

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**Citation:** Nassim v. Perth Insurance Company, 2009 NSSC 256

**Date:** 20090827  
**Docket:** Hfx No. 241552  
**Registry:** Halifax

**Between:**

Afif Nassim

Plaintiff

v.

Perth Insurance Company

Defendant

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**Judge:**The Honourable Justice C. Richard Coughlan

**Heard:**March 16, 17, 18, 19, 20, 23, 25 and 26, 2009 at Halifax, Nova Scotia

**Written Decision:**August 27, 2009

**Subject:** Insurance - Payment of Insurance Proceeds

**Summary:** Afif Nassim lives in the United States. He is the patriarch of his extended family. His brother Nabil lives

in Halifax, Nova Scotia. In Halifax, Afif owns a business, Gigantic Video, and a house at 924 McLean Street. The income from the business is used to support Afif's family in Halifax, including Nabil's family, who live in the 924 McLean Street property. On March 31, 2003, there was heavy rain in Halifax, flooding the basement of the McLean Street residence which was insured as "owner-occupied". At the time of the flood, Afif had not been in Halifax since at least 1996.

Nabil and his wife Marilyn Nassim told their insurance agent at the time the insurance was purchased in 1999 Afif travelled back and forth between Halifax and the United States. When questioned by an adjuster after the flood Nabil and Marilyn told him Afif lived half the year in Halifax and half the year in the United States. The adjuster was told Afif owned all the contents of the residence except the personal effects of Nabil and his family. Perth denied coverage based on misrepresentation on the application for insurance and the claim for personal effects was not for personal effects of the named insured.

**Issues:**

Has the plaintiff right of action because the proof of loss was not filed within one year?

Are the named insured's relatives "insured" under the policy?

Was the insurer acting in bad faith or with malice?

Is the plaintiff to be compensated for loss of use and enjoyment of the basement of the dwelling?

Is the insurer liable for the destruction of personal property removed from the basement?

Is this an appropriate case for solicitor and client costs?

**Result:**

On the facts, the plaintiff is relieved from the requirement to file a proof of loss within one year from the date of the loss.

Afif Nassim lived in Pennsylvania. He did not live at 924 McLean Street. In fact, he had not visited Halifax, on his own evidence, since 1996. His brother and sister-in-law, their children and his nephew were not living in the same household as Afif Nassim. Consequently, they are not insured under the policy.

Questions about the claim arose immediately. The insurer was not receiving clear answers to questions asked. This raised concerns about the claim. The insurer was not acting in bad faith or with malice.

The personal property removed from the basement was irreparably damaged. There is no liability on the defendant for its removal.

Any loss of use or enjoyment of the basement was not caused by the insurer, but by answers and conduct of the plaintiff and his family in responding to questions.

This is not an appropriate case for solicitor and client costs.

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**Counsel:**Charles D. Lienaux, for the plaintiff  
Philip M. Chapman, for the defendant

## Coughlan, J.:

1. Afif Nassim (Afif) lives in the United States. He is the patriarch of his extended family. His brother Nabil Nassim (Nabil) lives in Halifax, Nova Scotia. In Halifax, Afif owns a business, Gigantic Video, and a house at 924 McLean Street. Income from the business supports Afif's family in Halifax, including Nabil's family, who live in the 924 McLean Street property. On March 31, 2003, there was heavy rain in Halifax, flooding the basement of the McLean Street residence which was insured as "owner-occupied". At the time of the flood, Afif had not been in Halifax since at least 1996.
2. Nabil and his wife Marilyn Nassim (Marilyn) told their insurance agent when the insurance was purchased in 1999 that Afif travelled back and forth between Halifax and the United States. When questioned by an adjuster after the flood, Nabil and Marilyn told him Afif lived half the year in Halifax and half the year in the United States. The adjuster was told Afif owned all the contents of the residence except the personal effects of Nabil and his family. Perth Insurance Company (Perth) denied coverage based on misrepresentation on the application for insurance and the claim for personal effects was not for personal effects of the named insured.
3. Afif Nassim sued Perth for breach of the contract of insurance for damages to real and personal property damaged by the flood; loss of the use and enjoyment of the basement of the McLean Street property; for damages arising out of the destruction of personal property removed from the basement; punitive damages between \$290,000 and \$400,000 for acts of bad faith and malice; and sought solicitor and client costs.
4. Prior to the trial commencing, the parties agreed the insurance policy was in force for its term from October 27, 2002 to October 27, 2003. Perth agreed to pay for damage which occurred to 924 McLean Street as a result of the flood, consisting of the cost of repairs due to water damage of \$21,448.31, as shown on the estimate of Kline Construction Ltd. dated April 25, 2003; the sum of \$161.00 for pumping water from the basement, shown on the receipt of Arrow Plumbing & Heating; the sum of \$287.50 for removing water from the basement, shown on the invoice of Deep Down Cleaning Services dated April 1, 2003; and repairs to the furnace in the amount of \$227.01, shown on the invoice of S. Cunard and Company Limited dated May 7, 2003; which total \$22,123.82.
5. The parties agreed prejudgment interest on special damages is to be at five percent per annum. There is no agreement as to the time period prejudgment interest is to be paid.
6. The facts are as follows:

7. Nabil Nassim, his wife Marilyn Nassim and their children were living in Halifax, Nova Scotia. Nabil and Marilyn opened a video rental store at Somerset Place, South Park Street, Halifax in approximately 1987. Nabil and his brother, Afif Nassim, eventually became equal owners of the business. The business was incorporated in 1990. Initially the business prospered and expanded to three locations.

8. Nabil and Marilyn's income came from the business. In 1990, they purchased a home at 924 McLean Street, Halifax. All expenses for the residence were paid by the business, Gigantic Video.

9. In 1993, Nabil decided to return to Lebanon. His brother Afif purchased Nabil's interest in Gigantic Video and the residence at 924 McLean Street. A deed quit claiming Nabil and Marilyn's interest in the McLean Street property to Afif S. Nassim was prepared in December, 1993, signed by Marilyn in Halifax and taken by her to Lebanon where Nabil signed it. Eventually the deed was brought back to Canada by Marilyn and recorded at the Halifax Registry of Deeds on June 21, 1995.

10. The mortgage on the McLean Street property with Scotia Mortgage Corporation, was assumed by Afif Nassim. The mortgage originally with Montreal Trust Company as mortgagee was assigned to Scotia Mortgage Corporation. Michael Moore, the lawyer acting for Afif in 1993, had 924 McLean Street as Afif's address. Knowing Afif had business interests in Canada and the United States, Mr. Moore assumed Afif went back and forth between the United States and Halifax as business required.

