**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Merex Inc. v. Stoney Island Fisheries Ltd.*, 2014 NSSC 67

**Date:** 20140221
**Docket:** Hfx Nos. 327021; 349120
**Registry:** Halifax

**Between:**

Merex Incorporated

Plaintiff

v.

Stoney Island Fisheries Limited

Defendant

and

Lloyd's Underwriters, Members of Lloyd's London, England, subscribing to Policy No. M083250

Second Defendant

**Judge:** The Honourable Justice John D. Murphy

**Heard:** July 30, 2013, in Halifax, Nova Scotia

**Written Decision:** February 24, 2014

**Counsel:** Frank Metcalf, Q.C. and Eric Machum, for plaintiff
Andrew Nickerson, Q.C., for defendant Stoney Island
Michael S. Ryan, Q.C.; Richard Norman, for defendant Lloyd's

**By the Court:**

## INTRODUCTION

[1] In the context of motions for summary judgment on evidence brought by defendant insurance underwriters in two actions, the parties seek determination of a question of law – whether the plaintiff is an unnamed beneficiary under insurance policies with a direct right of action against underwriters.

## BACKGROUND

[2] The plaintiff, Merex Incorporated ("Merex") seeks damages for its fish product (“the Product”) lost in three fires at the Stoney Island Fisheries Limited ("Stoney Island") storage facility in southwestern Nova Scotia. At all relevant times, Merex and Stoney Island had contractual arrangements for storage of the Product at Stoney Island's facility, and Lloyd’s Underwriters ("Lloyds" or “Underwriters”) had issued an insurance policy to Stoney Island. The insurance policies in effect at the time of each fire contained identical language, and they are collectively referred to as the "Policy."

[3] In April 2010, Merex sued in relation to Product lost in a December 2008 fire, claiming that Stoney Island was negligent in caring for it. In February 2011 Merex added Lloyds as a defendant in that claim, seeking indemnity under the Policy. Merex commenced another action in May 2011 against both Stoney Island and Lloyds in relation to two subsequent fires during August and September 2010. Similar allegations are made by Merex against Stoney Island and Lloyds in both actions, and all claims have been defended. Merex claims total in excess of $1,444,000, plus interest and costs.

[4] The parties have taken similar steps in both proceedings. Affidavits of documents have been exchanged and representatives of Stoney Island and Merex, but not Lloyds, have been examined on discovery.

[5] In March 2013, the plaintiff filed motions in both actions seeking determination, as a question of law under *Civil Procedure Rules 12* and *13*,

whether the Policy provides coverage to Merex against loss of the Product. Subsequently, Underwriters brought motions in both proceedings seeking leave to amend their statements of defence, and both defendants moved for summary judgment on the evidence. Lloyds' motion to amend its defence and both Defendants' motions for summary judgment were scheduled for hearing on July 30, 2013, before the plaintiff's motion respecting coverage under the Policy, which was tentatively scheduled to be heard October 1, 2013, if the defendants' summary judgment motions failed.

[6] During the hearing of Lloyds' motion to amend its defences, the parties reached agreement concerning proposed changes, and revised statements of defence have been filed by consent. Motions for summary judgment and determination of the question of law relating to Policy coverage have proceeded in the context of Lloyds' amended statements of defence. Issues arising from those pleadings will be addressed later in these reasons; however, the thrust of Lloyds' position is that it did not insure the plaintiff's Product, Merex has no direct right of indemnity under the Policy, and the plaintiff can only recover from Lloyds if Stoney Island is liable for the loss of the Product and fails to satisfy a judgment in respect of that liability.

[7] Stoney Island sought summary judgment on the basis that there was no genuine issue for trial or dispute of material facts because (1) the plaintiff failed to provide any evidence upon which a court could conclude that Stoney Island was negligent in its care of the Product, and (2) there was no evidence of agreement by Stoney Island to insure the Product.

