N O V A S C O T I A
COUNTY OF HALIFAX C.H. 42705

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

BETWEEN:

BRUCE M. ATKINSON
BOATBUILDERS LIMITED,

Appellant

- and -

WAYNE EDDY,

Respondent

Darrel I. Pink, Esq., solicitor for the appellant.
Christopher Berryman, Esq., solicitor for the respondent.

1984, January 26, Anderson, J.C.C.:- This is an appeal by way of stated case pursuant to s.32(1)(a), Statutes of Nova Scotia 1980, Small Claims Act, from an order made under s.9(a) of the same Act. Both sections are reproduced below:

> 32 (1) A party to proceedings before an adjudicator may appeal from an order or determination of the adjudicator on the ground that
>
> (a) it is erroneous in point of law; ....
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> by applying to the adjudicator to state a case to be transmitted to the county court setting forth the facts as found by that adjudicator and the grounds on which the proceedings are questioned.
>
> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed two thousand dollars inclusive of any claim for general damages but exclusive of interest;

The facts, as enumerated by the adjudicator, are as follows:

1. The Claimant, now Respondent, and the Defendant, now Appellant, and the Fishermen's Loan Board, entered into an agreement on the 1st day of May, 1981, for the purchase of a vessel by the Respondent from the Appellant.

2. Under the terms of the agreement the Appellant was to be paid in total the sum of $55,447.00 for the vessel.

3. Also under the agreement, the Appellant guaranteed the vessel with respect to materials, equipment, machinery, and workmanship, for a period of three months.

4. The Respondent received the vessel on or about July 3rd, 1981.

5. When the Respondent put the vessel in the water, there appeared to be a problem with the engine, in that the vessel vibrated badly.

6. The Respondent telephoned Bruce Atkinson of the Appellant Company and told him that the vessel was vibrating badly.

7. Mr. Atkinson did not want to make the three hour trip to Eastern Passage, where the Respondent resided, from Clark's Harbour, where the Appellant, is located, to investigate the vibrations himself, so it was agreed between himself and the Respondent that Seaboard G.M. Diesal Limited of Dartmouth would examine the engine, and the Appellant would pay for any necessary repairs.

8. The engine for the vessel had been purchased from Seaboard G.M. Diesal Limited by the Appellant in the first instance, although not from the Dartmouth office.

9. Representatives of Seaboard G.M. Diesal of Darmtouth did go to Eastern Passage on three occasions between July, 1981, and November, 1981, at the request of the Respondent, to investigate the vibration problem the Respondent complained of.

10. On each occasion the persons sent out by Seaboard G.M. Diesal, lined up the engine, and informed the Respondent that the vessel was vibrating because it was a fiberglass vessel, rather than a wooden one.

11. The Respondent telephoned the Appellant Company at least three times during this five month period, I.e. between July, 1981 and November 1981, to complain about the vessel vibrating.

12. In the six month period preceding December of 1982, the Respondent had to replace the coupling bolts on the engine on four or five occasions, which were shearing off due to the vibrations in the vessel.

13. In December of 1982 the Respondent had his own mechanic, Mr. Fred Barkhouse examine the engine.

14. Mr. Barkhouse stated in evidence, and I accepted as fact, the following:

(a) The engine was way out of alignment with the shaft.

(b) The reason the engine was misaligned, and the reason the vessel vibrated so badly all the time, was because the engine was floating.

(c) The engine was floating because the front of the engine was not bolted down.

(d) The reason the front of the engine was not bolted down was because the leg bolts holding it had broken off.

(e) The leg bolts securing the front of the engine were inadequate to perform that function, and that was the reason they had broken off. As well, the bolts were too small for the holes into which they were placed.

15. Mr. Barkhouse solved the problem of the vessel vibrating by securing the front of the engine down.

16. The reason the problem had not been noticed before was because the front of the engine is located in such a position that is not easily accessible or easy to examine.

17. The transmission in the vessel failed the day after the vibration problem was resolved, and was replaced at a cost to the Respondent of $950.00.

18. A couple of weeks after the transmission in the vessel failed, the dry plate had to be replaced at a cost to the Respondent of $138.00.

19. The Respondent and his two crewmembers lost five fishing days due to the transmission failure, at a cost to the Respondent Of $473.90.

20. It was my finding that the misalignment of the engine in the vessel caused the transmission failure and the dry plate to wear, resulting in five lost fishing days for the Respondent.