11. In December, 1993, Mr. Moore prepared a power of attorney appointing Blanche Machaalani (Blanche), Afif's sister, as Afif's attorney. Nabil and his family moved to Lebanon in 1993. Then Blanche moved into 924 McLean Street. After living two years and seven months in Lebanon, Marilyn and her children returned to Halifax. Afif made arrangements for Marilyn and the children to live at 924 McLean Street. Later Nabil followed his family to Halifax.

12. There was a flood at the McLean Street property in 1996. The insurer, which had been arranged through Alfred J. Bell & Grant Limited (Bell & Grant) paid the claim. The insurer did not renew the policy. Marilyn obtained quotes of approximately \$1,800.00 from Bell & Grant for replacement insurance. When Marilyn told Afif of the quotes, he told her to shop around. The insurance on 924 McLean Street lapsed.

13. In 1999, Marilyn visited Bell & Grant concerning car insurance. She spoke to Karen Evans, a client service representative, who dealt with her file. Ms. Evans asked if Marilyn had arranged house insurance, saying she might be able to arrange insurance.

14. Ms. Evans completed an application. Ms. Evans only remembers Marilyn was present while the application was completed. She does not recall filling out the application. She does not recall making any inquiries where Afif Nassim lived. She testified Marilyn told her Afif travelled back and forth between the United States and Canada. Ms. Evans assumed Afif lived at McLean Street.

15. Ms. Evans testified her normal practice in 1999, when completing an application for insurance, was to obtain measurements and particulars of the dwelling in order to obtain a valuation of the property. She would ask the person applying various questions and complete the application. If she had been told Afif lived in United States, the policy would have been a rental policy. She agreed on cross-examination, she could have obtained the information for the application from her computer, as the information was in her computer from the earlier insurance policy for 924 McLean Street.

16. Marilyn testified she was never asked if Afif lived at 924 McLean Street. Marilyn testified Karen Evans might have asked some questions while completing the insurance application, but for the most part took the information from her computer screen. Marilyn testified she told Ms. Evans Afif came back and forth between Halifax and the United States, and it was possible she told Ms. Evans that Afif was in Halifax for three months, then in the United States for three months, and so on. In fact, Afif had not been in Halifax since at least 1996.

17. Marilyn testified she is bi-polar and had a panic attack during her examination on discovery. She had not taken all her medication. At her discovery, Marilyn testified she must have told Ms. Evans Afif lived at 924 McLean Street six months a year. At trial, Marilyn testified she did not remember what she said at discovery and did not remember saying Afif lived at McLean Street six months a year. Marilyn testified she did not remember the questions asked by Ms. Evans when completing the application. No medical evidence was adduced as to Marilyn's condition or the medication she took. The family being all important, it was evident Marilyn did not want to give any evidence which would negatively affect Afif's claim.

18. I find, although Afif Nassim had not been in Halifax since at least 1996, Marilyn Nassim told Karen Evans when applying for insurance on 924 McLean Street that Afif travelled back and forth between the United States and Halifax.

19. After the application was completed, Marilyn took it to Blanche, Afif's attorney, for signature. The application shows Afif's occupation as retired; his address as 924 McLean Street, Halifax, Nova Scotia, B3H 2V1; and under the rating information, the occupancy as "primary". Ms. Machaalani, who has a diploma in law from Beirut University Law School, did not read the application and signed it on behalf of Afif as his attorney. Ms. Machaalani confirmed if she

had read the application, she would know it contained incorrect information. Ms. Machaalani confirmed over the years she did not read the insurance renewals as they came in - each renewal showed the insured property as "owner occupied".

20. Marilyn and Nabil (when he was in Canada) worked at Gigantic Video at Somerset Place. Expenses for Nabil, Marilyn and their family, and the 924 McLean Street property were paid from revenue from Gigantic Video. Bills came to 924 McLean Street and Marilyn took them to her sister-in-law Blanche who paid the bills from funds of Gigantic Video. On occasion, if there were insufficient funds at Gigantic Video, Blanche paid the bills or gave money to Marilyn to pay the bill or make the requested purchase. When Blanche used her own funds, she was reimbursed by Afif. As Afif testified, money from Gigantic Video is used to support Nabil's and Blanche's families; he never received money from Gigantic Video.

21. In particular, with the insurance on the McLean Street property, payment was made by monthly withdrawals from Gigantic Video's chequing account. Each year Marilyn provided a void cheque to Bell & Grant for the automatic withdrawal.

The payments continued until October 31, 2003.

22. On March 31, 2003, there was heavy rain in Halifax. The Economical Group of Insurance Companies, of which Perth is a member, had 150 claims from the storm. The basement of 924 McLean Street was flooded. The water came in through the sump pump area - there were two sump pumps in the laundry room in the basement. Marilyn and Nabil attempted to bail the water. Marilyn called plumbers. The plumbers came on the morning of April 1, 2003 and attempted to suck out the water. Everything in the basement was wet.

23. Marilyn and Nabil's son's bedroom was in the basement. Their son woke to find the whole basement flooded and water around his bed, so that when he put his feet down the water came to his knees. He described the water as dirty, saying it was not clean but it was not sewage. He put some of his "stuff" on his bed before it got wet. He lost some of his possessions.

24. Nabil Nassim testified water was everywhere in the basement. Water was over his knees. His shoes were ruined. The day after the flood the video tapes in the basement were soaking wet - everything in the basement was ruined.

25. On the morning of April 1, 2003, Marilyn called Bell & Grant and spoke to Leslie Sutherland, the agent who took over servicing the account when Karen Evans left Bell & Grant's employ. The insurer was notified and in turn retained Shumka, Craig & Moore Insurance Adjusters Canada Limited to adjust the claim. John Norton, a licensed adjuster with the firm, was assigned the file.

26. Mr. Norton telephoned the occupants of 924 McLean Street on April 1, 2003 and arranged to visit the residence later that day. He arrived at the residence, made

an inspection of the basement, took photographs and checked the sump pumps. The water was gone by the time Mr. Norton visited. Mr. Norton met with Marilyn and Nabil. They discussed the named insured, Afif Nassim. Mr. Norton testified, and his notes of his conversation set out, he was told Afif lived in Halifax half of the year and half of the year in the United States. Mr. Norton believed he was told Afif travelled back and forth on business. Marilyn provided most of the answers.