[8] After considering written argument and hearing oral submissions, I dismissed Stoney Island's summary judgment motion. Reasons for the dismissal were communicated orally to the parties, and may be summarized as follows. Stoney Island's argument that there was no evidence that it was negligent rested on the submission that during discovery examination Merex's principals failed to point to any act or omission constituting a breach of Stoney Island's duty to take reasonable care of the Product. Without weighing the testimony which the plaintiffs' witnesses did provide, I determined that in this case, which clearly involves goods damaged during bailment for hire, Stoney Island could not obtain summary judgment solely on the basis that the plaintiff failed to provide evidence

raising a genuine issue in connection with Stoney Island's storage of the Product. As a bailee for reward, Stoney Island has a duty to exercise care and diligence. It also has the burden to establish the existence of a lawful excuse for refusal or failure to deliver the goods, and to prove that destruction while in its possession was not caused by its neglect, misconduct or default. (*Warehouse Receipts Act*, RSNS 1989, c. 498, s.7 and s.14; **British Motor Corporation of Canada Limited v. Ross E Judge Auto Transport Limited**, [1966]N.S.J. No. 11).

[9] A bailee with goods in its care and the burden to prove that its neglect did not cause damage cannot obtain summary judgment on the basis another party has not produced evidence of its negligence. In this case, Stoney Island, despite having possession, did not show how it looked after the plaintiffs' goods. It and not the plaintiff knew the care afforded the Product, but instead of putting "its best foot forward" and providing that information to the Court, it took the position the plaintiff had to do so. As Stoney Island did not demonstrate that the statements of claim failed to raise a genuine issue with respect to its care of the Product, and the plaintiff's claim in negligence survived the Stoney Island summary judgment motion, issues relating to agreement to insure were not assessed in the context of the Stoney Island motion.

**Lloyds' Motion for Summary Judgment**

[10] Following delivery of the oral decision dismissing Stoney Island's summary judgment motion on July 30th, the Court gave Lloyds and Merex the choice to proceed immediately with Lloyds' summary judgment motions or to postpone the hearing for that issue. The plaintiff and Lloyds chose to make submissions with respect to Lloyds' summary judgment motions immediately on July 30th, after agreeing and advising the Court as follows:

1. Merex did not wish to conduct discovery examination of Lloyds' representatives prior to the hearing.
2. The motion would be determined in the context of Lloyds' statements of defence, including the amendments to which the parties had agreed.
3. Determination of the question of law which had been scheduled in October 1, 2013 hearing – whether the Policy covered loss of the

Product in the fires – would be subsumed in the summary judgment hearing.

**Additional facts**

[11] The affidavits and discovery evidence filed by the parties revealed the following additional undisputed information, relevant to Lloyds' summary judgment motions:

1. The written agreement between Merex and Stoney Island was silent with respect to liability and insurance, and those topics were not discussed when arrangements were made for storage of the Product.
2. Merex is not a party to or a named insured in the Policy; however, third party property was not specifically excluded by wording in the Policy.
3. There were no communications or dealings between Merex and Lloyds prior to loss of the Product.
4. Merex obtained and maintained a separate policy insuring the Product at all material times. The plaintiff has been indemnified against the loss which is the subject of these claims by its own insurers, who are subrogated to any rights Merex has in this proceeding.

**Issue and Position of Parties**

[12] Lloyds' entitlement to summary judgment is substantially dependent upon resolution of the question of law posed by Merex for determination under *Civil Procedure Rule 12* in its Notices of Motion filed March 18, 2013, by which the plaintiff seeks an order stating:

> Policy…..language as stated above [language of the Policy, quoted in paragraph 17 below] includes, *inter alia*, the property of third parties contained within the Premises for processing and/or storage by the First defendant [Stoney Island] and which the First Defendant was caring for and is therefore insured by policy…..against loss or damage as if it is the property of the Insured.

[13] Resolving this question of law under *Rule 12* does not require the analysis the Court ordinarily undertakes to determine whether summary judgment on

evidence should be granted under *Rule 13.04*; *Rule 12.01(1)* contemplates determination of the question of law "even though the parties disagree about facts relevant to the question." After deciding the question of law under *Rule 12* I will determine, based on the evidence or lack of evidence, whether the Statement of Claim raises any other genuine issue for trial in order to assess whether Lloyds is entitled to summary judgment under *Rule 13.04*.

[14] The plaintiff seeks an order determining the question of law by ruling the Product was covered by the Policy, and consequent dismissal of the summary judgment motion. Merex claims that it is a beneficiary under the Policy and that the Policy covers the Product. The plaintiff maintains that its own insurance covering the Product is not relevant.