21. It was further my finding that the engine misalignment was caused by the fact that the front of the engine was not securely fastened down when it was built, causing the vessel to vibrate from the day it was purchased,

22. I allowed the claim. ($2,000.00)

23. I did not set off against the claim made by the Respondent, any monies claimed under the counter-claim by the Appellant, because it was my finding that some of the additional services claimed for under the counter-claim were never performed. It was further my finding that the parties had agreed long ago, that those additional services that were performed were not to be paid for.

The one ground of appeal in this case asks

> Did the Learned Small Claims Court Adjudicator err in law in failing to consider the terms of the contract?

Central to the appellant's argument is the role of s.22 of the Agreement and the contractual concept of the fundamental breach therein. Section 22 is an exception or exclusion clause providing the following:

> Notwithstanding anything in the Agreement contained the Builder warrants and guarantees:
>
> (a) With respect to the materials and equipment and machinery supplied by the Board and installed by the Builder, that the installation is sound and properly done and the engine is in line.
>
> (b) With respect to all other portions of the work, that the vessel is sound and seaworthy and fully in accordance with the said plans and specification, that the materials workmanship and construction are in general accord with the practice established for similar vessels by Lloyds, The Bureau of Steamship Inspection and the American Bureau of Shipping and that said materials are free from defects.
>
> Such Warranty and Guarantee shall continue for a period of three months from and after final acceptance of the vessel by the Board.

The appellant submits that the first matter to determine is whether or not there has been a fundamental breach of contract. Secondly, he states that should such a breach not be found, then, in relation to s.22 (supra), the warranty is only valid for three months (after the final inspection by the Fishermen's Loan Board). In support of this contention he cited the following cases, all of

which have been helpful in the resolution of this matter.

> *B.G. Linton Construction Limited v. Canadian National Railway Company* (1974), 49 D.L.R. (3d) 548;
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> *Blackwood Hodge Atlantic Limited v. Kelly* (1971), 3 N.S.R. (2d) 49;
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> *Suisse Atlantique Societe d'Arment Maritime S.A. v. N.V. Rotterdamshe Kohen Central,* [1966] 2 All E.R. 61, [1967] 1 A.C. 361;
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> *Canso Chemicals Limited v. Canadian Westinghouse Company Limited* (1974), 10 N.S.R. (2d) 306;
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> *R.G. MacLean v. Canadian Vickers Limited et al.*, [1971] 1 O.R. 207 (Ont.C.A.);
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> *Davis v. Chrysler Canada Limited et al.* (1978), 26 N.S.R. (2d) 410, 40 A.P.R. 410;
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> *Maughan v. International Harvester Company et al.* (1979), 36 N.S.R. (2d) 278.

Alternatively, the respondent's position is that in properly considering the terms of the contract the adjudicator established that the engine vibrations and inability of the appellant's agents to rectify them were brought to the latter's attention within the three month period.

Inherent in the determination of this matter is the concept of fundamental breach. Among a host of modifying adjectives it has been variously described as elusive, vexacious and misunderstood. By its very nature fundamental breach is open to wide and varied subjective interpretation which precludes a singular and definitive explanation. Nevertheless, there are helpful guides when it comes to considering its application to each case. Chesire and Fifoot's *Law of Contract*, 9th ed. describes it as follows (pp.571-572):

> Of what nature then, must a breach be before it is to be called "fundamental?" There are two alternative tests that may provide the answer. The court may find the decisive element either in the importance that the parties would seem to have attached to the term which has been broken

> or to the seriousness of the consequences that have in fact resulted from the breach.

In *Suisse Atlantique* Lord Reid said (at p.397)

> One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but what was likely to happen in future...

Widgery, L.J., in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co.Ltd.*, [1970] 1 All E.R. 225, formulated the following test as a means of determining whether or not a breach was fundamental.

> ...the first step is to see whether an event has occurred which has deprived the plaintiff of substantially the whole benefit which they were to obtain under the contract...if the event which occurs as a result of the defendant's breach is an event which would have frustrated the contract had it occurred without the fault of either party, then the breach is a fundamental breach for the present purposes.

Other similar descriptions are as follows:

> "totally different performance of the contract from that intended by the parties" and which will "undermine the whole contract" - Sellers, L.J., in *Hong Kong Fir Shipping Co. Limited v. Kawasaki Kisen Kaishu Ltd.*, [1962] 1 All.E.R. 474 (C.A.), at p.479

> " so defective as to be quite incapable of performing the function which both parties contemplated it should perform...resulting in performance totally different from what the parties had in contemplation - Arnup, J.A., in *McLean, supra*, in [1971] 1 O.R., at p.212

> "...an accumulation of defects which...taken en masse, constitute such a ....breach going to the root of the contract, as disentitles a party to take refuge behind an exception clause intended to

> give protection only in regard to those breaches which are not inconsistent with and not destructive of the whole essence of the contract." Pearce, L.J., in *Yeoman Credit Ltd. v. Apps*, [1961] 2 All E.R. 281, at p.289

In the final analysis it is necessary to look individually at the contract, the breach and its effect on the parties. Each case has its own unique circumstances and must be considered accordingly.

