involved. In my opinion that is an adequate and fair allowance to cover restoration of the non-warehouse section together with most of its contents. I would have added another $2,000 to allow for cleaning costs not necessarily covered in the Winnipeg Building estimate. In the result, an award here would have been rounded off at $52,000. This would include, of course, any possible claim under the policy for office contents loss.

4) I would not have recognized the validity of the plaintiff's claim for telephone replacements, for computers, or for 23 sets of CDs. All these items were in the office section of the premises and were not damaged. Although the computers apparently were seized, and remain seized, by the police, that does not justify a claim for their loss. The CDs, totalling 1,234 in all, were not only undamaged in the fire but they were largely faulty products and worthless to the plaintiff's business, in any event.

5) The plaintiff would have been entitled to damages related to the necessity of moving to alternate premises for a reasonable period of time while the needed repairs and clean-up at 469 Henderson should have been undertaken by the plaintiff in mitigation of its damages. I have decided that period can be fairly fixed at six months. After that time, the plaintiff could have re-established occupancy and but for the absence of the warehouse could have continued its operations from the old location. I fix $8,000 as a reasonable allowance for the six month period based on the plaintiff's rental costs at the alternate premises.

I would have provided compensation for rental of warehouse substitute premises during the absence of the warehouse but once again no evidence is before me to allow calculation of a cost figure. However, I can indicate the formula I would have followed to

determine an appropriate award here. I would have allowed the necessary rental cost of the substitute premises through to the election date if the plaintiff chose the replacement option. If it chose actual or market value, then, of course, the allowance would have been that value of the warehouse at the time of loss plus interest at ***The Court of Queen's Bench Act*** rates to the date of payment.

6) The plaintiff has claimed for loss arising from limited business income, a defined coverage included in the policy. The foundation for this claim is that the plaintiff incurred $43,037 in increased business operational expenses due to the fire loss. The sum of $4,288 of this amount relates to the purchase of music CDs presumably because of the faulty CDs that, although not lost in the fire, could not be used in the business. This does not justify a claim under the limited business income provision. The remaining $38,749 is identified by the plaintiff as the excess over the previous nine months for equipment rental. Without better evidence as to the details of exactly what was rented and confirmation that what was rented was to replace the inventory lost in the fire, and given the very negative financial condition of the plaintiff's business just prior to the fire, it is impossible to calculate a proper allowance

here. Accordingly, I would not have made any award under this heading.

7) Finally, I would have awarded $4,564 as claimed for accounting fees related to work arising because of the fire loss, $3,635 for an exterior sign for the alternative temporary premises, and $1,723 for related advertising costs. I agree with the submission on behalf of the defendant that a credit of approximately $3,400 should be allowed the defendant for vehicle costs. It is true another vehicle was rented to replace the vehicles lost in the fire, but the cost of this rental over the claimable period should take into account the maintenance costs saved which exceeded the rental costs. Accordingly, I would have reduced the damages otherwise awarded in this paragraph by the $3,400 excess.

[143] I would not have allowed the plaintiff's claim for fire inspection costs of $8,793 because I have been unable to connect it to the fire loss. It appears to arise from charges to the plaintiff for services by Steinkey.

[144] To conclude, I again record that the plaintiff's claim is dismissed, and I award costs in favour of the defendant in accordance with the Court of Queen's Bench tariff.

_____J.