**SCP No. 303107**

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**
**Cite as: Gillis v. ING Insurance Company, 2009 NSSM 53**

**BETWEEN:**

**ALLAN M. GILLIS**

**CLAIMANT**

**-and-**

**ING INSURANCE COMPANY OF CANADA**

**DEFENDANTS**

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**DECISION**

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**HEARD**: At Pictou on March 2, 2009

**DECISION**: June 30, 2009

**COUNSEL**: Nicolle Snow, Esq., for the Claimants

Joseph F. Burke, Esq.., for the Defendants

**BACKGROUND:**

The claimant, Allan Gillis, is a quality surveyor employed by Higgens Construction Limited of New Glasgow, Nova Scotia. He is presently on long-term disability. Mr. Gillis was, up to January 31, 2006, the owner of a residential property situate at 141 Abercrombie Road, New Glasgow, Nova Scotia. This property had two apartments. Mr. Gillis resided in the upper apartment. The property was sold to Edwin Goble on January 31, 2006. Mr. Gillis remained a tenant of the building but moved to the bottom flat. Mr. Gillis was also the owner of a company known as AMG Development Inc. on July 29, 2005, purchased the former West Side School property in New Glasgow, Nova Scotia. Mr. Gillis intended to convert this property into a number of condominium units. His plans were to tear down the old school building that had been empty and vacant for approximately two years before he bought it.

During the time the Abercrombie property was owned by Mr. Gillis, he had homeowner's fire insurance coverage on the building. After the building was sold on January 31, 2006, to Mr. Goble, the claimant had the policy was converted to a tenants package-standard. He paid the annual premium for this coverage by automatic monthly debit from his chequing account in 12 monthly installments.

Mr. Goble's intentions on purchasing the Abercrombie property was to renovate the upper level apartment occupied by Mr. Gillis and move Mr. Gillis into the lower level apartment. Prior to Mr. Gillis closing the sale of the Abercrombie property, Mr. Gillis moved a number of pieces of his furniture from the upper flat at 141 Abercrombie Road

to the old school property on Willow Avenue that he and his company, AMG Development Inc., had purchased from the Town of New Glasgow on July 29, 2005, and registered at Land Registry Office, Pictou, on August 15, 2005.

Mr. Gillis stated there was no room in the basement of the Abercrombie property to store this furniture and since the lower level apartment was rented fully furnished, Mr. Gillis could not move his furniture and effects from the upper level apartment into the lower level apartment.

On April 6, 2006, a major fire occurred at the old vacant school property on Willow Avenue, New Glasgow, which resulted in the whole building being destroyed. Mr. Gillis alleges his furniture and effects that he had stored in the old school were also destroyed in this fire.

In January, 2008, some eighteen (18) months after the fire, Mr. Gillis, for the first time, notified his insurer, the defendant, that there was a fire in 2006, and that he wished to claim for loss of his personal property. His insurer, the defendant, notified him on January 15, 2008, and again on April 18, 2008, after receipt of a Proof of Loss form dated March 25, 2008, that his claim was denied for a number of reasons. In the letter dated April 18, 2008, it sets out the following reasons:

> "The limitation period to present an insurance claim expires exactly one year after the date of loss so in this case the prescription date was April 6th, 2007,"

The claimant's action was commenced and filed on October 15, 2008, claiming breach of contract. The claimant relies on s. 33 of the *Insurance Act*, RSNS 1989, c. 231 and sections 2(e) and 3 of the *Limitation of Actions Act*, RSNS 1989, c. 258. The claim is for replacement costs of the contents totaling $19,145.00 plus loss of hardwood flooring stored at the old school in the amount of $20,930.00. The claimant informed the court prior to commencement of the trial that the claim for the hardwood flooring was withdrawn.

**FACTS AND EVIDENCE:**

**1. 141 Abercrombie Road property—furniture and effects**:

The property situate at 141 Abercrombie Road, was the former family property of the claimant. Mr. Gillis purchased the family home himself in 1997. It consisted of two levels, one being the main floor area, and the other being what was referred to as the upper level, being the loft (attic) and upper level. Mr. Gillis lived on the upper level apartment and rented the main level apartment, fully furnished, during the time he owned the property.

**Edwin Goble:**

On January 31, 2006, Mr. Gillis sold the Abercrombie property to his long-time friend, Edwin Goble. Mr. Goble was a long time high school friend and they continue to socialize together and see each other every month.

Mr. Goble signed a letter, Exhibit #3, stating he helped Mr. Gillis move the contents of a two-bedroom upper apartment at 141 Abercrombie Road being occupied by Mr. Gillis, to a vacant building known as the old Westside School, New Glasgow, in May, 2005. He was asked by Mr. Gillis to provide a letter stating he helped Mr. Gillis move the furniture. Mr. Goble stated he provided a hand-written letter to Mr. Gillis who in turn had a typed letter, that is not dated, Exhibit #3, signed by Mr. Goble. He stated Mr. Gillis told him it was May, 2005, when Mr. Goble helped Mr. Gillis move the furniture and other items. At the time the letter was prepared, Mr. Goble stated he didn't give a lot of thought as to when the furniture was moved. Since signing the letter and preparing for Court, Mr. Goble stated he gave this matter further thought and based on his recollection the tenant moved out of the downstairs apartment before he purchased the building from Mr. Gillis, but now, believed that Mr. Gillis' furniture from the upstairs apartment was moved to the old school sometime in January, 2006, in order that renovations could take place in the upper level apartment that had been occupied by Mr. Gillis. While Mr. Goble owned the building as of January 31, 2006, he did authorize Mr. Gillis to carry out the repairs, collect rents, making sure there would be a tenant in the

second unit and generally, to act as the superintendent, in consideration of Mr. Gillis having free rent.

