

**In the Small Claims Court of Nova Scotia**

Cite as: Jessy's Pizza (Bedford) v. Economical Mutual Insurance Company, 2008 NSSM 38

BETWEEN:

Name: Jessy's Pizza (Bedford)

**CLAIMANT**

- and -

Name: The Economical Mutual Insurance Company

**DEFENDANT**

**Revised Decision:** The text of the original decision has been revised to remove addresses of the parties on July 25, 2008.

**Adjudicator:** J.W. Stephen Johnston

**Appearances:** Janus Siebrits, for Jessy's Pizza  
Wayne Francis, for Economical Insurance Company

**DECISION**

1. This matter came before me on October 18, 2007. Jessy's Pizza was represented by Janus Siebrits, and the Economical Mutual Insurance Company was represented by Wayne Francis.

**FACTS**

2. Mrs. Samia Saifi testified on behalf of the Claimant. She was married to Antonias Saifi the sole proprietor of Jessy's Pizza.

3. Mrs. Saifi apparently managed the organizational side of Jessy's Pizza, dealing with customer service, purchases of stock, sales people and paying bills. She testified that it was a family business and Mr. Saifi had purchased it on September 1, 2002. She indicated that the business was located at 1312 Bedford Highway in Bedford, Nova Scotia and was located in a larger commercial building with two businesses below and apartments above. She said that the

business rented from the owner, Mr. Charles Chediak and I was provided with a copy of the lease between these two parties.

4. Mrs. Saifi said that they had purchased insurance from the Defendants and believed that they had proper insurance in place at the time that an incident took place on a copper supply line connecting two large oil drums to the furnace in the building where Jessy's Pizza was located. There was reference to vandalism, but nothing further was provided in proof of the cause of a resulting oil spill that ultimately leaked into the ground and under their leased premises.

5. Mrs. Saifi talked about the hours that her and her husband worked and indicated that there had been an odour in around September 13, 2006, that began to become apparent. She said the landlord sent individuals in to check out the problem and at first there was a concern that it was propane, however, it was later confirmed that the smell was arising from a vandalized oil supply line on the outside of the building.

6. She said that from that point forward, the oil smell had gotten worse and worse and at a certain stage, they had to begin leaving the doors and windows open in the business. She in fact said that the fumes got so bad that the customers would come in and place their orders for pizza and then go back to their cars instead of putting up with the smell of the oil fumes in their store.

7. She said that this affected the business itself and ultimately the business was forced to close.

8. She said that the business ultimately closed on November 14, as people began working at the site to remedy the oil spill that had sunken into the ground around the building.

9. I was provided in the Claimant's set of documents, a copy of a location plan generated by Environmental Solutions showing the extent of the oil seepage in the ground under the building. The same plan showed the division of the two businesses on the ground floor - being Jessy's Pizza and a convenience store and it appears from that location plan that a significant amount of the oil plume beneath the building was under Jessy's Pizza. Although nobody was in court to speak to this location certificate, the Defendants did not contest this information. According to Mrs. Saifi, they attempted to keep the store open as long as they could until ultimately the insurers of the building required their departure as the only way to remedy the problem was to remove the floor of the structure and dig out the contaminated soil. They were told by the adjuster for the insurer of the building, Larry Hay, that the landlord's insurance did not cover any of their losses.

10. Mrs. Saifi said that her adjuster from Economical Mutual Insurance came to the store. His name was Stewart Newson, a Field Claims Representative as noticed in the documentation presented to me. She said that Mr. Newson looked around and told them he would be back in a couple of days after he read the policy coverages. He returned, and indicated that the Defendant would only cover up to \$10,000.00, which he suggested could cover the cost of moving the establishment to another location so as not to lose business. Mrs. Saifi testified that she understood that the Economical coverage covered everything and she referred to "full coverage". She was told by Mr. Newson that there was no coverage for loss of income. He said the reason

being was that there was no damage to their equipment. She said she called Mr. Newson a week later and was mad because the bills were building up. Mr. Newson told her to retain a lawyer if they had any concerns in regard to Economical's position.

11. Mrs. Saifi said that Mr. Newson came twice to the establishment, once on the first day when he was called and on the second day for five minutes. She said that he never asked anything about earnings of the business.