Marilyn did not remember telling Mr. Norton Afif lived in Halifax six months a year. Nabil testified Mr. Norton asked him if Afif lived in Halifax six months a year and he responded Afif planned to live here six months a year. I accept Mr. Norton was told Afif lived half the year in Halifax and half the year in the United States.

27. On April 2, 2003, Mr. Norton attempted to engage a contractor to separate the contents of the basement and salvage what could be salvaged. The first contractor contacted was too busy. The second contractor, Kline Construction Limited, undertook the project. Mr. Norton was told Kline Construction was busy because of the volume of claims and did not know when it could do the work. Mr. Norton asked it be done as soon as possible. He was told it would be. Mr. Norton informed the Nassims.

28. On April 5, 2003, Mr. Norton visited the residence and gave schedule of loss forms to Nabil and his daughter Melissa. Melissa was a young woman Mr. Norton judged to be in her early twenties. Marilyn was not home. While Mr. Norton was explaining how to complete the schedules of loss, Marilyn called and Mr. Norton spoke to her explaining how the forms were to be completed. Melissa indicated she understood how to complete the forms. Nabil deferred to Melissa and Mr. Norton did not know if Nabil understood his explanation. Mr. Norton testified Marilyn appeared to understand how to complete the forms.

29. The contents of the basement had an unpleasant smell when Mr. Norton was at the residence on April 5, 2003.

30. On April 7, 2003, Kline Construction sent two crews to 924 McLean Street - one crew removed the carpet from the basement. A second crew was prepared to list the contents of the basement and remove them for disposal, but neither Marilyn nor Nabil would come home from Gigantic Video so the crew had to leave without removing the contents. Marilyn said Kline Construction did not give them enough notice to allow either she or Nabil to come home as they were busy at the store.

31. On April 8, 2003, Mr. Norton reported by telephone to Sylvia Langin, who was the person at Economical Mutual Insurance Company's claims department dealing with the claim at that time. Ms. Langin told Mr. Norton to put the claim on hold until he received instructions concerning the coverage questions. Mr. Norton told

Kline Construction not to proceed until further notice. Mr. Norton reported to Ms. Langin in writing on April 10, 2003.

32. Ms. Langin asked Mr. Norton to determine who was shown as mortgagor on the mortgage of the property. In his report, Mr. Norton reported title had been transferred by quit claim deed to Nabil and Marilyn by Afif. That was wrong. The quit claim deed was from Nabil and Marilyn to Afif.

33. On April 14, 2003, Mr. Norton spoke to Marilyn by telephone. He explained the coverage problem to her. Marilyn gave Mr. Norton Afif's address and telephone number in Pennsylvania and told Mr. Norton Afif lived some of the year in Halifax and the rest of the year in Pennsylvania. She did not explain Afif had not been in Halifax since 1996.

34. On April 18, 2003, Mr. Norton received instructions to discontinue investigating the coverage issue and proceed adjusting the claim. He contacted Kline Construction, instructing them to continue their work. On April 21, 2003, Kline Construction attended at 924 McLean Street, made an inventory of the contents of the basement and removed the contents. Marilyn signed the list of damaged wet contents prepared by Kline Construction.

35. On April 30, 2003, Marilyn advised Mr. Norton the schedule of loss forms were completed. On May 1, 2003, Mr. Norton met with Nabil at Gigantic Video and the schedules of loss were handed to him. Mr. Norton told Nabil the schedules did not contain the required information.

36. Mr. Norton spoke to Afif by telephone on May 9, 2003. Afif told Mr. Norton he had no idea when he was last at 924 McLean Street. Afif told Mr. Norton he owned the house and it was for the use of he and his family when in Halifax. Afif told Mr. Norton he owned all the contents, except what was owned by Nabil and his family. Mr. Norton said he would be sending a letter, Afif gave him his fax number.

37. Mr. Norton sent a detailed report on May 14, 2003 to Mary DiMartino, who had taken over the claim from Sylvia Langin. Mr. Norton corrected the error as to ownership of 924 McLean Street which had been in his April 10, 2003 report. Mr. Norton detailed his conversations with Nabil and Marilyn concerning occupancy of the property and the time Afif spent at the residence. He also reported his May 9, 2003 conversation with Afif who had told him he "occasionally" visits Halifax.

Concerning the May 9, 2003 conversation, Mr. Norton reported, in part:

... During the telephone conference of May 9, 2003, the insured indicated that he owned the dwelling and all of its contents. He went on to say "they own some things too". When we endeavored (sic) to obtain a clarification, he advised us to simply send him the list of contents for him to review. He indicated he would identify the items belonging to him on those lists.

38. Mr. Norton wrote to Afif on May 28, 2003, which letter was sent by fax and Priority Post. Enclosed with the letter was a blank proof of loss, as well as a copy of the schedule of loss forms given to Mr. Norton by Nabil. The letter provided, in part:

Our report to the insurer requested further instructions with respect to the insurance policy and the sums being claimed as loss in respect to both the dwelling and its various contents. We provided the insurer with as many facts concerning ownership and occupancy of the dwelling and ownership of the contents as we had been able to determine by the time of our report. Some of those facts caused us to be uncertain as to whether the insurance policy was properly issued; and, if properly issued, uncertain as to whose property the policy insured.

. . . .

4: Until the insurer has received enough verifiable facts with which to determine its liability, if any, to you under the terms and conditions of the above numbered insurance policy, the writer has been instructed to communicate with you in respect to this matter since you are the “Named Insured” on the insurance policy.

5: In accordance with provisions of the *Insurance Act of Nova Scotia*, we enclose a blank *Proof of Loss* form upon which to make your claim. Please note that all particulars required by the enclosed form must be completed before submitting it to the insurer. You must also appear before a Justice of the Peace, Attorney or Notary Public and swear to the accuracy and truthfulness of the information you provide in the *Proof of Loss* before submitting it to the insurer. Please note the signature lines on the bottom right and left sides of the form for that purpose.

In the event current concerns about the insurance policy are resolved in your favour; the insurer would like to resume adjusting of your claim(s) as quickly as possible.

During our telephone conversation on May 9th, you advised us you owned all of the contents in the dwelling except items owned by your brother and his family. We assume your nephew, Roland Nassim, also owns some personal items in the dwelling at the time of the loss. Unfortunately, to date, we have not been given sufficient information with which to distinguish contents you own from those owned by your brother, members of his family and your nephew.

