IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Stuart & Stuart Trust v. Royal and Sun Alliance Ins. Co. of Canada, [2004] NSSC 58*

Date: March 12, 2004
Docket: S.H. No. 156651
Registry: Halifax, NS

Between:

John T. Stuart, as Executor of the Will of Audrey E. Stuart and the Audrey E. Stuart Trust

Plaintiffs

v.

Royal and Sun Alliance Insurance Company of Canada

Defendant

Judge: The Honourable Associate Chief Justice Michael MacDonald

Heard: December 15, 16, & 17, 2003, in Halifax, Nova Scotia

Written Decision: March 12, 2004

Counsel: John Kulik & Tracy Bastow, *McInnes Cooper for the Plaintiffs*

W. Agustus Richardson, *Huestis Ritch for the Defendant*

By the Court:

[1] The Plaintiffs, sued their Insurer, seeking to recover the costs incidental to an oil leak at their home.

BACKGROUND

[2] In 1981 Mrs. Audrey E. Stuart's husband died. She was 70 at the time. With her children grown, she decided to carry on alone in her family home located at 1560 Larch Street, Halifax. She did so until 1998 when she suffered a debilitating illness rendering her incapacitated. Forced to leave her home, she entered a nursing home where she lived until her death in 2001.

[3] While living alone on Larch Street, Mrs. Stuart, for a good number of those years was vexed by a perplexing smell of oil. She seemed to tolerate this smell which by all accounts was confined to the basement.

[4] Upon Mrs. Stuart's departure from Larch Street, arrangements were made to have the property sold. During this process the oil smell was more thoroughly investigated. The results were not good. Unfortunately, what was for many years a nuisance turned into a clean-up project costing in excess of $143,000.

[5] Upon discovering the magnitude of the problem, Mrs. Stuart (through a family trust which held the legal title) turned to her Insurer for indemnity. She claimed under both the primary or "home protection" provisions, as well as the third party "personal liability" provisions.

[6] The Insurer denied coverage under the "Home Protection" provisions, asserting that the claim was filed years after the loss occurred and, therefore, well beyond the policy and statutory limitation periods. In response, the Plaintiffs rely on the discoverability rule; maintaining that (despite the persistent odour) the true nature of the leak was not discovered until the 1998 investigation. On this basis the action would be timely.

[7] Regarding the "personal liability" provisions, the Plaintiffs submit that they were required by the Nova Scotia Department of Environment to remediate the property. As such, they submit that the leak represented a third party loss (to the Government) which, again, did not occur until 1998. The Defendant, in response,

submits that the Plaintiffs pro-actively fixed the problem in order to sell the property. While the Government may have eventually ordered a remedy, it made no official claim and filed no such action. In other words, the Defendant asserts that there was never a third party claim as envisioned by the policy.

ISSUES

[8] There is no issue about the property being insured at all relevant times. In other words, over the years, the Defendant insured the perils upon which the Plaintiffs now rely. On the "Home Protection" claim, the key issue involves when the "prescription clock" began to tick. In other words when did the Plaintiffs know (or when ought they have known) that they had an insured loss? Was it when Mrs. Stuart first noticed the smell of oil, when the 1998 investigation revealed the source of the odour and the severity of the problem, or sometime in between? This issue involves an interesting analysis of the discoverability rule as it applies to contracts of indemnity. Additionally, the Defendant has briefly raised alternative issues about whether this loss was caught by the perils actually covered.

[9] The "personal liability" issue involves an analysis as to what constitutes a third party claim under the relevant policy. In other words to establish coverage, does there have to be an expressed third party loss and consequential demand, or can they be inferred? Can the facts of this case be considered a "personal liability" peril covered under the policy?

[10] Finally the Plaintiffs seek punitive and/or aggravated damages together with solicitor-client costs; all of which is disputed by the Defendant.