[15] Lloyds maintains Merex should not obtain the order it seeks under *Rule 12*, and says it is entitled to summary judgment because the Policy does not provide coverage to insure the Product; it was not a "goods" policy for Merex benefit. Lloyds relies on its interpretation of the Policy language, and its position respecting the parties' intentions. Lloyds claims that the plaintiff has no direct right of indemnity under the Policy, and it could only be required to pay the plaintiff's loss if Merex had an unsatisfied judgment against Stoney Island. Lloyds says pursuing any statutory right accruing to Merex as a judgment creditor should be the subject of a separate proceeding, and the underwriter should have summary judgment in the present actions.

**Analysis**

[16] The first step in deciding whether Merex has a direct right of action against Lloyds is to examine the wording of the Policy. If the text is not determinative, it may be necessary to consider extrinsic evidence, such as the intention of the parties.

## (i) The Policy Language

[17] The following provisions in the Policy issued by Lloyds to Stoney Island are relevant. The words which are most significant for determination of the issue are underlined:

> Insured
>
> Stoney Island Fisheries Limited and/or their Subsidiary and/or Associated and/or Affiliate companies and/or Joint Venture Companies and/or Partnerships as they now or may thereafter be created and/or constituted and/or for whom they may have instructions to insure and/or for whom they have or assume a responsibility to arrange insurance, whether contractually or otherwise, as their respective rights and interests may appear - hereinafter known as the Insured.
>
> Interest
>
> "GOODS AND/OR MERCHANDISE OF EVERY DESCRIPTION incidental to the Insured's business, consisting principally of, but not limited to Fresh and/or Frozen Fish and/or Shell Fish and/or Fish Products and/or Boxes, Crates, portable machinery, the property of the Insured or for which they are responsible, contractually or otherwise. [emphasis added]
>
> Attachment and Termination of Risk
>
> The insurance hereunder attaches from the time the subject-matter becomes at the Insured's risk or the Insured assumed interest and continues whilst the subject-matter is in transit and/or in store or during processing. Manufacturing, packing, repacking, consolidation, deconsolidation, preparation, distribution, and/or redistribution operations or elsewhere, including while held as stock and/or inventory and until the Insured's risk and/or interest finally ceases. ...(Emphasis added)

Merex says the Policy language is clear and unambiguous in extending coverage to it as an unnamed beneficiary.

[18] The plaintiff claims the Interest and Attachment clauses extend coverage to the Product because as bailee Stoney Island had an interest in the Product, and the storage was incidental to Stoney Island's business as operator of its facility. Merex maintains the words "risk and/or interest" and "responsible, contractually or otherwise" in those clauses extend coverage to any stored fish for which Stoney Island does not disclaim responsibility or risk, and that its responsibility

"otherwise" is as a bailee, trustee, in tort, etc., not limited to responsibility as a result of legal judgment.

[19] Lloyds acknowledges that the Policy covers fish Product owned by Stoney Island, the named insured. It argues however, that it should obtain summary judgment because with respect to Product owned by the plaintiff, the language used indicates at most liability insurance to indemnify Merex against Product loss resulting from Stoney Island's negligence or breach of contract. The insurer maintains the Policy language should be interpreted as only covering Merex Product if the plaintiff establishes Stoney Island's legal liability for loss of the Product.

[20] Much debate between the parties is focused on the words "for which they are responsible, contractually or otherwise", in the Interest clause.

[21] Merex relied upon three decisions by Courts of Appeal: **Smith v. Stevenson**, [1942] O.R. 79-91 in Ontario; **Westwood Electric v. Manitoba Public Insurance Corp.**, [1983] M.J. No. 115 in Manitoba; and **Vanderhoof Hotel (1972) v. Non Marine Underwriters at Lloyd's**, [1983] B.C.J. No. 1658 in British Columbia to support its position that the Policy covered the Product. In each of those cases, however, the insured, and not a party unnamed in the policy, such as Merex, was the plaintiff, and there was no indication another party maintained separate insurance as owner of goods. In my view, those cases are also distinguishable based on policy wording. (Key policy words or phrases are underlined in the next two paragraphs.)

[22] In **Smith v. Stevenson** (*supra*) the items destroyed by fire were included by the insured in the proof of loss and there was no question that the property fell within the definition of interest insured. The issue was whether the language of the policy covered all damage or only damage for which the warehouseman was liable. The policy language in **Stevenson** covered "stock...their own, held in trust or on commission for which they may be responsible," language which differs from "or for which they are responsible" as used in the Policy. The policy language in **Westwood Electric v. Manitoba Public Insurance Corp.** (*supra*) and **Vanderhoof Hotel (1972) v. Non Marine Underwriters at Lloyd's** (*supra*) also did not contain the words "are responsible." In **Westwood** the policy words were "and which the insured is under obligation to keep insured or for which the insured

is legally liable", and in **Vanderhoof** (*supra*) the Court considered the policy words "shall be liable by law."