Mr. Goble stated that the downstairs apartment was being rented as a fully furnished apartment.

Mr. Goble stated he used his truck to help move Mr. Gillis' furniture to the old school and that it took properly four loads. He recalled the living room in the upper apartment containing a television, couch, chair, end tables and the kitchen having dishes and refrigerator. Mr. Goble stated that everything was already packed in boxes and he didn't open the boxes. A bicycle and two-piece fitness equipment, treadmill, were also moved from the basement of 141 Abercrombie Road to the old school building on Willow Street. Mr. Goble stated he thought the renovations started around the time the building was sold to him.

When asked about what would happen to these furnishings after the renovations were completed, and he stated he did not know. He described the furniture, including the bedroom furniture, chair, tables, and refrigerator, as being older. He agreed it would be unusual to move this older furniture back into the upper level apartment that was newly renovated and he didn't know if Mr. Gillis was going to move back into the upper level apartment after the renovations were completed.

Mr. Goble talked about the school being dismantled—doors being removed; ceilings being tore down; floors being torn up. He could not say if the contents moved from the Abercrombie property to the old school were in the school when the fire occurred in April, 2006.

**Mark MacPherson** was called by the claimant. He at one time worked with Mr. Gillis at Higgens Construction. He is an equipment operator and was deployed to the old school property by his employer after the fire to remove the old brick from which the school was built. Prior to his going to the site, Marinus Verhagen was contacted to knock down the remaining walls of the building, Exhibit #1, and remove the debris after which Higgens Construction took away the old brick.

An undated letter, Exhibit #2, was signed by Mark MacPherson. He stated he was asked by Mr. Gillis to prepare a letter saying he saw the remains of furniture when he was at the site after the fire, to remove the brick. He wrote a letter and it was then typed up by Mr. Gillis following which Mr. MacPherson signed it. The handwritten letter or note was not put in evidence or produced. In the typed letter, Mr. MacPherson states "in the basement area I removed, or saw the charred remains of a lot of indoor and outdoor furniture. This debris was taken to the landfill site."

During Mr. MacPherson's testimony, he stated on directexamination that he saw bits and pieces of a leg, or an arm, of a table or chair. He said it was school stuff-old desk-typical of school stuff. He stated he saw an oven off a stove and referred to right

side of Exhibit 1A. He was in the Cat 320 excavator machine when he says he saw these things. On cross-examination, he was asked what he saw and stated it was "pieces of things-thinks it was from a couch."

I find the evidence of Mr. MacPherson at trial completely inconsistent with the documentary evidence, Exhibit #2, which he signed at the request of the claimant. His viva voce evidence does not support his statement set out in his letter, Exhibit #2, and on the whole, I did not accept his evidence as being creditable.

**Allan Gillis**, the claimant in this matter, is the former owner of 141 Abercrombie Road, New Glasgow. He is also the owner of AMG Development Inc. When Mr. Gillis purchased the former Westside School on July, 2005, he had the property put in his company's name. He is the sole officer and director. He presently resides in the lower unit of 141 Abercrombie Road and has done so since January, 2006. He sold this property to Edwin Goble in January, 2006 as he, Mr. Gillis, was in a money crunch due to the progress on the condo project scheduled for the old school property being delayed.

Mr. Gillis stated renovations at 141 Abercrombie Road started in mid-January, 2006. He stated the bedroom suite, chest of drawers, night table, two lamps, leather sofa and the television were moved from the apartment and stored at the old school. He stated this occurred after Christmas and that the former tenant of the lower unit moved out in mid-December, 2005. Some patio furniture was also moved from the basement to the old

school, as well as a refrigerator that was eight or nine years old; an elliptical machine and treadmill. He stated he left the stove in the apartment.

Some of the furniture was purchased by him and other items were family heirlooms which had been in the apartment.

One of the issues in dispute is whether the furniture and items were "temporarily stored" so as to be covered by the tenants insurance package. Mr. Gillis stated the furniture and items were to be moved back to the apartment prior to the school being demolished.

**Tenants Package:**

Mr. Gillis stated when he sold the Abercrombie property to Edwin Goble, he called his broker and told the broker he sold the property, but couldn't recall if he asked for a tenant's package to cover his contents. When he cancelled his homeowner's policy, he stated he thought he was cancelling everything and couldn't recall if he asked for a separate tenant's package. On direct, he couldn't recall getting mail from the insurer for tenant's coverage but on cross-examination, agreed he could have gotten mail and just not opened it or read it. He stated he did not know the insurance company was debiting his account monthly as he didn't open the mail containing the bank statements. I found Mr. Gillis' answers puzzling, giving he is an experienced business man with several years experience as a quality surveyor and having the knowledge to prepare for the

development of a multi-unit condominium project. He acknowledged he gets monthly bank statements which show the monthly debit for the premium on his tenant's package. His tenants package ran from February, 2006, to January 31, and was renewed each year in 2007, and 2008. Each year the premiums were paid through monthly installments automatically debited to his personal chequeing account.