We enclose a copy of each of the sixty-four (64) pages of *Schedule of Loss* forms submitted by your brother, Nabil, as part of this claim. You will notice the forms do not identify who owns which items being claimed. You will also notice he did not provide any information as to where and when any of the items were purchased or the original purchase price of the items. This information is required to be entered in each of the first four columns on the forms. The information is essential to an insurer’s ability to make an accurate adjustment of such claims.

Please review the enclosed copies of *Schedule of Loss* forms submitted by your brother, Nabil.

Please identify which, if any, of the items he listed on the forms belongs to you. We are enclosing a supply of blank *Schedule of Loss* forms for you to use to list any item(s) found on your brother's *Schedule of Loss* forms which actually belongs to you. In that event, please provide the information required by columns 1 - 5 inclusive, on your *Schedule of Loss* forms before returning them to us. We will promptly forward to the insurer all *Schedule of Loss* forms you submit as part of your claim in this matter.

39. Afif received and read Mr. Norton's May 28, 2003 letter. Afif did not know what was in the house. He relied on his family. He considered all the contents of the house belonged to him except for his brother's personal items. Afif did not provide any of the requested information. He did not remember what he did with the letter, he referred everything to his sister Blanche. Mr. Norton did not receive a response to the letter.

40. On June 5, 2003, Mr. Norton spoke to Afif by telephone. Afif acknowledged receiving Mr. Norton's letter with enclosures. Afif told Mr. Norton he owned all of the contents of 924 McLean Street other than Nabil's personal items, such as clothing. Mr. Nassim stated he did not want to do anything with the papers Mr. Norton sent him, and was told to hold them until Mr. Norton called him back. Mr. Nassim said the last time he had been in the house was about four years previous.

41. On July 21, 2003, Mr. Norton was advised by Paul Ross, who had taken over the file from Mary DiMartino, to contact the local Nassim family and tell them nothing further was being done on the claim until a response was received from Afif. The same day Mr. Norton informed Marilyn he would not be taking further action on the claim and, as he had been instructed, would not be communicating with them. Mr. Norton took no further action on the file.

42. On July 17, 2003, Mr. Ross wrote to Afif informing Mr. Nassim he had assumed carriage of the file and it was urgent Mr. Nassim contact him so a statement could be obtained from him. Afif telephoned Mr. Ross and arrangements were made for Afif to give a statement. Mr. Ross retained Crawford & Company, claims adjusters, to obtain a statement from Afif in Pennsylvania. A statement dated October 23, 2003 was obtained from Mr. Nassim and enclosed in a report to Mr. Ross dated November 25, 2003 from Crawford & Company. In the report the comment was made, "Although Afif Nassim is very excitable and has a tendency to talk a lot, he appeared to be honest and truthful throughout the statement." Mr. Ross reviewed the statement and report.

43. Mr. Ross wrote to Afif Nassim on January 27, 2004 denying coverage based on misrepresentation on the application for insurance, and the claim for personal effects was not for personal effects of the named insured. Mr. Ross also enclosed a blank proof of loss form. Upon receipt of Mr. Ross' letter, Afif called Mr. Ross requesting a copy of the application for insurance and stating the contents were all

his property. Mr. Ross then received a letter dated June 24, 2004 from Charles D. Lienaux, a solicitor retained by Afif Nassim, concerning the claim. Mr. Lienaux requested certain documents. Mr. Ross responded by letter dated June 28, 2004.

44. The insurer denied coverage on the basis that a proof of loss had not been filed within one year of the date of loss. No one had informed Afif Nassim or any other member of his family involved with the claim of the one year limitation period to file the proof of loss. The first time the time limit was mentioned was in Mr. Ross' letter to Mr. Lienaux dated November 12, 2004.

45. On December 21, 2004, Mr. Lienaux wrote to Mr. Ross, concerning Mr. Nassim's claim, demanding payment and enclosing a proof of loss signed by Blanche, as Afif Nassim's attorney. Ms. Machaalani's signature was not attested.

In the letter, Mr. Lienaux also demanded return of the video games and movie tapes removed from 924 McLean Street by Kline Construction as they belonged to Mr. Nassim's company, Gigantic Video Club, and were stored at McLean Street.

46. Mr. Ross returned the proof of loss dated December 21, 2004 to Mr. Lienaux by letter dated December 30, 2004. An attested proof of loss was provided to the insurer on May 30, 2006.

47. Perth submits as the proof of loss form was not filed within the time required, Mr. Nassim's right of action has expired.

48. On May 28, 2003, Mr. Norton enclosed a blank proof of loss form with his letter to Mr. Nassim. On January 27, 2004, Paul Ross enclosed a blank proof of loss with his letter to Afif Nassim. Mr. Nassim retained Mr. Lienaux who wrote to Bell & Grant on June 24, 2004. On June 28, 2004, Mr. Ross responded to Mr.

Lienaux's correspondence stating Mr. Nassim had received blank proof of loss forms in correspondence dated May 28, 2003 and January 27, 2004. In his letter to Mr. Lienaux dated November 12, 2004, Mr. Ross stated:

As previously outlined in our correspondence to your office dated June 28, 2004, the named insured was provided with a Proof of Loss form on May 28, 2003. In accordance with the insurance contract and the Act governing Insurance in the Province of Nova Scotia, your client's right of action has expired. This, regardless of the representation of risk issues at hand.

49. This was the first time any time limit was mentioned for filing the proof of loss.

Mr. Ross testified it was an oversight Mr. Nassim was not informed of the limitation period.

50. Mr. Lienaux enclosed a proof of loss signed by Blanche Machaalani, Afif Nassim's attorney, with his letter to Mr. Ross dated December 21, 2004. The proof of loss was not verified under oath. The proof of loss was returned to Mr. Lienaux by Mr. Ross by letter dated December 30, 2004. Referring to the proof of loss, Mr.

Ross stated:

In accordance with the Act governing insurance in the Province of Nova Scotia, we are returning the Proof of Loss form dated December 21, 2004.

51. Mr. Ross did not mention the problem with lack of verification under oath. A proof of loss verified under oath was provided to Perth on May 30, 2006.

52. A proof of loss in writing verified by a statutory declaration must be filed within a year of the loss. The statutory conditions which form part of the insurance policy on 924 McLean Street are set out in Part VII of the *Insurance Act*, R.S.N.S. 1980, c. 231 and include:

6(1) *Requirements after loss* - Upon the occurrence of any loss of or damage to the insured property, the insured shall, if such loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11,

- (a) forthwith give notice thereof in writing to the insurer;
- (b) deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,
  - (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
  - (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
  - (iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,
  - (iv) showing the amount of other insurances and the names of other insurers,
  - (v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,
  - (vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,
  - (vii) showing the place where the property insured was at the time of loss;
- (c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;
- (d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.