[23] Lloyds emphasizes that as bailee for hire, in the absence of a contractual duty to do so, Stoney Island had no common law obligation to insure Merex Product (**Longley v. Mitchell Fur Co. Ltd.**, [1983] NBJ No. 102 (NBCA)). In that context it claims the most logical interpretation of the Policy results when the words "GOODS...the property of the insured or for which they are responsible, contractually or otherwise" in the definition of *'Interest*' are read in conjunction with the words "and/or for whom they have or assume a responsibility to arrange insurance, whether contractually or otherwise" in the definition of *Insured*. Lloyds maintains that "responsible" in the definition of *'interest'* should be interpreted narrowly to read as "responsibility to insure."

[24] The Policy should be read as a whole, and in my view Lloyds' interpretation of the wording is correct. Any uncertainty about the extent of Stoney Island's responsibility in the *Interest* clause is resolved by reference to the description of *Insured*, which appears earlier in the Policy documentation, where the terms specific to the coverage provided in this case are set out.

[25] My conclusion that, absent Stoney Island having an obligation to insure the Product, Merex is not an unnamed beneficiary under the Policy wording does not change if the words "are responsible contractually or otherwise" in the definition of "Interest" are read independently from the definition of "Insured." Lloyds has provided case law to support its position that language prescribing insurance coverage in terms such as those used in the *Interest* clause in the Policy – "for which they are responsible" – indicates that a bailee's insurer is not responsible for loss unless the bailee's negligence is established.

[26] In **Canadian Pacific Forest Products Limited v. New Hampshire Insurance Company**, [2004] Q.J. No. 6624 (Que.CA) the Quebec Court of Appeal adopted what it called the common law interpretation of such policy language. **Canadian Pacific** relies largely on the trial judge's decision in **Ramco (UK) Ltd. v. International Insurance Company of Hanover Ltd.**, [2003] EWHC 2360 (QB), aff'd [2004] EWCA Civ 675 (CA).

[27] In **Canadian Pacific**, the plaintiff leased a tree feller which caught fire and was destroyed. The plaintiff notified its insurers who denied coverage. The insurers took the position that the policy provided property coverage, not liability coverage. The plaintiff settled the claim with the lessor and then sued the insurers for the amount paid, claiming that the policy was "hybrid" – i.e. provided both property and liability coverage. The trial judge disagreed, concluding the policy provided only property coverage, and that coverage was excluded under an "Other Insurance" clause. An appeal from the trial decision was dismissed.

[28] The clause in question read:

> Property and Interests Insured
>
> 7.10 All real and personal property of the Insured or for which they are responsible wherever located which, without limiting the generality of the foregoing includes:
>
> - Unlicensed mobile equipment
> - Licensed vehicles
> - Bridges, wharves, docks, floats, log dumping stations
> - Mooring dolphins

The Court specifically considered common law interpretations of this clause. In his reasons, Dalphond J.A. stated:

> 26 There is a history behind this type of coverage. Since the mid-nineteenth century, Common law courts have recognized that persons may insure not only for the loss of property they own, but also for the loss of property placed in their care, whether as carrier, bailee or trustee.
>
> 27 The words "for which they are responsible" or equivalents such as "for which they are liable" are interpreted in the Common law as justifying the coverage contracted by an insured with respect to property owned by third parties and limiting such coverage to cases where the insured is legally required to assume the loss. They are not, however, generally seen to create liability insurance with respect to a claim by a third party property owner or, in other words, to create hybrid coverage ("a composite insurance"). Indeed, the Common law is reluctant to interpret a contract as including liability insurance when the very wording used in the policy defines it as property insurance (**Tomlinson v. Hepburn**, [1966] A.C. 451).

