

CANADA / JUDGMENT

Kruger Products Limited v. First Choice Logistics Inc.

2010 BCSC 1242

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1242 Kruger Products Limited v. First Choice Logistics Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kruger Products Limited v. First Choice Logistics Inc.,

2010 BCSC 1242

Date: 20101126

Docket: L032139

Registry: Vancouver

Between:

Kruger Products Limited Produits Kruger Limitee

Plaintiff

And

First Choice Logistics Inc. and Terrance Bodnar

Defendants

And

Toyota Industries Corporation,

Toyota Industrial Equipment Mfg. Inc.,

Toyota Canada Inc.,

Toyota Material Handling, U.S.A. Inc.,

and Mason Lift Ltd.

Third Parties

Before: The Honourable Mr. Justice Burnyeat

Corrected Judgment: The text of the judgment was corrected
at paragraphs 192, and 211-212 on August 23, 2011

Reasons for Judgment

Counsel for the Plaintiff:

A.J. Saunders

D.R. Mackenzie

R.J. Bailey

Counsel for the Defendants:

W.G. Wharton

P.D. Mooney

Place and Date of Trial:

Vancouver, B.C.

June 16-20, 23-25, 27, 30,

July 2-4, 21-22, 28-30,

August 1, September 17 and

November 5, 2008

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2010

- [1] The Plaintiff, Kruger Products Limited Produits Kruger Limitee, formerly known as Scott Paper Limited and, in French, Papiers Scott Limitee ("Scott") is a company incorporated under the laws of the Province of British Columbia. Scott is in the business of manufacturing paper and paper products and did so at a paper and converting mill in the City of New Westminster ("Plant").
- [2] The Defendant, First Choice Logistics Inc. ("First") was incorporated under the laws of the Province of British Columbia and carries on the business of management and operation of warehouses. The Defendant, Terrance Bodnar was a lift truck operator employed by First.

- [3] The Third Party, Toyota Industries Corporation ("Industries") is a company incorporated under the laws of Japan and, through its unincorporated division, Toyota Material Handling Company ("Handling"), carries on the business of the design, development, manufacturing and distribution of industrial lift trucks. The Third Party, Toyota Industrial Equipment Mfg., Inc. ("Equipment") is a company incorporated under the laws of the United States with a head office in Columbus, Indiana carrying on the business of manufacturing and assembling industrial lift trucks. The Third Party, Toyota Canada Inc. ("Canada"), is incorporated under the laws of Canada, has a head office within British Columbia, and carries on the business of marketing and sale of industrial equipment, including distributing industrial lift trucks within Canada. The Third Party, Toyota Material Handling, U.S.A., Inc. ("Handling U.S.") is a company incorporated under the laws of the United States of America with its head office in California and carries on the business of marketing and sales of industrial equipment, including distributing industrial lift trucks within North America. These Third Parties are collectively referred to as the "Toyota Third Parties".
- [4] Originally, Industries, Equipment, Canada and Handling U.S. were Defendants in these proceedings (collectively referred to as the "Toyota Defendants"). After an agreement was reached between Scott and the Toyota Defendants, an application was made by Scott and a June 6, 2008 order was made that Scott be granted leave to file a Notice of Discontinuance relating to its claim against the Toyota Defendants.
- [5] The Third Party, Mason Forklift Ltd. ("Mason") is incorporated under the laws of the Province of British Columbia and carries on the business of sales, rental and servicing of industrial lift trucks. Originally, Mason was named as a Defendant in these proceedings. After an agreement was reached between Scott and Mason, an application was made by Scott and a June 6, 2008 order was made that Scott be granted leave to file a Notice of Discontinuance relating to its claim against Mason as a Defendant.
- [6] FM Global Insurance Company ("FM Global") is the property insurer for Scott including being the insurer of the inventory stored by Scott at warehouses operated by First. FM Global also provided risk management advice, analysis and recommendations to Scott regarding a number of matters including the appropriate storage of Scott product in warehouses.

BACKGROUND

- [7] Scott stored inventory of "parent rolls" and cases of finished products in a 200,000 square foot warehouse operated by First located at 450 Derwent Place, New Westminster, British Columbia ("Warehouse"). Parent rolls are large rolls of paper product which are stored until they can be returned to the Plant to be processed for packaging into the final product sold by Scott or until they can be shipped to other companies who use the paper to produce their own finished product. Once parent rolls and product were moved from the Plant to the Warehouse, they were moved by lift trucks and stored in stacks in the Warehouse.