(2)The evidence furnished under clauses (c) and (d) of sub-paragraph (1) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13.

....

12*When loss payable* - The loss shall be payable within sixty days after completion of the proof of loss, unless the contract provides for a shorter period.

....

14*Action* - Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs.

53.Section 33 of the *Insurance Act, supra*, provides:

33Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

54.Considering the facts of this case, including Perth never mentioned a limitation period for filing a proof of loss to Afif or anyone else involved prior to the expiration of the limitation period, I find it would be inequitable if the insurance should be forfeited or avoided on the basis the proof of loss was not filed within the one year limitation period. I relieve Afif Nassim from the requirement to file the proof of loss within one year from the date of the loss.

55.Mr. Nassim's counsel submits I should draw a negative inference as to the conditions at 924 McLean Street between April 8 and April 21, 2003 because of the failure of Perth to call Mr. Rafuse of Kline Construction to describe the conditions at 924 McLean Street between April 8 and April 21, 2003 - the period during which Perth instructed Mr. Norton to tell Kline Construction not to proceed with the salvage of goods in the basement.

56.In support of his request for a negative inference to be drawn, Mr. Nassim relies on the case of *Scotia Fuels Ltd. v. Lewis* (1991), 102 N.S.R. (2d) 12 (T.D.) in which Saunders, J., as he then was, in drawing a negative inference, stated at p. 15:

Such a failure leads me to draw an adverse inference against the defendant. It is well recognized that where a party or a witness fails to present evidence, which was in the power of the party or witness to give, then such failure justifies the court in drawing the inference that the evidence would have been unfavourable to the party to whom the failure was attributed. (See for example

*Murray v. Saskatoon*, [1952] 2 D.L.R. 499, at pp. 505-506). In particular the learned author in *Wigmore on Evidence* (3rd Ed.), volume 2, p. 162ff:

The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party.

In *Levesque v. Comeau et al.*, [1970] S.C.R. 1010, the plaintiff sued for damages allegedly suffered while a passenger in her husband's car while it was stationary at an intersection and rearended by the defendant's vehicle. The plaintiff alleged she suffered from deafness as a result of her injuries. She only called the physician who had examined her one year after the accident. The evidence disclosed that she had been examined by several other doctors who saw her prior to the examination by the physician who was called to testify. In delivering the majority judgment, Pigeon, J., concluded that only the plaintiff could have produced this evidence before the court and its absence meant that the court could draw an adverse inference.

In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case ... Under the circumstances, her testimony and that of her husband respecting her good state of health before the accident could properly be considered insufficient evidence for the purpose of excluding the other possible causes of the deafness.

57. Here, of course, Perth was not the only party which could have called Mr. Rafuse as a witness. Afif Nassim could have called Mr. Rafuse and, in any event, there was evidence from Nabil and other members of the family as to the conditions in the basement at 924 McLean Street between April 8 and April 21, 2003. I am not prepared to draw the requested inference.

58. Afif Nassim claims for personal property damaged in the flood. The issue arises whether personal property belonging to persons other than Afif is insured by the policy. Is personal property belonging to Nabil or Marilyn Nassim, their children or Afif's nephew living at 924 McLean Street insured?

59. The manner in which an insurance policy is to be interpreted was set out by McLachlin, J., as she then was, in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 at p. 269 as follows:

... 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 expectation of the parties.

60.In Mr. Nassim’s policy, “insured” is defined as follows:

“**Insured**” means the person(s) named as Insured on the Coverage Summary page and, while living in the same household:

his or her spouse

the relatives of either, and

any person under 21 in their care

Spouse includes either of two persons who are living together in a conjugal relationship outside marriage and have so lived together continuously for a period of 3 years or, if they are the natural or adoptive parents of a child, for a period of 1 year.

In addition, a student who is enrolled in and actually attends a school, college or university and who is dependent on the Named Insured or his or her spouse for support and maintenance is also insured even if temporarily residing away from the principal residence stated on the Coverage Summary page.

61.Afif Nassim was the named insurer. Nabil, Marilyn, their children and Afif’s nephew were relatives of the named insured living at 924 McLean Street. Were they living in the same household as Afif Nassim so as to be insured under the policy? Afif submits they were insured as they were living in the same household that he, the named insured, owned and had insured.

62.“Living” is defined in the Shorter Oxford Dictionary, fifth edition, as:

The action of Live verb; the fact of being alive or of dwelling in a specified place.

63.“Household” is defined in the same dictionary as:

The people living in a house, *esp.* a family in a house; a domestic establishment.

64.Afif Nassim lived in Pennsylvania. He did not live at 924 McLean Street. In fact, he had not visited Halifax, on his own evidence, since 1996. Nabil, Marilyn, their children and Afif’s nephew were not living in the same household as Afif.

Consequently, they are not insured under the policy. Afif is insured under the policy.

65.Afif Nassim is seeking compensation for video games and movie tapes (VHS tapes) destroyed by the flood. Giving evidence concerning the VHS tapes, Marilyn testified the tapes were owned by the store (Gigantic Video), which was an

incorporated company. Blanche Machaalani testified the movies were left off the Proof of Loss which was prepared. They thought the movies were not included in the claim. Blanche said the movies in the basement were taken from the store for Afif and his family. Nabil, Marilyn and the children took the movies home to watch. Gigantic Video paid for the movies. Blanche stated when the movies and the video games were taken to the house, they belonged to Afif. Mr. Norton testified Nabil told him the movies belonged to the business but were no longer used and were theirs now.

66. In his letter to Economical Insurance Group dated December 21, 2004, Mr. Lienaux, on behalf of Afif Nassim, stated:

In the inventory of damaged contents removed by Kline Construction Limited there were approximately \$19,000.00 worth of video games and movie tapes which belonged to Mr. Afif's company Gigantic Video Club. These were stored at Mr. Afif's property at 924 McLean Street and damaged in the flood. The games and video tapes were removed from the premises by Kline Construction Ltd. Since no claim is being made to have these paid for under Mr. Nassim's home owner's policy the return of these items is hereby requested.

