PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX **C.H. NO.: 75785**

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

QUANTEL LEASING CORPORATION

PLAINTIFF

- AND -

CO-OPERATORS GENERAL INSURANCE COMPANY

DEFENDANT

Lloyd R. Robbins, Esq., Counsel for the Plaintiff;
S. Raymond Morse, Esq., Counsel for the Defendant.

1993, January 25th, Palmeter, C.J.C.C.:-

This matter was heard before me on December 1st, 1992 and adjourned for decision. No evidence was adduced by either party on the hearing but an Agreed Statement of Facts, entered as Exhibit 1, was submitted by both parties. Memoranda were submitted by both the parties to the action.

The facts, as set out in the Agreed Statement of Facts, are as follows:

1. Pursuant to a Vehicle Lease Agreement executed February 4, 1989, Darrell E. Brookes and Ethel Williams then residing at 30 Williams Street, East Preston, Nova Scotia, as Lessees, agreed to lease a 1988 Pontiac Grand Am motor vehicle from Flexi Plan Leasing Corporation, as Lessor.

2. Prior to the execution of the Vehicle Lease Agree,ent, the Lessees had completed a credit application in support of the request for execution of a Vehicle Lease Agreement.

3. The credit inquiries made by Flexi Plan met with positive responses and approval for execution of the Vehicle Lease Agreement was given by Flexi Plan Leasing.

4. Accordingly, Flexi Plan Leasing proceeded to purchase the Grand Am from MacPhee Pontiac on February 3, 1989 for a total price of $15,000.00. The temporary registration confirmed Flexi Plan Leasing as owner of the vehicle.

5. Schedule "A" to the Lease Agreement

confirmed a monthly rental of $406.00, delivery date of February 4, 1989, and date for termination of the lease of February 28th, 1993.

6. By Invoice dated February 4, 1989, the Lessor billed the Lessees for the rent payment for February, 1989 as well as a security deposit in the amount of $450.00, together with transfer and license fees, for a total of $899.80. The Lessees paid this initial payment.

7. In accordance with the provisions of the Lease Agreement, Mr. Brookes and Ms. Williams initially arranged the necessary insurance coverage with Sun Alliance Insurance Company. This coverage was subsequently verified by Mr. Bob Buchanan of Flexi Plan Leasing on February 7, 1989. Mr. Buchanan was the salesperson who handled the initial transaction between Flexi Plan Leasing and Mr. Brookes and Ms. Williams.

8. At time of execution of the Lease Agreement, Mr. Brookes executed a pre-authorized Payment Authorization Form in

favour of Flexi Plan Leasing authorizing monthly debits to his bank account at the Royal Bank Westfall/Woodlawn branch, Dartmouth, Nova Scotia.

9. On or about April 26, 1989, Flexi Plan received notice of cancellation of the Sun Alliance insurance policy for non-payment of premium. The Notice confirmed that the monthly withdrawal in favour of Sun Alliance had been returned by the bank.

10. Subsequently, Mr. Brookes arranged for issuance of a policy of motor vehicle insurance by Co-Operators General Insurance Company. This coverage commenced May 1, 1989 for a term of six months. The policy specifically noted Flexi Plan Leasing and Mr. Brookes as insureds under the policy. The policy confirmed Section C coverage under subsection 2 for collision and upset, and under subsection 3 for comprehensive, and attached hereto is a copy of the SEF No. 23a endorsement issued to Flexi Plan Leasing at time of issuance of the policy, together with a copy of the SPF 1 standard automobile policy

for Nova Scotia.

11. Flexi Plan Leasing encountered difficulty with the pre-authorized monthly payments authorized by Mr. Brookes. The March, April and May 1989 payments were returned NSF. In June, 1989 Flexi Plan learned that the Royal Bank account Mr. Brookes had with the Westfall/Woodlawn branch had been closed. During this time the staff of Flexi Plan were in touch with the lessees with a view to putting the lease in good standing.

12. By June 7, 1989, Flexi Plan had advised Ms. Williams that if the lease payments due and owing at that time were not received, the lease account would be turned over to a third party and a Credit Bureau notified of their failure to honour the Lease Agreement. Mr. Philip Davies, Manager for Flexi Plan Leasing, advised Ms. that either the money or the car had to be turned over the Flexi Plan's office at 111 Ilsley Avenue in Dartmouth by noon on June 8, 1989.