ANALYSIS

The "Home Protection" Claim

[11] In my analysis, I will begin by considering the discoverability rule including a review of how it has been applied in cases similar to the one at Bar. I will then review the facts in some detail in an effort to determine what the Plaintiffs knew (or ought to have known) about the leak and when. Then, I will be in a position to answer the ultimate question: When should the Plaintiffs have filed their claim against the Defendant?

The Discoverability Rule

[12] The discoverability rule is grounded in common sense. No one would quarrel with the proposition that plaintiffs should commence their actions within a reasonable time period following the loss. These time limitations are understandably prescribed by statute and by the contract of insurance. The relevant legislation in Nova Scotia is the *Limitations of Actions Act*, R.S.N.S., c. 258, s. 1. (consolidated to October 29, 2003) amended 2003, c. 1, s. 27].

[13] But what happens when the loss is insidious, and the plaintiff is unaware of its existence? It would certainly be unfair to enforce filing deadlines when the plaintiff is not even aware of the loss. What about a plaintiff who is aware of a loss, but not its extent? In other words what if, on the surface, the damage appeared trifling but, underneath, there existed very extensive damage with serious consequences (the proverbial "tip of the iceberg")?

[14] To address these types of problems, Canadian Courts have held that a cause of action does not accrue (and the "prescription clock" does not start ticking) until the plaintiff knows (or with reasonable diligence ought to have known) the facts which comprise the cause of action. In other words the plaintiff must by applying reasonable diligence, "discover" the cause of action before the filing deadlines apply.

[15] The leading case dealing with this rule is the Supreme Court of Canada decision of *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147. At paragraph 77, Le Dain, J. directed:

> I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the *Nova Scotia Statute of Limitations*, R.S.N.S. 1967, c. 168.

[16] The Supreme Court of Canada elaborated on the policy reasons behind the rule in *Novak v. Bond*, [1999] 1 S.C.R. 808. Beginning at paragraph 65, McLachlin J. (as she then was) explains:

> 65 Over the last several decades, however, many legislatures have moved to modernize their limitations statutes, most of which were formerly based on diverse collections of centuries-old English statutes...As part of this process, renewed attention has been given to ensuring that the limitations statutes are framed in a manner that addresses more consistently the plaintiff's interests, not just those of the defendant. This trend has also been reflected in the more balanced way that courts have sought to interpret these statutes. Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action: see *Kamloops (City of) v. Niels*,[1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *M. (K.), supra*; *Peixeiro, supra*. Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably.
>
> 66 Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in *Murphy, supra*, "[a] limitations scheme must attempt to balance the interests of both sides" (p. 1080). See also *Peixeiro, supra*, at para. 39, per Major J.

[17] In the case at Bar, the Defendant suggests that the discoverability rule applies only to tort and not contract. Counsel for the Defendant explains at paragraph 48 of his pre-trial brief:

> First, the rule of “discoverability” is a doctrine that applies in the law of *tort*, not of contract. While a limitation period for a claim in tort commences on the date the plaintiff became aware or ought to have become aware of a particular loss, in *contract* the limitation period commences from the date the loss (that is, the breach of contract) actually occurred.

[18] In advancing this submission, the Defendant relies on two Nova Scotia cases. They are: *MacCulloch v McInnes, Cooper & Robertson*, [1995] NSJ No 185 (CA) and *Layes v. Chisholm*, [1998] NSJ No. 416 (TD); aff’d [1999] NSJ No. 66 (CA)

[19] In *MacCulloch* for instance Matthews J.A. at paragraph 69 identified the issue:

> 69 The respondents agree that the limitation period for a tort action runs from the date when the material facts on which it is based have been discovered or ought to have been discovered by the appellant by the exercise of due diligence. They do not

> cross-appeal from the chambers judge's finding that time began to run on the limitation period for tort in late December, 1986. They urge that in an action based on contract, the cause of action existed from the period when the breach of contract occurred, that is, here, in the latter part of 1981, when the respondents were the appellant's solicitors respecting the agreements to sell the two properties. If that submission were valid, the action in contract would be statute barred as some 12 to 13 years passed from that date in 1981 and the notice of application in this action.