67. Although he had not been in Halifax since 1996, Afif Nassim testified the movies at 924 McLean Street were his personal library. He said he discussed the movies on the telephone with the residents at 924 McLean Street. The movies were taken out of the inventory of the store and put in the house for his use. When discussing Mr. Norton's letter to him of May 28, 2003, Afif stated he did not know what was in the house, referring to 924 McLean Street.

68. I do not accept the video games and VHS tapes were Afif Nassim's personal library. The video games and VHS tapes were the property of Gigantic Video. This is consistent with the opinions of Blanche Machaalani and Marilyn Nassim when completing the Proof of Loss that the video games and tapes were owned by the store. It is also consistent with the position set out in Mr. Lienaux's letter of December 21, 2004. Not being the property of Afif Nassim, he cannot recover the value of the video games and movies in his claim against Perth.

69. The Nintendo and Super Nintendos are assets of Gigantic Video. Marilyn testified a Super Nintendo would be brought from the store, used and then returned to the store.

70. I find the shoes and clothing in the basement of 924 McLean Street were the property of Nabil, Marilyn, their children and nephew, not the property of Afif Nassim.

71. Afif Nassim is the owner of most of the household furniture and furnishings in the basement of 924 McLean Street.

72. Marilyn testified the following items were replaced:

•*Bureau* - Marilyn testified she paid at least \$500.00 for it, but does not remember the price. In Schedule B of Blanche Machaalani's answer to interrogatories dated May 30, 2007, it states the bureau was previously broken.

•*Christmas decorations and Christmas lights.*

•*Bed* - A bed which cost approximately \$1,000.00. In the Proof of Loss, the original cost of the bed is shown as \$1,000.00.

•*Vacuum cleaner* - The vacuum cleaner was given as a Christmas gift. In the Proof of Loss, the vacuum cleaner was shown as being purchased in approximately 1999 at a cost of \$200.00.

•*Television.*

•*Box spring and mattress* - In the Proof of loss, the box spring and mattress was shown as having a cost of \$1,000.00.

•*Suitcases* - A couple of suitcases costing \$150.00 to \$200.00 were replaced. In the Proof of Loss, the suitcases are shown as having a purchase price of \$150.00.

•*Dresser* - In the Proof of Loss, the dresser was shown as having an original price of \$500.00.

•*Computer, monitor, printer* - A computer, monitor, including printer was replaced costing \$1,600.00 to \$1,700.00.

•*Radio answering machine* - A radio answering machine which was replaced cost between \$50.00 and \$70.00.

•*Cordless phone* - A cordless phone was shown in the Proof of Loss as having a purchase price of \$79.99.

•*A lawn mower and whipper snipper* - They are shown in the Proof of Loss as having purchase prices of \$199.00 and \$79.00 respectively.

•*Set of bed rails.*

73. In answer to interrogatories dated May 30, 2007, Blanche Machaalani deposed that none of the items in the Schedule A of the interrogatories had been replaced.

Schedule A lists the same personal property listed in the proof of loss Perth

received with Mr. Lienaux's letter to Mr. Ross of December 21, 2004 and provided on May 30, 2006. By answer to interrogatories dated July 16, 2008, Afif confirmed the contents of Blanche's answer to interrogatories of May 30, 2007. From Blanche's answer to interrogatories, it appears the Christmas decorations and lights, and vacuum cleaner belonged to Marilyn. It appears most of the items Marilyn testified were replaced were the property of Marilyn and Nabil, not Afif. I find the personal property belonging to Afif replaced was the bureau, bed, box spring and mattress, dresser, lawn mower and whipper snipper. The computer is shown in Schedule A of Blanche's answer to interrogatories and was, therefore, not replaced by Afif.

74. It appears from the evidence the balance of the personal property owned by Afif Nassim destroyed in the flood was not replaced.

75. The insurance policy provides what is to be paid on a claim for personal property as follows:

#### **BASIS OF CLAIM PAYMENT**

....

**Personal Property:** We will pay the Actual Cash Value of the damage up to the applicable amount of insurance as at the date of the occurrence.

**Actual Cash Value:** The Actual Cash Value will take into such things as the cost of replacement less any depreciation, and in determining depreciation we will consider the condition immediately before the damage, use of the property, the resale value and the normal life expectancy.

**Insurance Under More Than One Policy:** If you have insurance on specifically described property, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up.

In all other cases, we will pay our rateable proportion of the loss or claim under this policy.

**Subrogation:** We will be entitled to assume all your rights of recovery against others and may bring action in your name to enforce these rights when we make payment or assume liability under this policy.

If you are a condominium unit owner, we agree to waive our rights to any claim against the Condominium Corporation, its Directors, Property Managers, agents and employees, except for arson, fraud and vehicle impact. We shall not consider independent contractors as being agents or employees of the Condominium Corporation, its Directors, Property Managers or of the unit

owners. Your right to recover from us is not affected by any release from liability entered into  
be you prior to loss.

## REPLACEMENT COST ON PERSONAL PROPERTY

If there is a loss insured by Coverage C, Personal Property, we agree to pay on the basis of replacement cost provided that:

- (i) the property at the time of loss was useable for its original purpose;
- (ii) you have repaired or replaced the property promptly.

Otherwise, payment will be based as if this endorsement had not been in effect.

“Replacement Cost” means the cost, at the time of loss, of repairs or replacement (whichever is lower), with new property of similar kind and quality, without deduction for depreciation.

76. Other than the amounts mentioned above, no evidence was produced as to the costs of the items replaced. Under the insurance policy, Mr. Nassim is entitled to replacement value, as defined in the policy, for the items replaced. I must determine the replacement value on the items replaced based on the limited evidence before me. I find the replacement value of items Mr. Nassim replaced is \$3,139.14, including H.S.T.

77. I must determine the actual cash value of Mr. Nassim’s personal property destroyed in the flood, but not replaced. There is really no evidence before me as to the actual cash value of what was destroyed and not replaced. As Marilyn testified, over the years sometimes you have “stuff” and just keep it. It does not appear the items owned by Afif Nassim which were destroyed and not replaced had much monetary value. One photograph showed a coffee table without legs. Mr. Ross testified normally his company considers the actual cash value of the personal property not replaced is in the range of 50-70% of the purchase price. Given the limited evidence before me, I find the value of the personal property of Afif Nassim which was not replaced is \$6,300.00.