13. Subsequently, on June 10, 1989, Mr. Davies met with Mr. Brookes at the Flexi Plan office. Mr. Brookes tried to give Mr. Davies a series of postdated cheques drawn on the Royal Bank account that had been closed. Mr. Davies refused these cheques and indicated that he wanted the vehicle returned. At that time, Mr. Brookes explained that he did not have the vehicle with him. Mr. Davies then proceeded to advise Mr. Brookes to return to the office on Tuesday, June 13, 1989 with either the cash and the vehicle so that it could be inspected, or alternatively, just to return the vehicle on that date or the matter would be assigned to a third party for repossession.

14. During the summer of 1989, several phone calls were made on behalf of Flexi Plan to Ms. Williams' or Mr. Brookes' places of employment, requesting that Mr. Brookes contact Flexi Plan. Flexi Plan unsuccessfully made repeated efforts throughout the summer to obtain payment from Mr. Brookes. B.C. Recovery Services was retained by Flexi Plan

in June 1989 to effect repossession; their efforts were unsuccessful.

15. On September 8, 1989, Flexi Plan received a copy of Registered correspondence from Co-Operators General Insurance Company, dated September 6, 1989 addressed to Mr. Brookes, informing Mr. Brookes that his policy of automobile insurance was being cancelled for non-payment. The cancellation was to take effect 15 days after delivery of the registered letter to the post office address for Mr. Brookes, so that the termination of the policy would be effective as of September 23, 1989.

16. Also on September 8, 1989 Flexi Plan Leasing received separate and specific notice from Co-Operators General Insurance Company by ordinary mail advising that coverage for the vehicle was no longer in force and indicating that coverage would be maintained in favour of Flexi Plan Leasing for 15 days from date of delivery of the notice. Accordingly, coverage was extended pursuant to this notice to September 23, 1989.

17. On September 12, 1989, Flexi Plan learned that Mr. Brookes had made arrangements to have a paint protection package applied to the vehicle. Inquiry to a Ziebart dealership revealed that Mr. Brookes had just left the premises and was heading for MacPhee Pontiac. At this point, Mr. Philip Davies and Mr. Bob Buchanan of Flexi Plan Leasing set out to intercept Mr. Brookes and attempt to repossess the vehicle. Their plan was to wait for Brookes to arrive with the Grand Am and then block his path by placing Buchanan's vehicle in front of the Grand Am and a B.C. Recover tow truck behind.

18. Neither Mr. Davies or Mr. Buchanan obtained permission from MacPhee Pontiac to attempt to repossess the Grand Am at the premises of MacPhee Pontiac. Shortly after arriving at MacPhee Pontiac, Mr. Davies observed Mr. Brookes at the MacPhee Pontiac dealership behind the wheel of the Grand Am, but coming from a different direction than they had anticipated. Mr. Davies approached the Grand Am and opened the passenger side door. The vehicle came to a stop. He stated

that he was repossessing the car for non-payment and because the insurance had been cancelled. When the vehicle began to move forward, Mr. Davies indicated that if Mr. Brookes left with the vehicle, it would be considered theft. Mr. Brookes quickly accelerated causing Mr. Davies to spin around and fall to the ground.

19. Mr. Buchanan, who was operating a 1988 Nissan Pathfinder, also owned by Flexi Plan Leasing, had positioned his vehicle so as to block or obstruct Mr. Brookes' exit route with the Pathfinder. However, the Grand Am proceeded to collide initially with the Pathfinder, and as a result the Grand Am sustained damage along the left hand or passenger side of the vehicle, and then subsequently collided with a 1955 Pontiac owned by MacPhee Pontiac, before proceeding to exit the MacPhee lot onto Portland Street. All these vehicle sustained damage as a result of the collisions. Buchanan pursued Brookes for some distance on Portland Street but discontinued pursuit when Brookes ran a red light. The parties hereto agreed that the

Grand Am sustained $2,000.00 damage as a result of the collisions that occurred on the premises of MacPhee Pontiac on September 12, 1989.

20. Mr. Davies then proceeded to report the incident to Dartmouth Police and Co-Operators General Insurance Company. Mr. Brookes was subsequently charged with hit and run and theft of a vehicle. The Grand Am was not recovered until October 22, 1989. Flexi Plan considered it was uneconomical to attempt to repair the vehicle and the damage was not appraised. The actual cash value of the vehicle as of September 12, 1989 was $13,970.00.