[20] Then at paragraph 80, Matthews, J.A. concludes:

> 80 In my opinion the law in respect to the applicable rule respecting actions in contract survives the judgment of the Supreme Court of Canada in *Rafuse*, that is, *the time begins to run as of the date of the breach*. The breach here occurred in the latter part of 1981. [Emphasis added.]

[21] It must be noted that in *MacCulloch* and *Layes* (like *Rafuse*, *supra*) the contracts in question involved solicitor/client relationships, and included concurrent tort allegations (where the discoverability rule would nonetheless be available to the plaintiff.). Furthermore, the alleged breaches of contract would have occurred simultaneous to the loss and, in any case, during the respective retainers. The case at Bar, however, involves a contract of indemnity. The loss did not trigger a breach of contract. Any breach of contract would only occur after the Defendant refused to indemnify. If that were the test, the Plaintiffs would have filed their claim well within the limitation period. Therefore, a proposition that the cause of action begins at the time of the breach does nothing to help this Defendant's case.

[22] This distinction between service contracts and contracts of indemnity was addressed by the New Brunswick Court of Appeal in *Callaghan Contracting Limited v. Royal Insurance Co. of Canada* (1989), 97 N.B.R., (2d) 381 (C.A.) [Leave to appeal dismissed by the Supreme Court of Canada (1990), 105 N.R. 80n]. At paragraphs 12 and 14, Stratton, C.J.N.B. noted:

> [12] Royal contends that the discoverability rule as applied in the *Rafuse* case does not have application to an action framed solely in contract as was the present action. As Royal put it, the Court in *Rafuse* "neither decided nor expressed its opinion regarding the application of the discoverability rule to cases based on contract". In this respect it is to be noted that the parties in the *Rafuse* case agreed that the discoverability rule was not applicable to contractual actions. This concession is made clear by the following statement by Mr. Justice Le Dain found at p. 217 of the *Rafuse* decision:
>
> > "As I indicated earlier, the appellant conceded that if its recourse against the respondents was in contract only its action was barred.

> As will appear, the limitations issue ultimately turns on whether the discoverability rule is to apply to the appellant's cause of action in tort."

...

> [14] At the hearing of the present appeal, the Court brought to the attention of counsel the recent decision of the Alberta Court of Appeal in *98956 Investments Ltd. (Receivership) v. Fidelity Trust Co.* (1988), 89 A.R. 151 (C.A.). In that case Harradence, J.A., speaking for the Court, stated that it was his understanding of the *Rafuse* decision that the discoverability rule as set out by the Court in that case was not meant to apply to actions in contract. But perhaps more important for the purpose of this appeal he also said this at p. 158:
>
> > "Arguably, the question of limitation periods must be addressed differently when dealing with contracts of indemnity. Because the very nature of a contract of indemnity is that it is a reimbursement obligation for an amount of damages that has actually seen suffered, it would seem to me that no cause of action can even arise until the extent of the lass has been quantified."
> >
> > (emphasis added)

[23] At paragraph 23, Stratton C.J.N.B. concluded:

> [23] In the light of the jurisprudence to which I have referred, I would conclude that under clause 14 of the multi-peril policy issued by Royal to Callaghan, the limitation period did not commence to run until the nature and amount of the City's claim against Callaghan had been determined.