On cross-examination, Mr. Gillis acknowledged he had not sold his personal property, including furniture, etc., and wanted to have insurance coverage on these items. He couldn't recall why he wouldn't call the broker and ask for the coverage. He did however, agree with the suggestion that when he called the broker to cancel the homeowner's policy, he would have gotten a notice of new tenant's package and he would have been notified of the substantially reduced premium. He stated he couldn't recall getting the new coverage amount but it was possible. When asked if there was any reason why he couldn't recall receiving the renewal policy in 2007, he again stated he couldn't recall receiving it. He stated it may have come but it wasn't opened.

Exhibit #7D, is a copy of Mr. Gillis' insurance coverage for the period February 7, 2006—January 31, 2007. The policy shows his homeowner's policy coverage being deleted and a tenant's package being added. The auto coverage is not changed.

Exhibit 8D, is a copy of a Memo from Proudfoot, Fox & Phinney dated February 7, 2006, to ING advising Mr. Gillis has sold his home on 141 Abercrombie Road and to delete that coverage. It advises that Mr. Gillis will continue to live in the home which he

will rent from the new owner and to therefore add a tenant's package in the amount of $25,000.00 effective the same date, February 7, 2006.

Mr. Gillis acknowledged that the monthly debit coming from his account was to cover both the vehicle coverage and the tenant's package.

In the testimony of Mr. Gillis, he was asked why he wouldn't call the broker or insurer and ask what kind of coverage he had after the fire. He answered by saying he thought the tenant's package covered his contents at the house and did not think it covered them when they were moved to the old school.

On cross-examination, Mr. Gillis stated it was possible that the furniture and effects were moved from the Abercrombie property to the old school in mid-January, 2006, which was prior to the closing on the sale of the property on January 31, 2006. He agrees he was not a tenant until after January 31, 2006. The insurer argued therefore, the personal property items in question were not in the Abercrombie property at any time under a tenant's package as he was not a tenant until after January 31st. Mr. Gillis agreed that from the date he became a tenant and the date of the fire, the furniture and effects being claimed as a loss due to fire were never used by him as a tenant at 141 Abercrombie Road.

I found, on reviewing all of the evidence that the furniture and effects at issue were never at the Abercrombie property under the tenant's package. Any property Mr. Gillis had in the lower level apartment on the other hand would have been covered under the tenant's package. The homeowner's policy that was in effect under February 7th, was cancelled when the building was sold to Mr. Goble.

The renewal policy for the period January 31, 2008, to January 31, 2009, was shown to Mr. Gillis. At the bottom of the first page of the statement, it shows a payment schedule for the policy starting December 31, 2007, with the amount withdrawn of $11.16. The same amount is set out each month thereafter. On page 2, it has under the heading "coverage's", personal property. Rider Exhibit 704, with amount of insurance being $27,000 and an annual premium of $130.00. The policy covers replacement cost of personal property. Mr. Gillis stated it was around January, 2008, that he saw an annual statement showing deductions from his account and this was the first time he noticed that he had tenant's coverage. At this time, he stated he contacted the insurance broker, Proudfoot, Fox & Phinney, New Glasgow, and asked if that insurance covered his items he had at the school. Soon after he received the letter of January, 2008, setting out the process in filing a claim.

Shortly after receipt of the January 8, 2008, letter from the insurer, Mr. Gillis received a further letter from the insurer dated January 15, 2008, which stated that the property is insured by the Standard Tenants Form policy but there does not appear to be coverage for the loss due to:

> "The limitation period to present an insurance claim expires exactly one year after the date of loss so in this case the prescription date was April 6, 2007."

Following receipt of the January 15, 2008, letter, Mr. Gillis filed a Proof of Loss Form that was included with the January 15th, letter. This form is signed and dated March 25, 2008. On page 3, of the Proof of Loss Form, under the heading "Changes" it states "Since the above policy was issued there has been no change in use, possession, location or exposure of the property described, except:". Mr. Gillis writes "building demolished."

This statement was, I find, vague and did not answer the simple question being asked. If the furniture and effects being claimed were never moved from the apartment in the first place, the answer to the question would have been, in my opinion, no. If on the other hand, they were moved to the location set out in the tenant's package, the answer would have been yes, and to where, in order that the insurer could continue to asses it's risk. I find the furniture and effects had been moved to the old vacant school on Willow Street, without the knowledge of the insurer, before the claimant became a tenant of the new owner, Mr. Goble. These items never were a part of the claimant's tenant package.

**Old Westside School-storage facility, warehouse, or property likely used to store furniture.**

The claimant stated there was no heat in the building, it was vacant and subject to vandalism. He had taken no steps to safeguard the property-either the building, or the alleged personal items he stated he stored in the old school- from vandalism and had not checked out the building or the furniture he alleged were stored there for over probably two months, when he was last at the building to get some of the hardwood flooring that he had ripped up and intended to use personally. He could not say if the furniture and items in question were in the building on the date of the fire.

The claimant was informed of the fire on April 6, 2006, at approximately 6:00 o'clock in the evening, when he received a call on his cell phone from a friend. He called Edwin Goble and asked him to inform the fire department that he, Mr. Gillis, was on his way. He did not ask Mr. Goble to inform the fire department that he had furniture and items stored at the old school and he had no conversation with the Chief of the fire department either at the time of the fire or subsequently, to that effect. He did talk to the police chief about the origin of the fire but not of the contents he alleges he stored at the vacant school that was being readied to be torn down. Mr. Gillis did not contact the insurance broker or the insurer to tell them of the loss of furniture and items in the fire, or that he had furniture and effects stored in the old school building under January, 2008. I find, based on the claimant's evidence, he made no effort to inform either the insurer, the

fire department, or his insurance adjuster that he had moved some furniture and effects into the old school that he was getting ready to demolish.