> 28 In **Ramco (UK) Ltd. v. International Insurance Company of Hanover Ltd**. [N.B: the trial judgment, not the English Court of Appeal decision], a very recent judgment of the English High Court of Justice, Justice Andrew Smith carries out an exhaustive review of the case law and undertakes an analysis not without interest in the present matter:
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> > 32. These being the authorities, I return to the interpretation of the particular policy issued by the defendant insurers. It is convenient first to consider whether the insureds were "responsible" for goods bailed to them only if they incurred legal liability in respect of them.
> >
> > 33. In my judgement, the word "responsible" does connote legal liability. The words "for which the Insured is responsible" are, it seems to me, naturally interpreted as limiting the insurers' liability, and unless they are interpreted as referring to legal liability, the words do not do so and they add nothing, or certainly they add nothing of business significance, to the requirement that third party's good be "held by the Insured in trust." The notion of "responsibility" was so interpreted in **Moffatt, in Engel** and by Roskill J in **Tomlinson**. Notwithstanding what was said by Lloyd J, it seems to me that I should be slow to re-interpret what has become a common expression in insurance contracts of this kind.
>
> […]
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> 29 The concept of "for which they are legally responsible" has also been the subject of a few recent Canadian court decisions, in particular **Vanguard Realty Ltd. v. Royal and Sun Alliance Insurance Co. of Canada**, [2002] B.C.J. No. 2273 (B.C.S.C.) and **International Nesmont Industrial Corp. v. Continental Insurance Co. of Canada** (2002) 99 B.C.L.R. (3d) (C.A.); (2000) 22 C.C.L.I. (3d) 31 (B.C.S.C.). In these cases, the courts concluded that these words do not denote liability insurance but rather an interest of the insured in property by reason of the insured's particular obligation in respect of that property. (underlining added)

[29] The trial and appellate decisions in **Ramco** review English cases which indicate that the common understanding in the insurance industry is that the addition of the words "for which he is responsible" restricts liability to circumstances when the insured bailee is liable for the damage. Both **Ramco** decisions support the conclusion that Lloyds has no obligation to indemnify Merex

for the Product destroyed in the fires – absent evidence that Stoney Island was somehow negligent in its care of the Product.

[30] A distinction between wording such as "for which they are responsible" as used in the Policy, and language with a different and broader scope such as "may be responsible", was recognized in Justice Huband's dissenting reasons in **Westwood Electric v. Manitoba Public Insurance Corp.** (supra) at paragraphs 41-43:

> **41** The goods on consignment in this particular matter came from two suppliers, and no evidence was tendered to indicate that there was any agreement between the plaintiff and those suppliers which obligated the plaintiff to keep goods on consignment insured. As a bailee of the goods, when a loss occurs, the plaintiff might be successfully sued if there were negligence on the part of the bailee, leading to the damage or destruction of the bailor's goods. There is a total absence of evidence of negligence on the part of the plaintiff leading to the fire loss here in question. I must conclude that there was no proof that the insured "is legally liable" with respect to the goods under consignment.
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> **42** The learned trial judge relied upon the decision of Robertson, C.J.O. in *Smith v. Stevenson*, [1942] O.R. 79 (Ont.C.A.) That case, like the present one, turned upon an interpretation of a definition of the word "stock", under a policy of insurance. But there was a significant difference in the wording in that the definition in the *Smith v. Stevenson* case referred to goods on consignment for which the insured "may be responsible." I would have no quarrel in finding the insurer liable if the definition of stock in the present case contained a similar wording, but the words, "is legally liable" carry an entirely different meaning.
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> **43** In my view, the case of *The North British and Mercantile Insurance Company v. Moffat*, (1871-2) Law Rep. 7 C.P. 25, is an authority more in keeping with the facts in this case. The policy of insurance provided coverage on the insured's own goods, and also those "in trust or on commission for which they are responsible." The goods in question consisted of tea, some of which had been sold to customers, but which remained in the custody of the insured. A fire loss destroyed the goods, but there was no suggestion that the fire was occasioned as a result of negligence on the part of the insured. That being so, the court concluded that the insured was not responsible for the goods, and a claim for the goods could not be advanced by the insured under the policy of insurance.

[31] When the words "for which they are responsible" in the Policy's *Interest* clause are considered independently of the policy definition of *Insured*, I find that

the more persuasive authorities support the conclusion that any responsibility contemplated is restricted to "legal liability." Adding the words "contractually or otherwise" does not expand the meaning of "responsible" beyond legal liability, but as Underwriters suggest, may encompass legal liability imposed other than by contract, such as by statute, common law, or by a court.

[32] This conclusion accords with commercial practice – when an insured agrees to be liable in respect of a third party's property, thereby expanding coverage provided by its insurer, it is more reasonable to expect the insurer to cover the liability of the insured, rather than the interest of an unknown third party.