78. I will provisionally determine the actual cash value of the video games and VHS tapes destroyed by the flood. Marilyn Nassim testified when the movies were purchased they cost between \$80.00 to \$100.00, and she put \$29.99 as the replacement value at the time of the loss. The video games and VHS tapes were not replaced. The value of the video games was said to be \$39.99. There is no independent evidence to substantiate the value of the video games or movies. There is no evidence of the condition of the tapes or games. They came out of the inventory of a movie rental business. They would be worth only a fraction of the purchase price. Considering the limited evidence before me, I find the actual cash value of the video games and VHS tapes at the time of the loss to be \$1,500.00.

79. I will provisionally determine the actual cash value of the shoes and clothing of Nabil, Marilyn, their children and nephew damaged in the flood. Other than the schedule of loss forms and proof of loss there is really no evidence before me as to the actual cash value of the shoes and clothing. Mr. Ross testified normally his company pays 70% of the value of clothing. On the limited evidence before me, I find the actual cash value of the shoes and clothing to be \$3,800.00.

80. Mr. Nassim claims against Perth punitive damages for malice and bad faith. Paragraph 61 of the amended statement of claim provides:

The Plaintiff hereby gives notice that at the trial of this action the Plaintiff will request a jury to award damages against the Defendant in a range between \$290,000.00 and \$400,000.00 as punitive damages for the aforesaid acts of malice and bad faith.

81. Punitive damages are available for breach of contract. They were awarded in the case of *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, cited by Mr. Nassim in support of his claim. In the introduction of the majority judgment, Binnie, J. stated at p. 603:

This case raises once again the spectre of uncontrolled and uncontrollable awards of punitive damages in civil actions. The jury was clearly outraged by the high-handed tactics employed by the respondent, Pilot Insurance Company, following its unjustified refusal to pay the appellant's claim under a fire insurance policy (ultimately quantified at approximately \$345,000). Pilot forced an eight-week trial on an allegation of arson that the jury obviously considered trumped up. It forced her to put at risk her only remaining asset (the insurance claim) plus approximately \$320,000 in legal costs that she did not have. The denial of the claim was designed to force her to make an unfair settlement for less than she was entitled to. The conduct was planned and deliberate and continued for over two years, while the financial situation of the appellant grew increasingly desperate. ...

82. The facts of *Whiten v. Pilot Insurance Co.* are compelling. Justice Binnie, in dealing with the facts, stated at p. 604:

The appellant, Daphne Whiten, bought her home in Haliburton County, Ontario, in 1985. Just after midnight on January 18, 1994, when she and her husband Keith were getting ready to go to bed, they discovered a fire in the addition to their house. They and their daughter, who had also been upstairs, fled the house wearing only their night clothes. It was minus 18 degrees Celsius. Mr. Whiten gave his slippers to his daughter to go for help and suffered serious frostbite to his feet for which he was hospitalized. He was thereafter confined to a wheelchair for a period of time. The fire totally destroyed the Whitens' home and its contents, including their few valuable antiques and many items of sentimental value and their three cats.

The appellant was able to rent a small winterized cottage nearby for \$650 per month. Pilot made a single \$5000 payment for living expenses and covered the rent for a couple of months or so, then cut off the rent without telling the family, and thereafter pursued a hostile and confrontational policy which the jury must have concluded was calculated to force the appellant

(whose family was in a very poor financial shape) to settle her claim at substantially less than its fair value. The allegation that the family had torched its own home was contradicted by the local fire chief, the respondent's own expert investigator, and its initial expert, all of whom said there was no evidence whatsoever of arson. The respondent's position, based on wishful thinking, was wholly discredited at trial. Pilot's appellate counsel conceded here and in the Ontario Court of Appeal that there was no air of reality to the allegation of arson.

83. In the majority judgment, Binnie, J. set out various principles concerning awarding of punitive damages, and at p. 644 set out directions a trial judge should give a jury when dealing with a claim for punitive damages, as follows:

To this end, not only should the pleadings of punitive damages be more rigorous in the future than in the past (see para. 87 above), but it would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3)

Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question.

(5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

84. This is not an appropriate case for an award of punitive damages. The facts are very different from those in *Whiten v. Pilot Insurance Co. et al.*, *supra*. Here, questions about the claim arose immediately and were exacerbated by the Nassim family. The policy in the name of Afif Nassim showed his address as 924 McLean Street, Halifax, Nova Scotia, his occupation as retired and the occupancy as primary. All incorrect information. When Mr. Norton visited the residence on the day the loss was reported, he was told Afif lived in Halifax half of the year and the other half in the United States. In fact, Afif had not been in Halifax since at least 1996. During their telephone conversation of May 9, 2003, Afif told Mr. Norton he had no idea when he was last at 924 McLean Street. Mr. Nassim told Mr.

Norton he occasionally visits Halifax. Afif said he owned the house (924 McLean Street) and its contents, and that Nabil and his family owned some things also.

Afif told Mr. Norton he should send a list of contents to him for review.

85. Mr. Norton wrote to Afif by letter dated May 28, 2003, enclosing a blank proof of loss, as well as a copy of the schedule of loss form which had been prepared for Perth. Afif received Mr. Norton's letter of May 28, 2003. Afif did not know what was in the house. He did not respond to Mr. Norton's letter.

86. Mr. Norton had a further telephone conversation with Afif on June 5, 2003. Afif told Mr. Norton he owned all the contents of 924 McLean Street, other than Nabil's personal items, such as clothing.

87. On July 17, 2003, Paul Ross wrote to Afif advising Afif to contact him so a statement could be obtained. Mr. Nassim called Mr. Ross and a statement from Afif was obtained and enclosed in a report to Mr. Ross dated November 25, 2003.

Mr. Ross denied coverage on behalf of Perth by letter dated January 27, 2004.

88. The Nassim family in Halifax completed schedules of loss and were told by Mr. Norton the schedules did not contain the information required.

89. Perth was not receiving clear answers from the Nassim family as to Afif's occupation of the McLean Street property or the ownership of the personal property damaged in the flood. This conduct raised concerns about the claim and hampered its resolution. The conduct of Perth in the circumstances of this case does not show Perth was acting in bad faith or with malice in adjusting the claim.

Mr. Nassim is not entitled to punitive damages.

90. Mr. Nassim claims for the loss of the use and enjoyment of the basement of the McLean Street property based on breach of the terms of the insurance policy and bad faith on the part of Perth, and the negligence of Karen Evans who took the application for insurance.

91. I found Perth did not act in bad faith or with malice in adjusting this claim. Any loss of use or enjoyment was not caused by Perth or Karen Evans, but by the evasive answers and the conduct of the Nassims in responding to Mr. Norton and Perth.