Mr. Gillis stated he had the furniture and items stored in the basement to the left side of the front entrance to the building. It was a former classroom and he stated he put a padlock on the door.

The defendant called the two firemen who were at the scene on April 6, 2006.

**Doug Dort** is the Deputy Fire Chief for the Town of New Glasgow. He was dispatched to the fire at the old school after receiving a call at approximately 4:00 p.m. After sending firefighters into the building to investigate the fire, the fire was located on the second floor. The firefighters fought the fire with the purpose of putting it out until approximately 8:00 p.m., when it got too dangerous for people to be in the building. From that point on, they attacked the fire as a controlled burn. Mr. Dort stated he entered the building on two occasions to survey the fire and to search to see if anyone was in the building other than the fire fighters and to view the interior.

During the two times Mr. Dort was in the building, he stated he saw no personal property stored in the building. He saw some bundles of hardwood flooring that appeared to be salvaged from other parts of the building. He stated no one reported to him of seeing any personal property in the building. If there were salvageable items, he

stated the firefighters would have taken steps to remove the items or protect them from the fire.

There are three levels to the building—bottom or basement; main floor; and upper, or third floor, levels. Mr. Dort described the building as being abandoned; floors torn up and the building being in disarray. All the ground floor windows were boarded up and the building had a number of rodents. It had no heat or electricity. A fence surrounded the school and the front and side doors had chains on them. The chains appeared to be cut with wire cutters. Mr. Dort did not observe any locks on any of the rooms in the basement and no one told him of seeing any locks. He stated if he had been told, he would have contacted the owner. Mr. Dort was asked if he went room to room. He stated probably not every room but did go floor to floor and did not see any furniture. In describing what he did to check to see if there were any people in the building and any salvageable property in the building, he stated he went from the front of the stairs in the basement and shone his flashlight around. Mr. Dort's evidence is not, I find, conclusive there was no furniture and items in the old school at the time of the fire, but it is also not conclusive that there was furniture and items present.

**Ross White** is a volunteer fire fighter and was at the scene on April 6th, and he was inside the building during the fire. When he arrived, the gate on the fence surrounding the building was locked. Access was made by forced entry-broke lock on chain fence and then broke door down and entered from rear of the building. When he entered the building, he found what he described as a garbage fire on the main floor

auditorium. When he and other fire fighters cut a hole in the floor, they found fire travelling between the floor joists.

Mr. Ross stated he walked through the basement, main floor and upper level. He entered the basement from outside the building, then travelled up the stairs from the basement to the main level and then up to the second floor. He travelled from the staircase to staircase. After entering the basement from the rear entrance, he travelled along the hallway and then up the stairs to the main level and then to the second floor. He stated he did not leave the hallway. When the fire fighters go on the defensive, they start a process of going or traverse from stairwell to stairwell to make sure nothing is left behind. He did not step into any of the rooms in the basement, but he stated he shone his flashlight in each room as they walked by the rooms. He stated he saw nothing in the rooms. He couldn't recall the number of classrooms downstairs. It was dark in the building. There was nothing that grabbed his attention when in the basement, main floor, or third floor. He stated he did not see any furniture or other items. He could not recall seeing any room with a lock on it. In describing what they would do if they saw a lock on a room, he stated initially they would leave it locked, but once the decision was to go on the defensive in fighting a fire, they would go room to room to see if people or combustible materials were present. He was aware the building had previously been vandalized and that a small fire occurred in the building previous to this fire on April 6th.

The claimant must prove on a balance of probabilities that the furniture and items in issue were stored in the old school building at the time of the fire. I have carefully

assessed all of the evidence and in my opinion, the claimant has not satisfied the civil burden of proving the items were in the building at the time of the fire.

**Insurance Policy:**

The defendant, ING Insurance Company ("ING") representative, Grace Jackson ("Jackson"), gave evidence on the policy that was issued to the claimant when Mr. Gillis was the owner of 141 Abercrombie Road and of the policy that was issued after he became a tenant. Jackson is the personal line underwriting manager and has occupied that position for 10 years. She was familiar with the issues between ING and the claimant. The policy was originally a homeowner's policy and it initially was in the claimant's parents names when they owned the family home. It was changed over to the claimant's name after he purchased the property from his parents at which time it became a two family dwelling from a one family dwelling. When the claimant owned the property, the homeowner's policy would include a tenants package. After he sold the property and he stayed in the house as a tenant, the policy was cancelled and a new tenant's package was taken out. Exhibit 7D, is a copy of the Home and Auto Policy effective February 7, 2006. It is the revision summary as of February 7, 2006, showing the homeowner's coverage deleted and the tenant's package added with the applicable premium. The auto coverage is not changed or revised. It shows the large reduction from the original premium charged and this large reduction would be reflected in the claimant's automatic debit to his chequing account each month, as he was paying monthly.

Ms. Jackson stated a Notice of the revision summary with changes would have been sent to the claimant-a copy of the new policy and the new monthly debit. She stated the changes would have resulted from a request to change the policy through the claimant's broker. Exhibit 8D is a copy of the memo from the claimant's broker requesting the change.