[33] My interpretation of the Policy language is that, absent Stoney Island's assuming responsibility to arrange insurance for the Product, it was not insured. Merex is not an unnamed beneficiary. The Plaintiff's entitlement to recover from Lloyds can only be determined in the context of Stoney Island having legal liability for the Plaintiff's loss.

**Parties' Intentions and Agreements**

[34] In case I have erred in concluding that the Policy wording determines that Merex is not an unnamed insured, and in the alternative that the Policy language is ambiguous, I will consider the evidence with respect to the plaintiff's claim that the parties intended Merex to be a third party beneficiary, and that there was agreement to insure the Product under the Policy.

[35] The Supreme Court of Canada held in **Fraser River Pile and Dredge Ltd. v. Can-Dive Services Ltd**,[1999] 3 S.C.R. 108 at para. 32 that for a third party to claim rights under a contract to which it is not a party, it must be shown that:

> (a) the parties to the contract intended to extend the benefit to the third party seeking to rely on the contractual provision; and
>
> (b) the activities performed by the third party seeking to rely on the contractual provision must be the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, as determined by reference to the intentions of the parties. (The "Fraser River Test")

[36] The relevant intentions when applying the Fraser River Test to this case are those of the parties to the Policy – Stoney Island and Lloyds. Merex claims that extrinsic evidence demonstrates that those parties actively contemplated storage of Merex Product at Stoney Island's facility, and intended Merex to be a third party beneficiary under the Policy. Lloyds argues that the policy wording reflects the intention of the parties, and that there is no admissible evidence that any of the parties negotiated, discussed or intended in any way to extend the coverage to Merex.

[37] Merex refers to post-loss investigative reports and to correspondence among insurance brokers and adjusters concerning the value of fish stored at Stoney Island's facility and referencing "determination of coverage on third-party stock". Those documents were attached to an affidavit from the plaintiff's solicitor's assistant, and they are not helpful, because their contents are either hearsay or unqualified opinion, or they were generated after loss occurred.

[38] The plaintiff referred to discovery evidence obtained from Stoney Island's principal, Mr. Atkinson. I have reviewed the transcripts provided, and found no reference to any dealings or communications with Lloyds displaying any intention by Stoney Island to include Merex or any other party as an unnamed beneficiary. Merex opted not to discover a Lloyds representative, and there is nothing in the record to contradict the assertions in Underwriters' amended statements of defence that they did not intend to extend the benefit of the policy to the plaintiff.

[39] Merex emphasizes that third-party property was not specifically excluded from the Policy, a proposition the defendants do not dispute. However, the fact that the Policy permits third-party coverage is not sufficient to establish that Merex can claim against Lloyds; there must be an intention to insure the third party's interest.

[40] The rule is explained in Craig Brown, Insurance Law in Canada, 8th ed. (Toronto: Carswell, 2013) at 4.4:

> The rule here is that it is permissible to insure the interest of another, and to collect the insurance when that interest is harmed, if the following conditions are satisfied. The person taking out the insurance must have intended to insure interests other than his/her own, the terms of the contract must permit it, and the

> person taking out the insurance must have some interest in the insured property personally. The indemnity principle is preserved by the requirement that the insured person must hold the proceeds of insurance, which exceed his/her personal loss, in trust for the others who also suffered loss. (underlining added)

The underlined portion of that excerpt is supported by the Supreme Court of Canada's decision in **Keefer v. Phoenix Insurance Co. of Hartford** (1901), 31 S.C.R. 144. In that case, Sedgewick, J. found it proper to derive the intention from both the terms of the policy and the evidence adduced in proof of such intention.

[41] In **Hepburn v. A. Tomlinson (Hauliers) Ltd.**, [1966] 2 W.L.R. 453 (HL), Lord Hodson wrote at page 471:

> Evidence of intention is clearly not to be given in aid of construction, but such evidence becomes relevant when insurable interest is in question.