Nowhere has the concept of fundamental breach been the subject of more controversy than in its relationship to exemption clauses. The two are so closely and inextricably interrelated that it is difficult to discuss one without making reference to the other. Pace, J.A. in *Keefe v. Fort*, 27 N.S.R. (2d) 353; 41 A.P.R. 353 (at pp 360-361) a case which reaffirmed the existence of fundamental breach in Nova Scotia stated:

> ...it would appear that the modern adaptation of the concept of fundamental breach has been invoked almost exclusively, if not exclusively, by the Courts to overcome the harsh results which would be wrought upon an innocent party when the contract contained exception clauses and the breaches were so radical as to constitute a breach going 'to the root of the contract', the performance of which would result in something totally different from what the parties intended.

Montreal Trust Company v. Canadian Pacific Airlines Ltd. (1977), 72 D.L.R. (3d) 257 establishes that whenever an exemption clause is invoked by a defendant there is a threshold question to be determined. It is necessary to answer whether the clause, though *ex facie* included in the contract, is in law deemed to be contained therein. This question, however, arises only in the so-called "ticket cases". For exemption clauses that are unquestionably of a contractual nature (as in this case) the *contra proferentem* rule has served to limit their role. In *Dabous v. Zuliani* (1976), 68 D.L.R. (2d) 414 (Ont.C.A.), the plaintiff's claim for loss caused by fire succeeded despite the existence of an exemption clause. The clause stated that the architect's final certificate "shall constitute a waiver of all claims by the owner". In holding that the clause was inapplicable, the court held its purpose was for "the resolution of disputes concerned directly with the proper completion of and the payment for the work in question".

Suisse Atlantique established that exemption clauses could not remove liability for breaches termed as fundamental. Exemption clauses therefore would not normally be applicable unless refuted by explicit terms. *Canso Chemicals* is one of a number of cases illustrating the proliferation of this theory in Canadian courts. Despite the existence of an exemption clause in that contract, the court found the defendant liable. In arriving at this decision Coffin, J.A. reflected the test evolved in English courts. Namely, had the effect of the breach "deprived the plaintiff of substantially the whole benefit which they were to obtain under the contract." In the determination of this issue an affirmative answer to the following question was necessary: "Was the design error which resulted in the malfunction of the rectifier equipment such as to justify a repudiation of the contract by the respondent"?(at p.534)

B.G. Linton Construction, supra, represented the first decision of the Supreme Court of Canada on this matter. Ritchie, J's majority judgment took a very narrow view of the doctrine by ruling that:

> There is a wide difference between negligent performance of a contract and fundamental breach. [In the 'car' cases where the doctrine was applied by the English courts]...it can be said that the contract has not been performed at all whereas the present case is one of negligent performance (at p.558-559).

Earlier he said:

> The case of *Suisse Atlantique Societe D'Arment Maritime S.A. v. N.V. Rotterdamsche Kohen Centrale* [1966] 2 All E.R. 61, is one of many authorities indicating that although in cases of ambiguity an exemption clause is to be strictly construed against the party relying on it, it is nevertheless to be given full force and effect if the language in which it is drafted is sufficiently clear to leave no doubt as to its meaning. (at p.553)

Davidson v. Three Spruces Realty Ltd. (1978), 79 D.L.R. (3d) 481 is an example of the interpretation of exemption clauses at the other end of the spectrum. Anderson, J. (B.C.S.C.) held that 'unreasonable" terms of a contract "although perfrectly clear will not be enforced".

While there has been no consensus of opinion on the matter the current position more closely resembles Linton than Davidson. A typical case in this regard is *Debuka Enterprises of London Ltd. v. Matthews Group Ltd.* (1978), 18 O.R. (2d) 454. After citing Suisse Atlantique and Linton, Killeen Co.Ct.J. held:

> The doctrine [of fundamental breach], on this approach, is one of construction only and is, in essence, an application of the principle that an exemption clause should not, in the absence of plain, unambiguous words, be construed to defeat the main purpose of the contract...