**Tenant's Coverage**

I accept the evidence of Ms. Jackson that the claimant had a Tenant's Standard Form coverage for the contents of the apartment at 141 Abercrombie Road. The premium for this package was automatically debited to his account monthly. Mr. Gillis never questioned the insurer why he was being debited these monthly payments.

Each year, 40-60 days before the policy expired, it would be renewed by the broker and sent directly to the insurer. Mr. Gillis never cancelled the policy which would require his signature. The insurer's standard practice when changes are made is to send a coy of the Package Summary, Exhibit 7D, and the Tenant's Standard Form policy to the insured party. Ms. Jackson stated these documents were not returned to them by Mr. Gillis.

I accepted the evidence of Ms. Jacson, which were not disputed by the claimant that Mr. Gillis was notified of the tenant's package each year; and it's annual premium. I find that Mr. Gillis knew or ought to have known from the documents sent to him and

from his own personal bank statements that he was being charged an annual premium for the coverage that was paid by an automatic debit to his chequeing account each month.

Factors considered when assessing the risk when writing a tenant's package included risk of fire; proximity to fire hydrants and fire department. Ms. Jackson stated the policy provides full coverage while the contents are moved to a storage facility for 30 days and after that, coverage is for theft only. Should the contents be moved to a vacant building or shed, she stated the policy provides no coverage. In the claimant's case, Mr. Gillis did not call or notify the insurer that he was moving some, or all of the contents from his apartment to the vacant school building. I find, the contents in question were not ever in the apartment he leased from Mr. Goble. As noted earlier, I find the claimant moved the furniture and items in dispute before the tenants package was arranged and became effective on February 7, 2006. If the claimant had coverage under the Homeowner's Policy, that coverage, I find, was cancelled on February 7, 2006. The claimant stated he and his friend moved the furniture and items out of 141 Abercrombie Road sometime in mid-January, 2006.

I find, based on all the evidence, that the claimant knew or should have known he had coverage but failed to report any loss until well after the statutory period set out in the policy.

**Vacant Building:**

It was Ms. Jackson's evidence that the old school was not a warehouse and a warehouse is not a vacant building and therefore the contents moved to the vacant old school would not be covered by a tenant's package in any event.

**Coverage "C"**

The Tenant's Standard Form Policy at page 3, provides the following:

> **Personal Property On Your Premises**
>
> "We insure the contents of your dwelling and other personally property you own, wear or use while on your premises and which are usual to the ownership and maintenance of a dwelling.
>
> **Personal Property Temporarily Away From Your Premises**
>
> We also insure your personal property while it is temporarily away from your premises anywhere in the world. If you wish, we will include personal property belonging to others while it is in your possession or belonging to a residence employee travelling for you…
>
> Personal property stored in a warehouse is insured, but for 30 days only, if the loss or damage is caused by an insured peril. Coverage will cease, except for loss by theft or attempted theft for the duration of the policy term, unless we have been notified within the first 30 days and endorse your policy accordingly.
>
> Personal property normally kept at any other location you own is not insured."

Reading paragraph one in it's full context with the terms of the policy and giving it a plain and ordinary meaning, I find it refers more to these cases for example where an insured has taken some contents with them while temporarily away from their normal residence. For example, if a professor went on sabbatical for a year and travelled, say in Montreal to do research and in the course of doing so, moved some furniture to an apartment in Montreal for his own use, with intention of moving the furniture back when he returned to Nova Scotia, it would be covered. I do not think it is unjust or unreasonable for the insurer to have regard to the character and security of the premises where the goods are kept in order to access the risk and this information must of course come from the insured party.

In **Kekarainen v. Oreland Movers Ltd**. (1981), 8 Man R. (2d) 23 (QB), Wilson, J. at paragraph 20 stated:

> "Turning to the application of s. 145 of the I*nsurance Act*, supra, nobody would argue, I think, that it was not "just and reasonable" for the defendant Wawanesa to want to know the nature of the "Principal Residence" before assuming the risk of fire in that building. Why should it not be equally "just and reasonable" to restrict the obligation to indemnify to such times as the goods were so located? Unless forewarned, the insurer could have no knowledge of the security of placement elsewhere than in the "Principal Residence", the disaster which in fact occurred being, perhaps, a sufficient measure of the safety offered by defendant Oreland's warehouse."

At page 2, of the Tenants Standard Form policy, it defines vacant as:

> "**Vacant** refers to the circumstance where, regardless of the presence of furnishings:
> - all occupants have moved out with no **intention** of returning and no new occupant has taken up residence; or,
> - in the case of a newly constructed dwelling, no occupant has yet taken up residence." (my emphasis)

This definition is of little assistance in our case.

There is little dispute between the parties that the old school building was a vacant building and I find it was a vacant building which was in the process of being torn down. It was Ms. Jackson's evidence that property stored in a vacant building is not covered as a matter of policy. The claimant takes the position no where in the policy does it say a vacant building is not covered. The claimant argues that there is ambiguity in the policy and where there is an ambiguity, it should be construed against the insurer.

While the claimant stated he was going to move the furniture and effects back to the Abercrombie Road property, I find the evidence does not support this intention."