- [8] Prior to engaging First and forwarding its product to the Warehouse for storage, handling and shipping, Scott had stored its products at the Plant or at various third party warehouses. In addition to storing the inventory of Scott at the Warehouse, First also provided labour, space management and shipping co-ordination services to Scott in what was described by First as a "converting" operation.
- [9] In order to handle the parent rolls, First employed one "electric clamp" forklift and one "propane clamp" forklift. The configuration of the propane clamp forklift was described at Trial as being a short wheelbase "box car special" that had the advantage of a shorter turning radius while having the identical lifting power of the electric clamp forklift.
- [10] At the end of August 2000, a Toyota propane forklift was leased by First from Mason to assist in the storage of parent rolls and product ("Original Forklift"). The Original Forklift was a stock Toyota propane forklift but prior to its arrival at First, the Original Forklift had been equipped with venting on the forward and side areas of the hood.
- [11] When use of the Original Forklift began, lift truck operators noticed that it would overheat due to paper debris being sucked up into the body of the vehicle by the operation of the radiator cooling fan. From time to time, operators also noticed that they could smell paper smouldering within the machine as a result of contact with various hot elements associated with the engine and exhaust system. As a result of these occurrences, operators were forced to stop the Original Forklift and allow it to cool before cleaning it and putting it back into service.
- [12] First sought assistance from Mason regarding these problems. After several visits to the Warehouse by Mason personnel in November 2000, a determination was made by First and Mason to obtain an air compressor to "blow out" the Original Forklift at various intervals and to have the exhaust pipe wrapped with fibreglass insulation in order to shield paper and debris from the hot surface of the exhaust pipe.
- [13] Following implementation of the compressor and exhaust wrapping, the problem with smouldering paper was greatly reduced although instances of fires continued as a result of contact between paper and hot elements of the machine. Subsequent testing established that even a wrapped pipe would be hot enough to ignite paper. The overheating problem was also managed through the use of blowing out the machine with the compressor at the end of the shift and at intervals during the day.
- [14] The evidence of various Scott employees regarding their use of compressors established that the practice of blowing down machines with compressed air as a response to overheating and smouldering paper or tissue paper fires within the machine was also adopted by Scott and was viewed as a reasonable response to this problem. Scott did not have any of the exhaust pipes on their propane forklifts wrapped with asbestos or fibreglass tape. It was the evidence of representatives of Mason that, notwithstanding their long relationship with Scott and others in the paper industry who handled similar material, Mason had never wrapped an exhaust pipe on a Toyota propane machine prior to wrapping the exhaust pipe

on the Original Forklift.

- [15] On July 31, 2001, a fire broke out within the Warehouse ("Fire"). Approximately one week prior to the Fire, an employee accidentally ran the Original Forklift into a structure within the Warehouse. The accident occurred on Friday, July 20, 2001. On Monday, July 23, 2001, Mason was called to the Warehouse for an inspection of the damaged Original Forklift. Following that inspection, Mason determined that the Original Forklift would have to be taken for repair. Mason was asked to attempt to find a replacement unit which could be used during the repair period.
- [16] Transportation documents establish that a replacement forklift was obtained from Kamloops by Mason. After transporting this forklift to the Mason facilities and after fitting it with a roll clamp so it could handle parent rolls, this replacement forklift ("Forklift") was delivered to the Warehouse sometime late on Thursday, July 26, 2001. The Forklift was owned by Mason and leased to First.
- [17] While I find that there was time available for Mason to install venting on the forward and side areas of the hood and wrap the exhaust pipes of the Forklift with fibreglass prior to delivering the Forklift to First, Mason did not perform these modifications. I also find that First did not request or insist upon these modifications being made to the Forklift prior to it being delivered. There is no indication that Scott was consulted regarding the use of the Forklift without the modifications that had been made to the Original Forklift.
- [18] Mr. Bodnar had been on holidays. When he arrived back to work on Monday, July 30, 2001, he noted during his daily inspection that it was not the Original Forklift and that the exhaust pipes of the Forklift were not wrapped with fibreglass tape. In this regard, Mr. Bodnar was asked the following questions and gave the following answers at his Examination for Discovery:

Q. Did you learn at some point in time prior to the fire that there was no wrapping on the exhaust pipe? No asbestos wrapping?

A. Yes. The first day I did my inspection I noticed right away.

Q. Did you ask Dan [Woykin] about that or did you draw it to his attention?

A. I didn't ask him about the wrapping. I just asked about why we got a new forklift. So just my common sense: Well, they're not going to wrap it because we didn't ask him to. So it's -

Q. You assumed that -

A. It's a loaner machine. I doubt there's any other machines out there that had the pipe wrapped. That was just my opinion. Something I wouldn't even ask - this is a loaner, of course it's not going to be wrapped.