[24] In light of the above, I find that the discoverability rule does apply to contracts of indemnity. Therefore, as directed by LeDain J. in *Rafuse (supra)*, I must determine "when the material facts on which [the claim] is based have been discovered or ought to have been discovered by the Plaintiffs by the exercise of reasonable diligence"

The History of the Oil Leak

[25] With Mrs. Stuart now deceased, it fell mostly to her son John to explain the history of the oil smell. John lived close to his mother and visited there regularly. Although Mrs. Stuart was an independent lady, John did, when asked, assist her with some of her affairs; including dealing with this oil smell. I also heard briefly from Mrs. Stuart's daughter and son-in-law, Nancy and Bentley Fullerton regarding their perception of the smell over the years. They would have visited less frequently; about once a month.

[26] A smell was first detected in 1984 when the boiler on the oil furnace was replaced. Their plumbers, S. Cunard and Company, left a mess in the basement. John and his son cleaned this up after Cunard refused to do so. The smell abated to some degree, but still persisted. John spoke to Cunard for advice and they recommended a bleaching process for the basement floor followed by painting. This was done, but the smell persisted. Throughout this time the family attributed the smell to the 1984 boiler mess.

[27] However in 1986, the oil supply tank was replaced. This large 1000 gallon tank was stored underground beneath the garage floor. The old tank was not removed at that time. The oil left in it was pumped into the new 250 gallon tank placed outdoors and above ground. The smell persisted. Family members insisted that the smell at all times was confined to the basement. In fact, Bentley Fullerton suffers from an environmental illness with a significant intolerance to petroleum products. He stated that, during his various visits to the home, he sensed nothing on the main level or anywhere else on the property except the basement. I accept this evidence.

[28] Despite the smell being confined to the basement, it is clear that John on behalf of his family was troubled by this, and he turned to Cunard for answers. It is also clear from John's correspondence to Cunard, that after 1986, he was looking to the old oil supply tank as the source of the problem.

[29] His letter of October 20, 1993 [*Exhibit 1, Tab 41*] provides an interesting history of the problem from the family's perspective. It is highly relevant, and I reproduce it here:

> 20 October 1993
>
> Michael J. Savage
> General Manager
> S. Cunard & Co Limited
> PO Box 128 Halifax, NS
> B3J 1R6
>
> Dear Mr. Savage:
>
> Re: Audrey E. Stuart
> 1560 Larch St, Halifax, NS

Ever since S. Cunard and Company commenced business over a hundred years ago, my family has been a customer. This relationship has been amicable and, until recently, has been completely satisfactory. One possibility that comes to mind is that, until recently, the dealings have always been with a male customer. The difficulties, perhaps coincidently started when your Company began dealing for the first time with an elderly widow in our family.

In 1984 Mrs Stuart needed a new furnace. It was installed by your Company but, short of removing the old boiler, little was done to return the area to its previous condition. In fact, my son and I had to spend two days cleaning up dirt, soot and oil from the basement.

The new boiler began to leak water. Your Company was contacted but denied it was the responsibility of Cunards. A plumber was called and, while he was quite prepared to correct the problem, was adamant that it should have been repaired by the company that installed the furnace.

In 1986 *the original oil tanks [sic] sprang a leak*. Cunards installed a new tank but the transfer of oil from the old tank took the better part of two months. Instead of quickly removing the oil, a minute pump was set up that worked at the speed of a snail. Mrs Stuart had to spend a number of days watching to see that it didn't overflow. I too spent a day watching the never ending pumping of oil.

The basement continued to smell of oil. After scrubbing the floor the odour persisted but Cunards denied any responsibility. After numerous telephone calls, an expert called on behalf of Cunards to say that the solution would be to scrub the basement with Javex and water. At considerable expense this was done. The floor was then scrubbed again and given two coats of paint - but the scent persists. It is interesting that the smell is stronger in winter (when the furnace is on) than in the summer.

As a side issue, the bottom then rusted out of the hot water heater, possibly hastened from being immersed in water a few years ago.

This is a brief summary of what has transpired over the past eleven years, but no doubt your file contains the full details. The net result is that, while Cunards has been the sole custodian of the heating plant, *there is a persistent smell of fuel oil in the basement* and Cunards denies any responsibility. This situation has created a very dissatisfied long term customer.