92. If there had been a loss of use or enjoyment, Mr. Nassim failed to mitigate his damages.

93. A plaintiff is under a duty to take all reasonable steps to mitigate his damages. The onus of proving failure to mitigate is on the defendant. These principles were described by Laskin, C.J.C. in giving the majority opinion in *Red Deer College v. Michaels et al.*, [1976] 2 S.C.R. 324 at p. 330 as follows:

... It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is. The parameters of loss are governed by legal principle. The primary role in breach of contract cases, that a wronged

plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a “duty” to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In *Payzu Ltd. v. Saunders*, at 589, Scrutton L.J. explained the matter in this way:

Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant’s breach, the result is the same.

... If it is the defendant’s position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge’s assessment of the plaintiff’s evidence on avoidable consequences. ...

....

Cheshire and Fifoot, *supra*, expressed the position more tersely as follows:

But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

94. Afif Nassim testified his net worth is between five to ten million dollars, and he had the money to repair the basement. Mr. Nassim chose not to make the necessary repairs. If Mr. Nassim had suffered loss of enjoyment or use of the basement, he failed to mitigate the loss.

95. Afif Nassim claims Perth is liable for the destruction by Kline Construction of personal property damaged by the flooding. The evidence is clear the items removed by Kline Construction from 924 McLean Street were ruined and could not be used. Marilyn Nassim signed a list of the damaged contents prepared by Kline Construction and agreed the items on the list were irreparably damaged. She also testified if the items had not been removed by Kline Construction they would have had to be removed from the residence. In addition, on April 7, 2003, Kline Construction had a crew prepared to list the contents of the basement and remove them for disposal but neither Nabil nor Marilyn would come home, so the crew had to leave without doing its work. There is no liability on Perth for the removal of

personal property by Kline Construction. The only claim against Perth in relation to personal property in the basement is pursuant to the insurance policy.

96. Mr. Nassim seeks costs on a solicitor and client basis. He states where there is an allegation of fraud in a proceeding, which is not established, costs are awarded on a solicitor and client basis.

97. Costs on a solicitor and client basis are rarely awarded. Dealing with awarding solicitor and client costs, McLachlin, J., as she then was, stated in *Young v. Young* (1994), 108 D.L.R. (4th) 193 (S.C.C.) at p. 283:

... Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs ...

98. In *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43 (C.A.), Pugsley, J.A., in giving the Court's judgment, stated at p. 55:

While it is clear that this Court has the authority to award costs as between solicitor and client, it is also clear that this power is only exercised in rare and exceptional circumstances, to highlight the court's disapproval of the conduct of one of the parties in the litigation (*Wournell (P.A.) Contracting Ltd. et al. v. Allen* (1980), 37 N.S.R. (2d) 125; 67 A.P.R. 125 (C.A.)).

This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible. (*Lockhart v. MacDonald* (1980), 42 N.S.R. (2d) 29; 77 A.P.R. 29 (C.A.) *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146; 109 A.P.R. 146 (C.A.))

The word "reprehensible" is defined in *The Concise Oxford Dictionary* (1990) as "deserving censure or rebuke".

The conduct of the Authority, in my opinion, deserves that description.

There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

99. In dealing with the question of when costs may be awarded on a solicitor and client basis, Saunders, J., as he then was, stated in *MacDonnell v. M & M Developments Ltd. et al.* (1997), 164 N.S.R. (2d) 81 (S.C.) at p. 97:

The question then becomes whether costs ought to be awarded on a party and party or solicitor and client basis? I have studied the cases to which I was referred by counsel. It is clear from such cases as *Roose, supra*, and *Brown v. Metropolitan Authority et al.* (1996), 150 N.S.R. (2d) 43; 436 A.P.R. 43 (C.A.) that in Nova Scotia it must be a "rare and exceptional circumstance" before solicitor and client costs are awarded. In *Roose, supra*, solicitor and client costs were not

awarded even though punitive damages were. A similar result arose in *Flame Bar-B-Q Ltd. v. Hoar Estate* (1979), 27 N.B.R. (2d) 271; 60 A.P.R. 271; 106 D.L.R. (3d) 438 (C.A.). It would appear from *Warner v. Arsenault* (1982), 53 N.S.R. (2d) 146; 138 A.P.R. 146 (C.A.) and *Brown, supra*, that even conduct shown to be “reprehensible” is not enough to justify an award of costs on a solicitor and client basis. From my reading of the cases in order to justify an award of solicitor and client costs there must be proof tantamount to fraud or an abuse of process. Unless or until the observations of Pace, J.A., in *Warner, supra*, are varied or refined I am bound to follow them.

100. There is no automatic trigger for solicitor and client costs, such as an allegation of fraud which is not established. Whether such costs are awarded depends on the facts of the particular proceeding. This is not an appropriate case for the plaintiff to receive solicitor and client costs. The conduct of Perth was not “a rare and exceptional circumstance” to justify such an award.

101. The parties agreed prejudgment interest on special damages is to be five percent per annum. The issue remains, for what period prejudgment interest is to be paid. Mr. Ross received the report from Crawford & Company dated November 25, 2003 and statement of Afif Nassim dated October 23, 2003 some time after November 25, 2003 and before he denied coverage in his letter of January 27, 2004. Perth, upon receiving the report and statement had information clarifying the status of the title to the McLean Street property. Consequently, prejudgment interest at five percent per annum will be paid from January 1, 2004 on \$22,123.82 related to the repairs to the real property.

102. The proof of loss signed by Blanche Machaalani, but not verified under oath, was submitted with Mr. Lienaus’s letter of December 21, 2004. An attested proof of loss was not delivered until May 30, 2006. The statutory conditions applicable to this policy of insurance clearly state the proof of loss must be verified by a statutory declaration. Any loss was payable sixty days after completion of the proof of loss. Mr. Nassim was represented by counsel. However, until Perth received Blanche’s answer to interrogatories dated May 30, 2007, it did not know the owners of the contents of the basement. Therefore, Perth could not deal with the claim for damage to personal property prior to May 30, 2007. The damages relating to damage to Afif Nassim’s personal property which total \$9,439.14 will bear prejudgment interest at five percent per annum from May 30, 2007.

103. In conclusion, Perth Insurance will pay Afif Nassim \$31,562.96, with prejudgment interest at five percent per annum on \$22,123.82 from January 1, 2004, and prejudgment interest on \$9,439.14, from May 30, 2007.

104. If the parties are unable to agree, I will hear them on the issue of costs.

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Coughlan, J.