12. Mrs. Saifi also testified that they initially did consider having to leave the location, and find another location. They looked at a number of locations, one being the old Lobster Ranch located on the Bedford Highway, which she said would cost a significant amount for renovations, plus an additional significant amount per month for rent. She said the only other place that they found within that geographical region was the old Fabricville, but it was too big and also the monthly amount was too high.

13. Mrs. Saifi said that ultimately they were out of their original establishment until March 12 of 2007 and incurred significant costs arising out of that down time.

14. On cross-examination, she was asked by Economical's solicitor, Wayne Francis, whether she had received a letter dated November 9, 2006, from Stewart Newson. This, as I understand, was the first letter generated by Mr. Newson, which read as follows:

"Dear Antonios Saifi:

This will confirm our telephone conversation of November 2, 2006 when we advised you that your loss of business interruption did not fall within the scope of your insurance coverage. We refer you to section ii under your policy, specifically, perils insured (copy attached).

There is coverage available under the Express On-Premises Extension Form in the amount of \$10,000.00 for the removal and reinstall of the insured equipment and stock.

If you choose to dispute this decision, Statutory Condition 14 provides that you have until the first anniversary of the loss or damage in which to commence any action or proceeding against your insurer.

As required by the Insurance Act of Nova Scotia, we are attaching a blank Proof of Loss form."

15. Mrs. Saifi testified that she did not think she received that particular letter and suggested that the correspondence being sent to their business was supposed to be re-forwarded by the landlord. I note that they departed the business on November 14.

16. Through Mr. Francis' cross-examination, it was confirmed that a Proof of Loss was never filled out under these circumstances. Mrs. Saifi further testified that upon being told that there was no coverage from Economical, there would be no point in filling out a Proof of Loss and she

proceeded with her husband to initiate an action on this matter to recover damages she believed Economical Insurance was responsible for under the policy.

17. Further to additional cross-examination, Mrs. Saifi confirmed the clean up crew hired to remedy the problem, knocked the demising wall between the business down on the main floor and took out the floor itself to remove the oil soaked ground below.

18. Mr. Saifi gave evidence confirming his ownership of his business and suggested the business was growing at the time of this loss. He also confirmed that from late fall through Christmas was the busiest time of the year. He testified that the closing down of his business had a severe financial impact on he and his wife. He had put everything into this store that he owned, and that after the business was closed he had to deal with a lot of collectors.

19. I was provided an extensive package of income tax returns and unaudited income statements along with invoices for start up costs associated with the expenses experienced by Jessy's Pizza as a result of having to move out and back in to this building. In addition to Mr. Newson's November 9, 2006, letter, I was provided a number of different correspondence between Mr. Newson and Mr. Dean Wood, solicitor for Jessy's Pizza at the time.

20. In December 22, 2006, Mr. Wood wrote Mr. Newson seeking for a detailed reasoning as to why Mr. Saifi's loss was not covered by the policy.

21. On January 17, 2007, Mr. Stewart Newson wrote back explaining the following:

"I am enclosing a copy of the Business Interruption Wording which states under Section ii Perils Insured, that coverage is extended for "business earnings" caused only by direct physical loss of, or damage to property insured.

There was no direct physical loss of or damage to our insured's property".

That was the extent of the interaction after which time Jessy's Pizza began this action.

22. The Defendants led evidence through Mr. Paul Ross, Regional Line Manager at the Defendant's branch in Halifax. Unfortunately, the Defendant's adjuster who made this determination or at least expressed it to the Claimants, Stewart Newson, was not available for testimony.

23. Mr. Paul Ross managed the technical aspects of the provision of coverage for the Defendant. He said he had been doing that work since 1983 and at the time of this matter had been with Economical for seven years. Although he was not involved directly with this file, he was consulted on the coverage issue by Mr. Newson and his supervisor. The supervisor was also not available to give testimony on this matter.

24. Essentially Mr. Ross was brought in by the Defendants to go through their interpretation of the coverage. Mr. Ross kindly provided a summary breakdown as to how the coverage was reviewed. In addition, he provided his testimony, in support of his, and therefore the Defendants'

interpretation of the policy.