[42] Evidence of intention was also considered in **National Trust Co. v. Allan**, [1999] 11 W.W.R. 368 (Man Q.B.). Canadian General Insurance brought a subrogated claim in the name of its insured, the National Trust Company, against the defendant, Dawn Allan, to recover money it spent repairing a home which was damaged by fire. The plaintiff claimed the fire was caused by the defendant's negligence. The defendant argued that subrogated proceedings could not be brought against her because National Trust had an obligation to insure on behalf of her husband, a beneficiary residing in the home, and she was entitled to the benefit of that obligation. The Court found that the defendant could not be considered an insured under the policy, and discussed the requirement for evidence of intention:

> **31** In any case, there must still be shown an intention on the part of the trustee to have insured for her benefit (see *Keefer v. The Phoenix Insurance Co. of Hartford* (1901), 31 S.C.R. 144). The onus is on the defendant to prove such an intention on the balance of probabilities.
>
> **32** There is no evidence concerning such intention. In fact the only evidence concerning the intention of the trustee refutes the suggestion that there was an expectation that Dawn Allan would be insured. She has no personal interest in the estate and the trustee did not have her named as an insured under the Canadian General policy.

[43] Merex has not met the first requirement of the Fraser River Test – it has not directed the Court to any admissible evidence that either Stoney Island or Lloyds intended to extend coverage to Merex as an unnamed beneficiary under the Policy, or that the issue was discussed or considered by those parties before the losses occurred.

[44] Merex says it has satisfied the second requirement of the Fraser River test, because it performed the activity contemplated by the Policy – storage of seafood Product at Stoney Island's facilities for processing – and it was in the course of that storage that the Product was lost. In my view, however, the plaintiff's act of storing the Product at Stoney Island's facility only brings Merex within the scope of the insurable interest provision of the Policy if Stoney Island agreed to insure Merex's Product.

[45] The plaintiff has not established that Stoney Island agreed to insure the Product. The written contract between those parties is silent with respect to liability and insurance. The discovery testimony does not advance the plaintiff's position. Mr. Nickerson, who gave evidence on the plaintiff's behalf, testified that he did not recall discussing insurance with Stoney Island. He indicated Merex's business policy had always been to maintain insurance coverage over their inventory. Both Mr Nickerson and Mr. Atkinson, who testified on Stoney Island's behalf, indicated that at no time did Merex ask Stoney Island to insure the Product. Merex had its own insurance, and neither the written contract nor any collateral verbal discussion mentioned insurance or obligated Stoney Island to insure the Product.

[46] As there is no basis upon which the Court can conclude or infer that the plaintiff made or intended to make an agreement that the Product would be insured by Lloyds, Merex has not satisfied the second Fraser River Test requirement – its activity of storing the Product is not in itself sufficient to bring the plaintiff within the scope of the insurable interest provision of the Policy.

[47] Merex is not an unnamed beneficiary under the Policy; it has no privity of contract or direct right of action against Underwriters. This result is based upon interpretation of the Policy language, and in the alternative from examination of the Parties' intentions and agreements. The question of law posed by the plaintiff

under *Rule 12* is therefore resolved; Merex is not entitled to the order sought – its property is not insured by the Policy.

**Summary Judgment**

[48] Upon determining the question of law under *Rule 12*, I find that the Statements of Claim raise no other genuine issue for trial between the plaintiff and Lloyds. Merex's claim against Underwriters, as set out in Statements of Claim, rests solely on its Product being insured under the Policy. Absent a direct right of action against Underwriters, the plaintiff has no route to recovery from Lloyds via this proceeding. Merex's standing to claim against Lloyds is defined by Section 28 of the *Nova Scotia Insurance Act* R.S.N.S. c.231, which provides as follows:

> Action against insurer
>
> **28 (1)** Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of his liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[49] Before having a right of action against Underwriters, Merex must obtain judgment to establish Stoney Island's legal liability for loss of the Product, and that judgment must be unsatisfied by Stoney Island.

[50] As the prerequisite requirements for Merex to advance a claim against Lloyds are unsatisfied, there is no remaining issue for trial between the plaintiff and Lloyds in this proceeding, and Lloyds is therefore entitled to summary judgment. An Order dismissing the plaintiff's claim against Underwriters will issue. That Order shall not affect any future right which may accrue to Merex under Section 28 of the *Insurance Act*, if the requirements of that legislation are satisfied.

**COSTS**

[51] The parties presented oral submissions respecting costs arising from Lloyds' motions for leave to amend their Statements of Defence. At that time I reserved decision with respect to costs of those motions, and advised counsel that costs of the motions to amend and motions for summary judgment would be assessed at the same time. If counsel are unable to agree, I invite all parties to make written submissions addressing costs arising from the summary judgment motions advanced by both defendants by April 15, 2014, a deadline which, if necessary, may be extended by agreement or upon request.

Murphy, J.