21. Co-Operators General Insurance Company denied liability to Flexi Plan under the policy.

22. Mr. Brookes subsequently was arrested and pleaded guilty to theft.

23. The question to be determined in this proceeding is whether or not Flexi Plan

Leasing, as insured, is entitled to indemnification for loss arising from the theft of the Grand Am under the comprehensive coverage provided by the Defendant's policy. The following specific issues are to be determined at trial;

(a) the applicability of exclusion clause 1(b) of Section C.

(b) whether or not the $2,000.00 damage sustained on September 12, 1989 was accidental so as to be covered under Section C.

24. The parties confirm that in the event the court finds that the plaintiff is entitled to indemnity under the policy; the plaintiff shall recover prejudgment interest on the amount awarded by the court at a rate of 9% per annum for a three year period.

As set forth in the Agreed Statement of Facts the following specific issues are to be determined, namely:

(a) the applicability of exclusion clause 1(b) of Section C of the Insurance Policy

which is the SPF 1 Standard Automobile Policy for Nova Scotia, and

(b) whether or not the $2,000.00 damage sustained on September 12th, 1989 was accidental so as to be covered under the said Section C of the policy.

Section C of the said policy contains the following exclusion clause, namely:

> "The insurer shall not be liable
>
> (1) under any subsection of Section C for loss or damage
>
> (b) caused by the conversion, embezzlement, theft or secretion by any person in lawful possession of the automobile under a mortgage, conditional sale, lease or other similar written agreement:"

Section C covers indemnity for loss or damage to the insured automobile for all perils, collision or upset, comprehensive and certain specified perils.

The Plaintiff argues that loss or damage to the insured vehicle is covered under Section C, subsection 3 comprehensive which reads as follows:

> "Subsection 3 - COMPREHENSIVE - from any peril other than by collision with another object or by upset;
>
> The words 'another object' as used in the Subsection 3 shall be deemed to include (a) a vehicle to which the automobile is attached and (b) the surface of the ground and any object therein or thereon. Loss or damages caused by missile, falling or flying objects, fire, theft, explosion, earthquake, windstorm, hail, rising water, malicious mischief, riot or civil commotion shall be deemed loss or damage caused by perils for which insurance is provided under this subsection 3."

There is no question in my mind that on the Agreed Statement of Facts the individual Brookes committed theft or conversion of the motor vehicle. He did in fact plead guilty to theft. The issue to be determined therefore is the interpretation of "lawful possession" in the exclusion clause. At the time of the theft was Brookes in lawful possession of the motor vehicle.

The Plaintiff submits that Brookes, the lessee, was not in lawful possession of the vehicle at the time of the theft and that the Defendant is liable for the full amount of the vehicle less the salvage value. The Defendant submits that lawful possession under such circumstances is determined by the circumstances at the time of entering into the lease agreement and that there

was no intervening event which would terminate such lawful possession.

The facts contained in the Agreed Statement of Facts indicate to me that Brookes was in lawful possession of the vehicle at the time of entering into the lease agreement. The matter then to be determined was whether any intervening event terminated such lawful possession.

The Defendant has submitted three cases in particular to this Court and alleges that lawful possession in such cases is only to be determined from the situation existing at the time of entering into the lease.

The first case is **Cedar Grove Mobile Home Sales Limited** v. **Home Insurance Company** (1970) 1 L.R. 1-309 (Ont. C.A.). An individual rented a trailer from the plaintiff using a false name. The person made payment by cash and cheques that later were returned NSF. The trailer was never returned by the lessor but was ultimately recovered. The plaintiff claimed an indemnity from the insurer and the insurer denied on the grounds of exclusionary provision which provided that the insurer would not be liable for loss caused by conversion, embezzlement, theft or secretion by any person in lawful

possession of the automobile. At trial, the Trial Judge found that the fraud in the first instance denied the use of the exclusionary provision because the person who was responsible for the conversion was not "in lawful possession". But on appeal, the Ontario Court of Appeal overturned the trial decision. The Court of Appeal found that possession was obtained in a "lawful manner" in the first instance and accordingly the subsequent conversion or theft brought the exclusionary clause into play, resulting in the insured being unable to recover for any of the loss or damage sustained as a result of the theft.