25. I was provided by the Defendants a Book of Exhibits, which included the Declaration Page and copies of the relevant wordings. Mr. Ross indicated that the Declaration Page set out numerous forms and endorsements provided to Jessie's Pizza for the period in question. The policy number was 4839438 and amongst other coverages included in the Declaration Page, was Coverage to the Contents of Every Description and Loss of Income - Actual Loss Sustained. Some of the endorsements were extensions of the main coverage, form 6557 referred to as the Commercial Building, Equipment and Stock Form. Some other forms, such as the Loss of Income - Actual Loss Sustained, No. 6561 entitled Business Interruption, Actual Loss Sustained Form, appeared to be stand-alone forms with a separate indemnity agreement and direct references to the Declaration Page as to "property described". Mr. Ross used both his summary and the wordings set out in the Business Interruption Actual/ Loss Sustained Form to explain the Defendants' position.

26. Mr. Ross indicated that the coverage provided for- (1) actual business loss and (2) the extra expense necessary to resume the normal business operations- *when*- it arose from the interruption of business or the un-tenability of the premises - *and when* - the business contents, or other property described on the Declaration Page are damaged during the policy period as a result of a peril insured against - *due to*- direct physical loss of, or damage to the property insured - *by* - perils insured against under the policy.

27. Essentially, Mr. Ross presented the legal argument as to his interpretation of this coverage. Mr. Ross suggested that the loss in question involved neither direct physical loss of the property insured, or damage to the property insured.

28. The first leg of Mr. Ross' argument, if I can put it that way, was that the peril - the vandalism associated with the fuel supply line, causing the oil spill, caused no direct damage or physical loss to the property insured. Mr. Ross was careful to point out in this instance that the Claimants had no coverage on the building per se, as they only leased the location and therefore their coverage extended to the contents that they owned in that premises. Mr. Ross suggested, through his knowledge of this loss, that there was no direct physical loss of property or damage to property occasioned by this oil spill. He said before the business interruption coverage could be invoked, further to section II, Perils Insured, there must be direct physical damage or loss to the insured property. In this case, it was his determination that none of the contents owned by the Claimants was damaged in any way by the oil spill. The second leg of Mr. Ross' position, I believe was meant to deal with indirect damage caused by the remediation done by the building's insurer in correcting the problem. Specifically, I refer to a floor that had been installed by the Claimants further to their franchise responsibilities. Apparently Jessie's Pizza was a chain of stores and required a particular type of floor to be installed further to conditions of that franchise agreement. I specifically had a piece of correspondence provided by the Claimants confirming that the franchiser had no title or interest in any of the equipment, counters or flooring at the location.

29. I understood from evidence presented by both sides that the flooring in fact was destroyed through the remediation of the problem by the contractor who had to remove the floor.

At this stage, Mr. Ross referred me back to the Commercial Building Equipment and Stock Form, 6557, and specifically referred me to section 2(Q), Perils Excluded as set out below:

"This form does not provide insurance for loss or damage sustained to "equipment" or "stock" which are actually being worked upon and directly resulting there from, or caused by any repairing, adjusting or servicing of "equipment" or "stock", unless fire, explosion as described in "Named Perils" of the definitions section of this form ensues and then only for the loss or damage caused by such ensuing fire or explosion."

30. Mr. Ross contended that in the instance of the flooring, such property was excluded as it was damaged while being worked on.

31. I think that I have accurately set out the Defendants position as it relates to the interpretation of this coverage.

32. Allegations made by the Claimants were that the oil was spilled as a result of some vandalism and I heard no evidence to the contrary from the Defendants as it relates to this cause. In addition, I understood that further to this vandalism, the ground below the building became polluted with this furnace oil, which was what required the remediation. Finally, I noted in my review, the pollution exclusion in the Commercial Building Equipment and Stock Form, No. 6557. No references or comments were made by the Defendant that such exclusion was the reason for the denial of coverage under these sets of facts and I therefore did not consider this issue.

33. Although the evidence clearly demonstrated that the Defendant offered a \$10,000.00 payout under the "Express On -Premises Extension Form" (6558), I was never given a satisfactory reason from the Defendants why such an amount was offered and why such an amount was not also subject to the same restrictions as enunciated quite precisely by Mr. Ross under the Commercial Building Equipment and Stock Form (6557).

34. I was provided with a copy of the Express On-Premises Extension Form, which clearly set out in the pre-ambule that this form is simply an extension of the Commercial Building, Equipment and Stock Form No. 6557 and that the limit of these extensions shall be in addition to the limits of coverage provided under section 1 of Form 6557.