Photo Productions Ltd. v. Securicor Transport Ltd., [1981] 1 All E.R. 556 provides an example of greater acceptance of exemption clauses and a more restrictive approach toward fundamental breach. It was held that in interpreting the exemption clause the court's role was to determine whether on its correct construction it was relevant to the circumstances concerning the litigation. The case clearly held that exemption clauses will be interpreted in a manner proportionate to the harshness of their predicted effect, yet a court is not permitted to reject such a clause "however unreasonable the court itself may think it is, if the words are clear and susceptible of one meaning only". As well, the case affirmed that any contractual obligations and liabilities may be excluded or amended by clearly drawn provisions, within the limit that "the agreement must retain the legal characteristics of a contract". Thus the English courts have severely restricted fundamental breach. Subsequent Canadian decisions have not shown any consistency in this regard. Notwithstanding this inconsistency there does seem to be some agreement with Lord Wilberforce's assertion (in Photo, supra) that:

> In commercial matters generally when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is this the case for judicial intervention undemonstrated, but there is everything to be said...for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

This approach was adopted in *Canadian Dominion Leasing Corporation Ltd. v. George A. Welch and Co.* (1982), 125 D.L.R. (3d) 723 (Ont.C.A.) However, two other cases suggest the *Photo* position has not gained full acceptance in Canada and fundamental breach still thrives. In *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.* (1982), 128 D.L.R. (3d) 227 (Ont.H.C.) Trainor, J. cited with approval Lord Halsbury in *Glynn et al. v. Margetson & Co. et al.*, [1893] A.C. 351 at p.357:

> Looking at the whole of the instrument, and seeing what one must regard...as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

In *Rose v. Borisko Brothers Ltd.* (1982), 125 D.L.R. (3d) 671 (Ont.High Ct.), OBrien, J., in considering whether the limitation clause applied, said "I believe I should ask the question whether it is fair and reasonable for the exclusionary clause to survive the fundamental breach..."

On the basis of the aforementioned cases the law in Nova Scotia (and Canada) would still seem to be that fundamental breach will negate the impact of an exemption clause.

Assuming there has been fundamental breach, what are the remedies available to the aggrieved party? In *Harbutt's, supra*, at p.233 Lord Denning said:

> In cases where the contract is still open to be performed, the effect of a fundamental breach is this: it gives the innocent party,

> when he gets to know of it, an option either to *affirm* the contract or to disaffirm it. If he elects to *affirm* it, then it remains in being *for the future* on both sides. Each has a right to sue for damages for *past* or *future* breaches. If he elects to disaffirm it (i.e., accepts the fundamental breach as determining the contract), then it is at an end from that moment. It does not continue into the future. All that is left is the right to sue for past breaches or for the fundamental breach, but there is no right to sue for *future* breaches.

Cooper, J.A., in *Blackwood Hodge Atlantic Ltd. v. Kelly* (1972), 3 N.S.R. (2d) 49, reaffirmed this position holding that:

> Where a fundamental breach has occurred the innocent party may elect to treat the breach as a repudiation, bring the contract to an end and sue for damages. The consequence is stated by Lord Reid in Suisse Atlantique at p.398 A.C.:
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> > 'Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term.'
>
> On the other hand, if the innocent party has elected that the contract should continue in force the clause excluding liability must continue to apply and it becomes a matter of construction as to whether or not the clause will serve to overcome the breach. (at p.59)

Similarly see Arnup, J.A., in *R.G. MacLean, supra*, at pp. 18 and 19.

The circumstances of this case did not amount to a fundamental breach. In arriving at this conclusion I have considered not only the aforementioned case law, but the type of structural and mechanical failures associated with the vessel. For there

to be fundamental breach there would have to be a total or permanent failure in the operation of the boat. *Harbutt's Plasticine*, *McLean*, *Suisse Atlantique* and *Hong Kong Fir* establish this criteria. Consider McLean a case where fundamental breach was found: "In short, the machine simply did not do the job which it had been purchased to do and could not be made to do it by all efforts of both parties" (Arnup, J.A., at p.210). Here, while the vessel did not operate efficiently, until the respondent had it repaired, the failures of performance could be classified as partial. Here the breach was within the scope of the contract and its warranty clause. This finding, however, does not settle the issue. The respondent purchased a vessel on the premise that it would be seaworthy. The appellant guaranteed it, in this regard, for a period of some three months subsequent to the purchase date. Within that three month period the respondent encountered operating difficulties with the vessel and within that same period reported them to the appellant. The adjudicator drew specific attention to the contractual terms in paragraphs one to three of the stated case. She then properly considered them in light of the facts, particularly those in paragraphs five, six, eleven, twenty and twenty-one. The adjudicator did not fail to consider the terms of the contract. The appeal therefore is dismissed and costs are awarded to the respondent.

A Judge of the County Court of
District Number One