Q. Did that concern you, that you were going to be using -

A. It did because I had concerns before we had it wrapped so I would use it. Sure enough, it started overheating right away.

Q. And you had the same smouldering issues?

A. Yes. Uh-hum.

Q. Just the same as you had with the permanent lift truck?

A. Right back to square one. Like smouldering, overheating, and just got to be really careful again.

[19] Dan Woykin was the Warehouse Manager employed by First at the Warehouse. I find that Mr. Woykin advised Mr. Bodnar to proceed to use the Forklift but to adhere to the procedure of blowing down the machine with compressed air as required. The evidence of Mr. Bodnar at Trial was that the Forklift was blown down with compressed air approximately 10 to 15 minutes prior to the July 31, 2001 Fire. I accept that evidence and make that finding.

THE FIRE

[20] The Warehouse was divided into areas where parent rolls were stored, where finished products were stored, and where both were stored. The aisles in the Warehouse ran in a north/south direction and were used by the forklift drivers to access product. It was the testimony of Rod Shaw, Director of Operations for First at the Warehouse, that the aisles were approximately 12 feet wide and that they were wide enough for two lift trucks to pass each other abreast.

[21] While in an aisle in the parent roll area of the Warehouse, Mr. Bodnar was driving the Forklift in a northerly direction with no parent roll in the clamps of the Forklift. Mr. Bodnar had just brought a parent roll into that particular aisle and was returning to another area to pick up a further parent roll. Mr. Bodnar testified that he did not notice any smell which he would associate with smouldering or burning paper and that he saw no evidence of paper products in the vicinity of the Forklift while he was driving it.

[22] The Forklift driven by Mr. Bodnar passed Mr. Nijjar who was driving the electric lift truck in a southerly direction. Prior to passing the Forklift being driven by Mr. Nijjar, Mr. Bodnar did not see any large pieces of paper in the aisle ahead of him.

[23] Mr. Nijjar noticed a piece of paper approximately 2 to 3 feet long in the vicinity of the exhaust grill of the Forklift. The paper was on fire. Mr. Nijjar saw the paper drifting away from the back of the Forklift. The burning paper landed at the base of a stack of parent rolls. The burning paper immediately transferred flame to the stack of parent rolls.

[24] Mr. Nijjar made an attempt to stomp out the fire before running to get a nearby fire extinguisher. When Mr. Nijjar returned with a fire extinguisher, he felt the fire was already out of control so he left the area to report the Fire.

- [25] Prior to observing the burning piece of tissue, Mr. Nijjar did not see anything in the aisle which was unusual. In particular, Mr. Nijjar did not see any burning embers or other fires when he looked down the aisle in the direction he was travelling.
- [26] Mr. Bodnar picked up another parent roll with the Forklift, drove the Forklift to the northerly end of the aisle in question, and observed the fire in progress. By that time, Mr. Bodnar was of the view that the fire was out of control so he was not in a position to attempt to extinguish the fire. He left the scene of the fire.
- [27] The fire spread within the Warehouse and resulted in the total destruction of the building and the destruction or constructive loss of the entire contents of the product of Scott stored at the Warehouse. This product included approximately 3,713 tonnes of parent rolls of tissue paper, approximately 236,262 cases of finished paper products, and miscellaneous materials and supplies.

CLAIMS OF SCOTT AGAINST FIRST

- [28] Scott claims that its goods were in the Warehouse under a partly written and partly oral contract wherein First agreed to warehouse the inventory of parent rolls and cases of finished paper products and to provide logistics services relating to the warehousing, movement, storing and shipping of those products. Scott claims that it was a term of the contract that First would: (a) take all reasonable steps in the selection, training and instruction of employees involved; (b) maintain the Warehouse in a condition that met or exceeded professional warehousing management practices; (c) use equipment including lift trucks properly, safely and efficiently; (d) would keep all equipment in proper working order at all times; (e) would operate the Warehouse so as to minimize the risk of damage to the inventory of Scott, including the risk of damage by fire; and (f) would obtain "warehouseman's legal liability insurance" with respect to its liability for loss and damage to the goods of Scott stored in the Warehouse.
- [29] In addition to obligations owed by First to Scott under their contract, Scott claims that First owed it a common law duty of care, a duty of care as a warehouser under the Warehouse Receipt Act, R.S.B.C. 1996, c. 481 as amended, and a duty of care as an occupier of the Warehouse under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 as amended.
- [30] Scott claims that the Fire and its losses and damages of in excess of \$16,000,000 were caused by breaches of contract and of statutory and common law duties of care owed by First, the gross negligence of First, and the breach of common law duties of care and gross negligence of Mr. Bodnar and of other employees of First for which acts or omissions First is vicariously liable. The particulars of the fault of First and its employees are said by Scott to include:
- (a) operation of the Warehouse and the storage of goods therein in such a manner as to create excessive waste paper and paper debris;