35. There is a specific notation on the Declaration Page under the listing of Expressed On-Premises Extension Form with a \$500,000.00 limit. That extension reads as follows:

"Note the limit of coverage for loss of any or all items under this extension shall be an aggregate of \$500,000 per policy, except pollution clean up expenses which is subject to a \$10,000.00 sub-limit."

36. The specific section under the Expressed On-Premises Extension Form, # 5, entitled Clean Up Expenses for On-Premises Pollutants reads as follows:

"This form is extended to insure, for an amount not exceeding \$10,000.00, subject to all

its terms and conditions, expenses incurred in the clean up of pollutants where such dumping:

- (a) originates to the premises;
- (b) the dumping of pollutants occurs without the knowledge or consent of the insured;
- (c) is sudden, unexpected and unintended from the standpoint of the insured; and
- (d) occurs during the policy period."

37. It was my understanding that the Expressed On-Premises Extension Form was in fact an extension of the Commercial Building Equipment and Stock Form, No. 6557 making these coverages also subject to any exclusions set out in the main form. This was unlike the Business Interruption /Actual Loss Sustained Form No. 6561 which appeared to have the ability to stand-alone.

38. Although never explained, it appears from the Defendants actions and there position at trail was that the \$10,000.00 coverage for clean up and expenses for premises pollutants was not contingent on the requirement that there be direct physical loss or damage to the property insured under Section II, Perils Insured.

## **DISCUSSION**

39. On first blush, as a small business owner with Business Interruption Coverage it would appear reasonable under these circumstances that an owner would expect Business Interruption Coverage having been forced out of his premises for four and a half months preventing him from carrying on business.

40. Aside from Mr. Ross' references to the exclusion of damage to stock or equipment while actually being worked upon, it appears that the issue in this instance is a function of the definition of direct physical loss of or damage to property insured. Business interruption coverage is a unique and extended form of insurance, which clearly requires specific parameters to apply.

41. I am satisfied that there is no issue as it relates to the all risk coverage of this policy and that this peril, no matter how defined, would have been normally covered under these circumstances. The question is whether there was any direct physical loss of, or damage to the property insured.

42. I view this issue from two perspectives. There appeared to be no argument that the initial cause of this loss was the vandalism to the fuel supply line. In my view, this is not only the initial cause, but the proximate cause of the overall loss whether it be to the secondary destruction of the floor of the pizza shop, due to the need to remove the contaminated soil and concrete or the damage in general that the fumes appear to have had to the interior of the pizza shop as it relates to the untenable conditions it caused.

43. Although Mr. and Mrs. Saifi continued their business up until the last moment, in an

attempt to mitigate the loss, I find from the evidence that the shops business was untenable prior to their departure, given the commentary evidencing that the customers were in fact sitting outside in their cars due to the strong fuel oil odour in the business itself.

44. Further to section VI - Definitions, under the Commercial Building Equipment and Stock Form, I find that the floor installed by Jessy's Pizza falls within the definition of equipment in sub 3 (C) of that section, where it says as follows:

"Equipment" means

(C) Tenants improvements, which are defined as building improvements, alterations or betterments made at the expense of the insured to a building occupied by the insured and which are not otherwise insured, provided the insured is not the owner of such building."

45. Notwithstanding that the floor was subsequently removed by the contractors, I find that the vandalized fuel line caused direct physical loss to the floor. I believe it is unreasonable to find otherwise. I find that the furnace oil fumes themselves contacted and damaged the floor covering. I find that the oil spill damaged both the soil and concrete floor from below and by association the floor covering above as the concrete floor and floor covering could not in terms of repair be distinguished. Permanent damage to the concrete floor meant damage to the floor covering. The secondary intentional removal by the remediation contractor of the floor was after the damage had already taken place.

46. I find that any attempt to make this extremely "fine" distinction to be counter intuitive with respect to the design of such insurance coverage. Damage was done to the floor by the oil spill. The fumes physically damaged the contents of the business.