The next case is that of **Davlyn Corp. Limited** v. **Liberty Mutual Fire Insurance Company** (1975) I.L.R. 1-707 (Alta. S.C.) where an insured vehicle was rented and not returned. The renter was subsequently convicted of theft and the car was never located. The owner adjourned a claim under Section C comprehensive provisions of his automobile insurance policy. The policy contained an exclusionary clause relating to conversions. The Court found that the lessee was guilty of conversion and the exclusionary clause came into play and the loss was excluded because the lessee was in lawful possession under the lease agreement.

The Third case is **R.M.K. Enterprises Limited** v.

Manitoba Public Insurance Corp.,(1981) I.L.R. 1 - 1416 (Man. Q.B.). The car rental company rented a vehicle to a person who fraudulently identified himself and later stole the vehicle. The rental company sought indemnification from its insurer. The insurer denied on the grounds that the thief was in lawful possession at the time. The Manitoba Court of Queen's Bench held that the insured was not in lawful possession because of his misrepresentations at time of the leasing of the vehicle. Accordingly, the Court concluded that the exclusionary clause in the insurance policy was not applicable because the lessee was not in lawful possession at the outset of the lease contract."

The Defendant submits that consideration of the wording of the exclusion confirms and indicates that "lawful possession" is to be determined on the basis of consideration of the circumstances existent at the time the lessee first acquired possession of the vehicle.

On the other hand, the Plaintiff submits that all of the intervening events, including actions taken by the Plaintiff to repossess the vehicle and more specifically the actions of the Plaintiff on September 12, 1989, did in fact put an end to the lawful possession of the vehicle by Brookes. The Plaintiff submits that the cases

cited by the Defendant and other decided cases to date have not considered whether an intervening event could end the lawful possession. It suggests that in the cases to date which have applied the exclusion clause, the chattels were taken by the lessees and never returned and that the case reports appear to indicate that there was little or no further contact between the parties after execution of the lease agreement.

Presumably, the intervening events relied upon by the Plaintiff was the contact by the Plaintiff with Brookes and Williams in June of 1989, the telephone calls to Brookes and Williams during the summer of 1989, and the actual events of September 12th, 1989 when the Plaintiff made an unsuccessful attempt to repossess the car. I state unsuccessful because the Plaintiff was not able to successfully obtain possession of the motor vehicle.

In my opinion, on September 12th, 1989, the lessee was in serious breach of the lease agreement and the Plaintiff was entitled to possession of the motor vehicle. Repossession must be done in a lawful manner and if the lessor is unable to effect repossession lawfully, and without difficulty, it has the option of applying to the Courts for a proper order for possession.

In my opinion the actions of the Plaintiff in attempting to repossess the vehicle were not unlawful, but the Plaintiff did not regain possession. I do not find any breach of the peace in the actions of the Plaintiff on September 12th.

In the cases decided on the exclusion clause, in almost every instance there was a theft or conversion of the motor vehicle. In most cases the lease agreement was breached to the extent that the lessor would be entitled to the lawful possession of the motor vehicle. Under those circumstances, continued possession on the part of the lessee is, in most instances, unlawful whether there has been an unsuccessful attempt at repossession by the lessor or not.

The Defendant suggests that motor vehicle insurers are not prepared to underwrite the increase in risk inherent in cases where a conflict occurs between a lessor and a lessee, and with this I am inclined to agree. Inherent in the exclusion is that there be a lawful contract between the lessor and lessee as at the time it was entered into, that is that there was no fraud or other factor which would declare the contract void or unlawful, **ab initio.**

In my opinion there was no intervening event which took place which would negate the exclusionary clause. The Plaintiff was entitled to lawful possession of the motor vehicle but did not gain possession. Had the Plaintiff obtained possession and later the lessee stole the vehicle, this would be a different matter but this is not what happened in this case.

It is my opinion based on the cases submitted and the arguments made, that it is the circumstances pertaining to the original acquisition of the vehicle by the lessee that are to be considered in determining whether or not the lessee was in lawful possession of the automobile under the provisions of the written lease agreement. Accordingly, in this case the lessee Brookes had "lawful possession of the automobile" under the provisions of the exclusion clause, notwithstanding that the Plaintiff had the lawful right to regain possession of the vehicle. Both the specific issues raised have accordingly been determined by this finding.

I would accordingly dismiss the action against the Defendant. The Defendant shall have its costs in this action against the Plaintiff on a party and party basis

based on Tariff "A", Scale 3 (basic). Amount involved shall be considered to be $12,000.00.

A Judge of the County Court of District Number One