Wilson J. in **Kekarainen v. Oreland Movers Ltd**., supra, at paragraph 28, had this to say in regards to ambiguity in a policy of insurance:

> "Plaintiff affects to discover an ambiguity in the policy and of course, if there be such, it must be construed against the

> insured. For the rule to apply there must be indeed an ambiguity; and see Laidlaw, J.A., in *Kruger v. Mutual Benefit Health and Accident Association*, [1944] O.R. 157, p. 161, "the contract of insurance should be given a reasonable interpretation. The court should endeavour to see that the insured obtains all the benefits fairly and reasonably in contemplation of the parties at the time the policy was issued. In a case of doubt or uncertainty, the court should not readily be persuaded to negative or minimize the obligation of the insurer. But the application of the principle mentioned requires that there should be an obscurity, uncertainty or ambiguity in the policy. The doubt or difficulty in construction must not be fanciful, it must be real."

Given the evidence in this case and the terms of the policy, I am not satisfied there is any ambiguity in the policy as to "temporary removed" or "vacant" as defined in the policy.

Coverage "C" provides that:

> "We also insure your property while it is temporarily away from your premises anywhere in the world."

It is the "intention" of the insured that is relevant to whether personal property is "temporarily away" from the insured premises. It was the evidence of Ms. MacEachern that when considering whether property is temporarily away from the premises, she looked at a number of factors, including "intention" of the insured. The claimant states that the property was temporarily stored at the old school so that renovations could be carried out in the upper apartment. Those renovations commenced in January, 2006. Some three months later, the fire occurred at the old school. The claimant states that the

furniture and effects that were stored at the old school were lost in the fire. On cross-examination, he stated he could not say with any certainly that the property was still at the old school at the time of the fire. He had not checked to verify if the property was there for a couple of months.

Were the renovations to the upper flat, being the upstairs in the old family home, completed by April 6, 2006? No evidence was led on this issue, one way or another. It is clear however, and I find, that the claimant did not intend to store the property at the school on a permanent basis. In **Patus v. Zurich Insurance Co.** (1993), 87 Man R. (2d) 158 (Q.B.), the court at paragraph 11 stated that "temporarily" to the opposite of "permanently". In **Landry v. Cooperators**(1982), 38 N.B.R (2d) 608 (Q.B.), the court noted that temporarily meant a "limited time" substantially shorter than the period of time during which the goods are on the insured's premises, otherwise, it would involve a material change in risk.

I find the furniture and effects were moved from the Abercrombie property in mid-January, 2006, to allow renovations to the upper level apartment at Abercrombie that was previously occupied by Mr. Gillis when he owned the property. The policy of insurance was put in place effective February 6, 2006, which of course was after Mr. Gillis had already moved the property to the old school. I agree with the defendant's position that the personal property could not have been "temporarily away" when it had never been used by Mr. Gillis in his rented premises. The fact that the furniture and effects were not stored at the old school "temporarily", is of no assistance to the claimant

as these items of furniture and effect never did form part of the furniture and items that were never used by the claimant in the rented premises to start with.

**Genevieve MacEachern** is a Property Clause Specialist with ING Insurance. She was familiar with the claimant's claim, having first become aware of it in January, 2008, when the defendant phoned to report a claim. She was also familiar with the letter from their claims representative, Rheal Aucoin to Allan M. Gillis, dated January 15, 2008, advising the claim was not covered as the limitation period to present the claim expired one year after the date of loss, in this case, the prescription date being April 6, 2007. In support of this position, the insurer relied on paragraphs 6 and 14 of the Statutory Condition.

Under "Statutory Conditions of the Tenants Standard Policy it states:

> **Requirements After Loss**
>
> (1) Upon the occurrence of any loss of or damage to the insured property, the Insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10, and 11:
>
> a) forthwith give notice thereof in writing to the Insurer;
>
> b) deliver as soon as practicable to the Insurer a proof of loss verified by a statutory declaration,
>
> (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and

particulars of amount of loss claimed;

(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the Insured knows or believes;

(iii) stating that the loss did not occur through any willful act or neglect or the procurement, means or connivance of the Insured;

(iv) showing the amount of other insurances and the names of other insurers;

(v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property;

(vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract;

(vii) showing the place where the property insured was at the time of loss;

c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;

d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration, and furnish a copy of the written portion of any other contract.

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

Paragraph 14 states:

> **Action:**
>
> "Every action or proceeding against the Insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year* next after the loss or damage occurs.
> *Two years in Province of Manitoba and Yukon Territory."

The claimant filed a Proof of Loss Form on March 25, 2008. After further investigation by the insurer, the defendant insurer wrote to the claimant again on April 18, 2008, setting out the reasons why the claim was being denied.

Ms. MacEachern states it was an underwriting practice not to insure property stored in a vacant building and the first thing an insurer does before insuring a property is to access the risk. The defendant in this case had no knowledge that contents had been stored at the old Westside School.

She stated that a determination of whether a property is deemed to be temporarily away from the insured location and is covered by the policy is on a case by case basis.

Ms. MacEachern stated that her investigation in determining whether to issue a "risk" would include findings of the general state of the vacant and unused school building; the building having been vandalized and a previous fire. She stated if these facts were not disclosed, it could amount to a material change of the risk. She stated the

property they insured was at an apartment at Abercrombie Road. These contents were moved from that location to the old school without their knowledge. She relies on paragraph four of the statutory conditions which states:

> **Material Change**
>
> "Any change material to the risk and within the control and knowledge of the Insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the Insurer or its local agent, and the Insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if he desires the contract to continue in force, he must, within fifteen days of the receipt of the notice, pay to the Insurer an additional premium, and in default of such a payment the contract is no longer in force and the Insurer shall return the unearned portion, if any, of the premium paid."