Before taking further action, I would ask that you state your position, in writing, with regard to the persistent oil fumes in the basement of the houses [sic]. If you deny responsibility, please outline your reasons for doing so. I would appreciate your response before the 15th of November 1995.

Yours truly

J.T. Stuart
Manager [Emphasis added]

[30] Two aspects of this letter are particularly significant. Firstly, it corroborates the assertion that the basement is the source of the smell, and it shows that the family suspected the old oil supply tank as the source of the problem.

[31] In testimony before me, John Stuart confirmed that he called Cunard's about this problem three times in the summer and fall of 1986, and again in August of 1990. The is corroborated by his computer memo that was exhibited at trial [*Exhibit 1, Tab 42*].

[32] In the early 1990's an exhaust fan was installed in the basement to reduce the smell. After that the smell just seemed to be tolerated.

[33] Interestingly, in the summer of 1994, the Defendant, in fact, sent an inspector to the Stuart property to assess its risk. Mr. Michael Kempton completed his inspection on September 7, 1994 [*Exhibit 1, Tab 48*]. His task, typically, was to check the plumbing, heating, roof and electrical for potential hazards. Mr. Kempton confirmed that he would have reported a strong smell of oil, had he detected one. Although he had no specific recollection of this particular inspection, (based upon the reports his inspection generated [*Exhibit 1, Tabs 48 and 49*) he was able to confirm that he had made no note of any such oil-related problem.

[34] The next event was the 1998 investigation performed incidental to the sale of the house. As stated, it revealed significant latent damage to the property. In essence, the soil and ground water surrounding the house, and even under the concrete basement floor, was contaminated. The remediation effort was enormous. It involved removing all of the contaminated soil. To access the soil under the house, the concrete floor had to be broken and removed in a slow tedious process. The parties, in their admissions [*Exhibit 4*] agreed that the remediation costs incidental to the oil leak totalled $143,346.84. The remediation process also revealed the source of the leak. It was the old oil tank under the garage floor which was drained in 1986. When it was removed in the remediation process, it was empty and clearly corroded with many holes [*Exhibit 2, Tab 69, Appendix 2, Photo 4*].

Is the Plaintiffs Claim Statute-Barred?

[35] With these facts, and with the above case law guiding me, I must now determine when the cause of action accrued. If it accrued back in the mid-eighties, when the smell was detected, the claim is statute-barred. If it accrued at the time of the 1998 investigation, it is not barred because the action was filed in June of 1999, within a year of the investigation.

[36] In approaching this question, it is clear to me that the Plaintiffs had no idea of the extent of the loss until the 1998 investigation was complete. It is the family's evidence, which I accept, that they had no idea the soil and ground water surrounding the home was contaminated. I find that, throughout, they thought it was a problem somewhere in the basement that would be categorized as a nuisance.

[37] In their claim, the Plaintiffs are not seeking to be compensated for a vexing smell. They are seeking to be indemnified for a major remediation project resulting from contaminated soil. The material facts are that they had a major environmental catastrophe on their hands, and this was not known until the 1998 investigation. Therefore, referring back to *Rafuse, (supra),* the Plaintiffs did not know the material facts upon which [the claim] is based until the fall of 1998, when the environmental investigation was completed. This would make the claim timely.

[38] However, that does not end the matter. The more difficult question is: By exercising "reasonable diligence", *should* the Plaintiffs have been aware of the claim back in the mid-1980's when the smell of oil remained persistent, despite extensive efforts to bleach and paint the basement floor. A first reaction would be "surely they must have known that they had a major leak or at least should have investigated it further". However, the situation was not that simple. I find, after carefully considering all the evidence in this matter, that the Stuart family, without the benefit of hindsight, was reasonably diligent in handling this problem. I have reached this conclusion for five main reasons. They are:

1. There was this 1984 distraction that the furnace repair was the source of the problem. In this regard, I find that the smell was first noticed in 1984 when the furnace boiler was being replaced. In reaching this conclusion, I have considered Defence counsel's effective cross examination of John Stuart, suggesting that the smell actually started in 1986 coincidental to the oil tank replacement (making an oil tank leak more likely). I realize that in his correspondence to Cunard, and at one point in his discovery,

Mr. Stuart acknowledged that the oil tank was the source of the problem. I am, also, aware that the real estate appraisals and environmental reports suggest that Mr. Stuart reported having direct knowledge of an oil leak. I also note that in his October 20, 1993 letter, *(supra),* Mr. Stuart seemed to suggest that the bleaching and painting exercise followed the 1986 tank replacement. Despite all this, I find that he did detect a smell in 1984 and he, initially at least, attributed it to an oily mess left by plumbers.

I say this for several reasons. First Mr. Stuart was a truthful witness who recounted events as best he could. Of course he could have been mistaken. Yet, he has a specific memory of the boiler being removed in 1984. He recalled that it had to be cut in half. He recalled he and his son spent two days cleaning the oily mess. The Cunard invoice [*Exhibit 1*, *Tab 40*] shows the boiler installation in December of 1984. He recalls the subsequent phone calls to Cunard together with the scouring and painting.

While it is now clear that the oil tank was the source, the 1984 oily mess was a distraction, making the oil tank, initially at least, less obvious as a source.

2. I have already found as a fact, that the oil smell was confined to the basement. This is consistent with all the evidence. This would also distract someone from concluding that the oil tank under the garage was the source. It also made the problem less obvious. The basement was not used much and Mrs. Stuart lived in the house alone. It was a problem that seemed to attract pockets of attention as opposed to being an everyday issue.

3. The Defendant’s own inspector viewed the home and, I infer from the reports, detected no smell of oil. If anyone would be looking for such a risk, it would be Mr. Kempton.

4. Reasonable diligence in the 1980's and even 1990's is not the same as today. The mere smell of oil is a scary spectre in today’s world. As the environmental expert testified, today the authorities are much more

vigilant. Everyone seems much more conscious of, and alert to, this type of problem.

5. Finally, the Stuart family appears to be diligent and conscientious generally. Mrs. Stuart was very capable and independent; a person who according to the evidence, would not let things slide. John Stuart was persistent in his quarrel with Cunard. If the potential for a major leak were so obvious, I would have expected him to act promptly. Again it would be wrong to impose hindsight when considering this question of due diligence.

[39] For all these reasons, and applying *Rafuse, (supra)*, I find that "the material facts on which [the claim] is based...[were not] discovered or ought to have been discovered by the Plaintiffs by the exercise of reasonable diligence" until the fall of 1998. The action was filed in June of 1999. It is, therefore, timely and not barred by contract or statute.

Other Coverage Issues

[40] The Defendant, also asserts that, even if the action was timely, this loss is not covered by the respective policy. These submissions are succinctly set out at paragraphs 42 to 45 of its brief:

42. Only the "dwelling" (Coverage A), not the "premises," was insured against "all risks of direct physical damage."

43. In other words, the Royal policy did *not* insure the soil *under* or *around* the "dwelling." It insured only damage to the house; not to the soil on which it stood.

44. Even assuming that the soil would be covered, a loss was excluded from coverage if it was caused by "inherent vice, latent defect, mechanical breakdown, *deterioration, rust or corrosion,* extremes of temperature, wet or dry rot, mold or *contamination.*"

45. The claim would accordingly be excluded as being caused by deterioration, rust or corrosion, or contamination.

[41] In considering these submissions, I am guided by some common law principles of interpretation involving insurance contracts. They support a finding of coverage in the face of ambiguities. The leading case on point is *Simcoe & Erie General Insurance Co. v. Reid Crowther & Partners Ltd.*, [1993] 1 S.C.R. 252. Beginning at page 268, McLachlin, J. (as she then was) explained:

> 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
>
> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.
>
> [Emphasis added]

[42] Turning to these submissions, my first task is to identify the relevant policy. The leak obviously occurred before the bleaching and the painting procedure because the smell persisted after that exercise. This cleaning, I find (according to John Stuart's evidence, which I accept), occurred before the oil tank was replaced in 1986, and after the December 1984 boiler installation; making 1995 the likely year. With the initial smell attributable to the December 1984 mess, the leak, therefore, most likely occurred sometime after that, but as noted, before the 1985 bleaching, and in any event before the old oil tank was emptied. According to the Cunard statements [*Exhibit 1, Tab 40*]; the old tank was emptied in 1986. Through deductive reasoning, the leak, therefore, most likely occurred sometime in the year 1985; after the December 1984 boiler installation, and before the beaching exercise. On this basis, I find, the relevant policy to be the one covering December 13, 1984 to December 13, 1985. [*Exhibit 1, Tab 13*].

[43] This policy is known as the *Select Homeshield Policy*. Its terms are set out in *Exhibit 1, Tab 9.* I refer specifically to page 2, under the heading "Your Home". It provides that coverage includes more than just the building. It includes the "property surrounding your home". This would, therefore, include the contaminated soil and ground water.

[44] Turning to the alleged exclusion for *deterioration, rust, corrosion, or contamination* I note at the outset, that at page 4, "damage caused by bursting...of

your...fuel tank" is covered. In this part of the policy at least, there is no specific exclusion for *deterioration, rust, corrosion, or contamination.* In this regard, I accept Plaintiffs counsel's submission that if any such exclusion did exist, applying the *Simcoe and Erie, (supra)* principles, only the actual thing *deteriorated*, etc. would be excluded i.e. the old worthless oil tank. I find, therefore, that this loss was a covered peril.

[45] In light of all the above and subject to policy limits, the Defendant must indemnify the Plaintiffs in the amount agreed upon; namely $143,346.84.

[46] Turning to the policy limits issue, I again turn to the relevant policy. As set out in *Exhibit 1, Tab 13*, the specified limits are $105,000. Additionally, there is an inflation allowance as set out in *Exhibit 1, Tab 9*, page 1:

> **Inflation Allowance.** Your Homeshield Policy automatically protects you against inflation at no extra cost to you. We'll increase the limits of your coverage on your home, personal belongings (except special items) and additional living expenses by 2% after your policy has been in effect for 3 months. And by another 2% when your policy was been in effect for 5, 6 and 9 months. This means that at the end of 9 months these limits will have been increased by a total of 8%. Moreover, on the renewal date of the policy, we'll automatically adjust these limits by a percentage which will reflect the latest indexes published by Statistics Canada relating to residential building construction prices and relevant consumer (non-food) prices.

[47] This benefit allows for an 8% increase over the year. It is impossible to know exactly when, during the policy period, the leak occurred. However, my best attempt is to set the inflation figure at 4% or five months into the policy. Therefore, I find the policy limits to be $109,200 and the Plaintiffs are entitled to judgment accordingly.

The "Personal Liability" Claim

The Nature of the Coverage and the Alleged Statutory Responsibility

[48] In advancing this claim, the Plaintiffs in essence assert that by remediating the property, they were responding to an obligation by the Government as set in its environmental protection legislation. The policy's personal liability coverage is set out at page 6 [*Exhibit 1,Tab 9*]:

> Your Homeshield Policy covers you for claims made against you for accidental physical injury to others or damage to their property...
>
> We'll defend any suit brought against you, even if it is groundless, and pay all costs of your defense, including investigation and court costs. We may investigate, negotiate and settle any claim or suit if we decide this is appropriate...

> **Where You're Protected**
> Your Personal Liability protection covers you when you're responsible for unintentional physical injury or damage. You're covered whether the injury or damage occurs in your home or your spouse's or at any place you are temporarily renting or staying.