47. I now refer to Mr. Ross' reference under the Commercial Building Equipment and Stock Form, more specifically under section (Q) of Perils Excluded and reference to equipment not covered while actually being worked upon. It is my view that this particular exclusion arises out of the need to draw a very distinct line between the risks that an insurer wants to assume and those risks that are properly in the hands of the insured or its agents. This is not dissimilar to the standard "work performed exclusions" under similar coverage in attempts to place the responsibility on the insured or his agents when they are the one in control of the results. It is my view, that the floor in this instance was not being worked upon as conceived by this exclusion, and in fact was being completely removed. The floor was not being repaired, adjusted or serviced. It was being removed. This exclusion does not apply.

48. I refer to the decision of *D. P. Murphy Inc. v. Laurentian Casualty Company of Canada*, 99 N.F.L.D. & P.E.I.R. 331, a decision of the Prince Edward Island Supreme Court. In that particular instance, the disbursement of gasoline in a sewer outlet caused the air to be contaminated in the insured's building and thus making it inhabitable and unsafe. The court determined in that instance that the phraseology "direct physical loss or damage of property" was synonymous with injury but was not confined to physical damage. If I am incorrect as it relates to determining that the damage to the floor cannot be considered a direct physical loss arising



from the vandalized fuel line, it is then my opinion that Justice Matheson's decision in the noted case is correct in determining that such phraseology is not synonymous with physical damage only. I note that the wording in the Business Interruption Actual Loss Sustained Form has only a minor difference in its phraseology with its use of the "of" after "by direct physical loss". This does not change my view as it relates to comparison to the phraseology in the *D. P. Murphy Inc.* case. In fact the "of" is in form 6561 but not in the similar section of form 6557 creating some significant ambiguity to which I find in favour of the Claimant. It is my view that the Claimant's loss, requiring them to vacate their location for four months arose directly from a fortuitous act and would reasonably be expected to be covered under the circumstances.

## **PROOF OF LOSS**

49. As indicated in my factual finding, it was confirmed that a Proof of Loss was never filled out in regards to this matter, further to the requirements of the *Insurance Act* in this province. The Defendant took the position that because the Proof of Loss was not filed, the Claimants could not perfect their claim, even if they should be successful in proving that coverage existed.

50. I queried the defence counsel as to whether I had the discretion to correct that problem, should I be satisfied that the proper factual base existed for the claim. Mr. Francis suggested that as a Small Claims Court Adjudicator I had no discretion to provide relief from forfeiture under the circumstances. With all due respect to Mr. Francis, I disagree with that submission and determine that to grant relief for forfeiture for this failure did not prejudice the Defendant in this instance. There was no additional information or lack of appreciation that the Defendant had for the Claimant's position. The Claimant set out a very detailed Statement of Claim in its Small Claims Court Action issued on July 24, 2007, well under the one-year limitation with respect to their obligation to initiate an action. In addition, in correspondence from Mr. Dean Wood, January 17, 2007, the Defendant in fact encouraged that they proceed with their action within a one-year period. I therefore find that the Claimant can obtain relief from forfeiture under these circumstances.

## **DAMAGES**

51. In reviewing the submission by Mr. Siebrits of October 16, 2007, I am satisfied with his delineation and calculation of costs associated with the loss. I have reviewed the income statements and income tax returns of Mrs. Saifi and the coverages provided under the circumstances. I find the net profits request of \$3,250.00 per month to be exceedingly reasonable, along with a \$2,000.00 per month for Mrs. Saifi's permanent salary. On the basis of four lost months, I find the total of \$21,000.00 to be the total payable under these circumstances. In addition, there were conditions for restart-up as it relates to the re-inspection of the fire suppression equipment, the reinstall and supply of propane, the painting of the interior, the reinstallation of the floor and an amount for a re-opening advertisement. The total of those amounts was \$7,116.52. I also find those amounts appropriate under the circumstances.

52. The total claim therefore exceeds the amount of the Small Claims Court jurisdiction of \$25,000.00. I understand from the Claimant's pleadings and their submissions, that they accepted the jurisdictional limits of this court and I therefore award the amount of \$25,000.00.

53. This is by no means a clear and unambiguous area of insurance coverage interpretation and as a result, there will be no amount awarded for interest or the cost of issuing this action.

**Order**

54. I order, the Defendant, the Economical Mutual Insurance Company, to pay to the Claimant, Jessy's Pizza, the amount of \$25,000.00.

DATED at Halifax this            day of January, 2008.

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J. W. Stephen Johnston  
Small Claims Court Adjudicator

Original Court Copy  
cc: Claimant/Defendant