Surely the removal of the goods from the location contemplated by the policy to a vacant old school that was being torn down; vandalized; fires being set; without obviously little difficulty in accessing, notwithstanding a gated fence;, boards on the windows and locks on the doors, would affect the risk in a material way. Wilson J. in **Kekarainen v. Oreland Movers Ltd.**, supra, referred to the comment of Chif Justice in **Kline Brothers v. Dominion Fire Ins. Co** (1912), 47 S.C.R. 252, p. 254:

> "..it is useless to insist upon the many reasons which may be urged to support the (insurer's) contention, that the location of the goods materially affect the risk; they are so obvious as not to require mention."

Goodfellow, J. in **Pentagon v. Canadian Supply**, S.H. No. 64958, in determining whether there was a material change to the risk stated:

> "The question of whether or not there has been a material change of the risk is a question of fact and the court has to weigh the evidence advanced to determine on a balance of probabilities whether or not the defendant has established a breach of statutory condition number 4."

I find the evidence here, which is not disputed, is that the claimant's furniture and effects were moved from the Abercrombie property to the old Westside School prior to the building being sold to Mr. Goble on January 31st, which was, **before**, the Tenants Standard Form policy was put in place, which occurred on February 6, 2006. The defendant did not know at any time either before the Tenants package was put in place; or after the policy became effective in February, 2006, that the insuring property being insured was being stored at a vacant, abandoned building in another in Town.

MacIntosh J. in **Swinimer v. Corkum** (1978) 28 N.S.R. (2d) 484, at paragraph 22, in dealing with discovery of a risk material to the contract states:

> "In order to show that the change of risk material to the contract it must be shown that the facts which were not disclosed would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

I conclude from the evidence that had the claimant disclosed to the defendant that he had already moved property to a vacant building that was in the process of being torn apart from inside to out; that it was subject to vandalism; that a fire had already occurred in the building while vacant; and that he moved items from the property either before or after the policy came into force, in a different location in another Town where security would be an issue, without providing a list or any other documentary evidence of same to the insurer, it would have undoubtedly influenced the insurer, and the coverage would have been denied, or the premium charged would have been different.

I am of the opinion, on the facts in this case, the placement of the furniture and effects of the defendant in the abandoned, vacant school in New Glasgow, under the circumstances in this case, represented a material change in the risk.

The burden of proof in civil cases is on the balance of probabilities. In insurance matters, it's for the insurer to prove the applicability of any clause or condition leading to avoidance of liabilities, which term or conditions, are to be strictly construed. See *Indemnity Ins. Co. v. Excel Cleaning*, [1954] S.C.R..

In **Kekarinen v. Oreland Movers Limited** (19810, 8 Mar R (2d) 23 (Q.B.) stated:

> "removal of the goods from the location contemplated by and specified in the policy affected the risk in a material way."

And in **L.G. Trask Agency Ltd. v. Nickerson** (1989), 96 N.S.R. (2d) 1 (Co. Ct.), the court, quoting the earlier case of **Swinimer v. Corkum**, noted:

> "In order to show that the change of risk is material to the contract it must be shown that the facts which were not disclosed would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

I am satisfied the defendant has met this burden and is entitled to void the contract.

I conclude that Mr. Gillis knew, or ought to have know, he had a tenant's package and accept his evidence he didn't think once he moved furniture to the old school it was not covered. I find Mr. Gillis moved furniture to the school for storage where it was to stay until he had the building completely demolished after taking out anything he thought was salvageable.

I also find, the evidence does not support Mr. Gillis' statement that he was going to move the furniture back to Abercrombie Road. He was renting the lower level apartment that was fully furnished and at the time of trial he was still in that unit. There was no room in this apartment to put all his furnishings and effects that he took to the old school for storage. He stated in his evidence this was the very reason he moved the items to the old school in the first place.

**Statutory Conditions 6(1)(a) and 14**

Statutory Condition 6(1)(a):

> 6. Requirement After Loss
>
> (1) Upon the occurrence of any loss of or damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10 and 11;
>
> (a) forthwith give notice thereof in writing to the insurer."

It is admitted by the claimant that he did not give written notice to the defendant insurer until January, 2008, a period of nearly two years after the fire. He clearly did not give notice forthwith. In *Accident Insurance v. Young* (1891), 2v S.C.R. 280 (S.C.C.), the Court held that forthwith implies prompt, vigorous action.

I find in this case there was a breach of Statutory Condition 6(1)(a).

The defendant also argues that there has also been a breach of Statutory Condition 14, which requires an action or proceeding be commenced within one year of the loss.

> 14. **Action**
>
> "Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damages occur."

The evidence is clear and I find the claimant did not commence the action for recovery of damages until October 15, 2008.

The claimant asks the court to consider Section 3(2) and (4)4, of the **Statute of Limitations Act** and Section 33 of the **Insurance Act**, and grant relief from forfeiture of the insurance

> **Statute of Limitations, s. 3:**
>
> (2) "Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which
>
> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.
>
> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
>
> (a) the length of and the reasons for the delay on the part of the plaintiff;
>
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
>
> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to

> requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
>
> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

What prejudice was suffered, if any, and to what degree, by the defendant and what prejudice and to what degree would be suffered by the claimant in not allowing relief from forfeiter. The degree of prejudice that would be suffered by the claimant was expressed by Hallett J., in *Anderson v. Co-Op Fire and Casualty* (1993) 58 N.S.R. (2) 163:

> "The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost."