[49] The relevant Provincial legislation is the *Environment Act,* S.N.S. 1994-95, c. 1, s. 1. S. 71 sets out the alleged responsibility:

> Any person responsible for the release of a substance under this Part **shall**, at that person's own cost, and as soon as that person knows or ought to have known of the release of a substance into the environment that has caused, is causing or may cause an adverse effect,
>
> (a) **take all reasonable measures** to
>
> (i) prevent, reduce and remedy the adverse effects of the substance, and
>
> (ii) **remove or otherwise dispose of** the substance in such a manner as to minimize adverse effects;
>
> (b) take any other measures required by an inspector or an administrator; and
>
> (c) **rehabilitate the environment to a standard prescribed or adopted by the Department.**
>
> [Emphasis added]

Is This a Personal Liability Claim Under the Policy?

[50] The Plaintiffs' submission on this issue is straight forward: Under the *Environment Act,* they were "responsible for unintentional damage" to the Province's ground water.

[51] I have carefully considered this interesting argument. In so doing, I find that this is not the type of risk covered by these policy provisions. In reaching this conclusion, I again have been guided by the pro-coverage principles set out in *Simcoe and Erie, (supra)*. Despite the *contra proferentum* rule and the direction to broadly construe coverage provisions, I must try to give "effect to the reasonable expectations of the parties". When I consider this personal liability package, it is clear to me that its purpose is to protect insured's from third party lawsuits, either threatened or filed. In the case at Bar, the remediation work was completed to make the property marketable. The fact that it may have been eventually ordered by the Government does not render it a covered peril. The following reference in the policy should not be taken out of context: "[You are covered] when you're responsible for unintentional physical...damage". This clause falls under the heading "*Where* you are Protected".

[52] This clause should not be seen to expand what is otherwise clear - this coverage is designed to protect against actual third party claims. While I know of no Canadian authorities on point, at least one U.S. State Supreme Court refused to extend similar provisions to include this type of loss. See: *City of Edgerton v. General Cas. Co.* 1994 Wisc. LEXIS 83.

[53] The Plaintiffs' claim under the "personal liability" provisions is, therefore, denied.

The Punitive/Aggravated Damages Claim

[54] Finally, the Plaintiffs, in their Statement of Claim have pleaded punitive and/or aggravated damages in addition to solicitor-client costs; alleging the Defendant exerted bad faith by denying coverage.

[55] On the facts of this case, there is no merit to these submissions. This was a difficult case to resolve, and the Defendant was well within its rights to ask the Court to determine the matter.

CONCLUSION

[56] The Plaintiffs shall recover $109,200 together with reasonable pre-judgment interest and (subject to any offers to settle) party-party costs.

[57] On the question of interest, there is no reason to deny the Plaintiffs the same from the date they made the payments to the present. The investigation and subsequent remediation work commenced in the fall of 1998 and continued into 2000. Because the payments were made over time, I set 4.5 years as the appropriate time period for the Plaintiffs to receive simple interest.

[58] Furthermore (subject to the parties presenting submissions and or evidence to the contrary on the appropriate rate) I would be inclined to set a reasonable annual rate at 4% or 18% overall.

[59] I trust the parties can agree on costs. My inclination would be to set costs according to the Standard Scale 3 in Tariff "A" for an "amount involved" of $110,000; together with reasonable disbursement to be taxed.

[60] Should the parties be unable to resolve the issue of party-party costs, or the interest rate issue, I invite written submissions (together with proof of any offers to settle), first by Mr. Kulik on or before March 29, 2004, and in response by Mr. Richardson on or before April 8, 2004. In any event, when these outstanding issues are resolved, I direct Mr. Kulik to present the Order, after Mr. Richardson has had an opportunity to consent as to form.

Michael MacDonald
Associate Chief Justice