As to the prejudice to the defendant, one only has to look at the evidence of Ms. MacEachern and that of Mr. Gillis.

Ms. MacEachern became aware of the defendant's claim in January, 2008, which is approximately 20 months after the fire. By this time, the old Westside School building that had been totaled in the fire, was demolished with the walls knocked down and the

brick and debris hauled away. As a result, any evidence that may have been present of any furnishings and effects was gone. Ms. MacEachern stated one of the first things done after a fire is to send investigators to the scene to collect evidence of possible causes of the fire and of lost personal property. As well, they would interview people that had any knowledge of the fire and the insured party. Because the fire was not reported for approximately 20 months after it occurred, any evidence that may have been obtainable was gone. While the defendant was able to locate two firemen approximately 30 months after the defendant reported the fire, these events prevented the defendant from gathering evidence that may have helped determine if there was in fact a loss of personal property.

Mr. Gillis was unable to say if the furniture and effects he claims he stored at the old school in mid-January, 2006, were still in the building on the date of the fire. His witness, Mark MacPherson, stated in a written statement typed up by Mr. Gillis, that he saw from his excavator when removing the brick from the demolished old school, the charred remains of a lot of indoor and outdoor furniture, which was taken to the landfill site. His job as an employee of Higgens Construction was to remove the brick and take it to the landfill. Marinus Verhagen Construction was hired to knock down the brick walls of the old school and after the brick was removed by Higgens Construction, Marinus Verhagen Construction was to take all the remaining debris to the land fill site.

No one from Marinus Verhagen Construction was called to give evidence of what they saw.

On direct examination, Mr. MacPherson could only recall seeing bits and pieces of a leg or arm of a chair or table. He said it was school stuff. As the defendant had no opportunity of having an investigator at the site after the fire or when the building was demolished after the fire, it was not able to gather any evidence either to support of or to refute the evidence of Mr. MacPherson. This is important, I find, as the defendant submits that there is a question of whether the personal property was stored at the old school at the time of the fire. Both firemen stated they saw no furniture or personal property stored in the basement and they did not see a locked room in the basement where the furniture was alleged to have been stored.

The claimant stated he did not know he had an insurance policy on contents. This is in the face of the evidence that he changed his homeowner's policy to a tenant's package at the end of January, 2006. I accept the evidence of the defendant that a copy of this policy as well as the annual reminders were sent to the claimant by mail and not returned; that the annual premium was automatically debited monthly from the claimants account. Mr. Gillis himself acknowledged that he may have received the annual renewals but just didn't open the mail. He acknowledged he received a monthly bank statement that showed the automatic debits for the insurance premium. Again, he stated he probably didn't open the statement.

In assessing the length of and the reasons for the delay on the part of the claimant in determining the degrees of prejudice suffered, I must also look at the events on the day

of the fire and the days up to when the walls of the burnt out old school were knocked down and the brick and debris removed.

Mr. Gillis stated he received a call early in the evening on April 6th, of a fire at the school. He was on the road on his way home. He called his friend Mr. Goble to go to the site and he would be there shortly. He does not tell Mr. Goble to tell the firefighters that his thousands of dollars of personal property are stored at the school. When he arrives at the school, Mr. Gillis does not tell the firefighters of the personal property that is worth thousands of dollars stored at the school. There was no evidence he told anyone between April 6, 2006-January, 2008, including the police, firefighters, the defendant insurer, his broker, Proudfoot Fox & Phinney, or the Town of New Glasgow, that he had stored personal property at the school and it was destroyed by the fire.

Sometime after March, 2008, when the claimant was notified by the defendant that the insurance claim was being denied, he contacted Mr. Mark MacPherson to have him agree to sign a statement saying he saw a lot of indoor and outdoor furniture when Mr. MacPherson was removing the brick from the old school—a statement that was not supported by his viva voce evidence.

I do not find the claimant's evidence very persuasive or reliable. I have considered the comments of Hallett J., in *Anderson v. Co-Op Fire and Casualty*, supra, at page 170 where he stated:

> "The purpose of time limitations within which to bring actions is to see that matters are brought on expeditiously within reasonable time frames considering the nature of the claim. The purpose is not to defeat bona fide claims through a technical failure to have commenced action within a specific time period. The Legislature has obviously intended to grant some relief to sleepy or negligent litigants subject to certain safeguards, the chief of which relates to any prejudice to the defendant caused by the delay in defending the case on its merits, taking into consideration the conduct of the plaintiff. The Legislature apparently perceived there were inequities arising out of the defence of time limitation and has provided a mechanism to resolve such inequities. In this case, the delay was very short; the defendant is not prejudiced in defending the case on its merits; this is the type of case in which equitable relief is required.

After having considered all of the evidence, I find this is a proper case to allow the limitation defence as well.

For all of the above reasons there is no need to decide if the Proof of Loss Forms filed by the claimant were proper.

The claimant's claims are hereby dismissed. There shall be no costs to either party.

Dated at Pictou, Nova Scotia this 30th , day of June , 2009

Issued at Pictou, Nova Scotia this , day of , 2009.

Ray E. O'Blenis
Adjudicator