- (b) failure to maintain the Warehouse and thereby allowing for the accumulation and presence of waste paper and paper debris within the Warehouse;
- (c) use of a type of lift truck in areas of the Warehouse where paper debris would be generated and would accumulate which First knew or ought to have known had a propensity to accumulate paper and paper debris within the body of the lift truck and knew or ought to have known of the risk that such paper might ignite;
- (d) failure to keep the body of the Forklift clean and clear of paper and paper debris;
- (e) failure to install or, alternatively, failure to instruct Mason to install, safeguards against the igniting of paper and paper debris by the Forklift when First knew that such safeguards were readily available and had been previously implemented to solve previous problems associated with the Original Forklift;
- (f) use of the Forklift when First knew or ought to have known that the Forklift incorporated no or insufficient safeguards to minimize the risk of ignition of accumulated paper and paper debris;
- (g) storage of goods within the Warehouse contrary to standard industry practices, in such a manner and configuration as to impair both the effective operation of fire suppression and firefighting equipment and personnel;
- (h) failure to adequately train and supervise its managers, supervisors and employees in the operation of the Warehouse, the cleaning of the Warehouse, the storage of goods therein, the use and maintenance of Forklifts, and fire suppression;
- (i) failure to exercise the care and diligence in regard to goods stored in the Warehouse as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances;
- (j) failure to take reasonable care to see that goods of Scott in storage within the Warehouse would remain reasonably safe therein;
- (k) failure to warn the Plaintiff that the degree of accumulation of paper debris in parts of the Warehouse and the operation of the Forklift therein created an unreasonable risk of fire; and

(I) failure to warn the Plaintiff that the Forklift was operated in the Warehouse with no or insufficient safeguards to minimize the risk of paper debris ignition when First knew that such safeguards were readily available.

[31] The particulars of the fault alleged against Mr. Bodnar are said by Scott to include:

- (a) his failure to keep the Warehouse reasonably clean and clear of waste paper and paper debris;

- (b) use of the Forklift in an area of the Warehouse where he knew or ought to have known was not reasonably clean and clear of waste paper and paper debris;
 - (c) failure to keep the body of the Forklift clean and clear of paper debris;
 - (d) use of the Forklift when he knew or ought to have known that the body of the Forklift was not clean and clear of paper debris;
 - (e) use of the Forklift when he knew or ought to have known that the Forklift incorporated no or insufficient safeguards to minimize the risk of ignition of accumulated paper debris; and
 - (f) his failure to keep the Forklift in good working order.
- [32] While the Defendants submit that Scott did not wrap the exhaust on its own propane lift trucks and the practice of not wrapping its exhaust pipes should be regarded as the industry standard against which the conduct of First should be measured, Scott submits that the decision of First to wrap the exhaust pipe was not an extraordinary measure within the Warehouse given the recommendation of Mason and given the experience of First with the problems of smouldering and burning paper. Scott submits that First cannot turn a "blind eye to its own experience and cannot excuse itself by falling back on a standard which reflects the practices of others" (including Scott).

ORIGINAL CLAIMS OF SCOTT AGAINST THE TOYOTA DEFENDANTS

- [33] A settlement was reached between Scott and the Toyota Defendants. In addition to granting leave to Scott to file a Notice of Discontinuance against the Toyota Defendants, leave was granted to Scott to file an Amended Statement of Claim. The Further Amended Statement of Claim set out the following provision:

The Plaintiff expressly waives any and all rights to recover from the Defendants or any other party, any portion of its loss that may be attributable to the fault, tort, negligence, breach of contract, breach of bylaw, and/or the breach of any equitable, common law or statutory duty of ... [the Toyota Defendants] and any other individuals or corporations not named as defendants (collectively, the "Excluded Parties"), and for which the Defendants may reasonably be entitled to claim from any one or more of the Excluded Parties contribution, indemnity or an apportionment either at common law, in equity, pursuant to the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto, or any successor legislation.

- [34] The claim against the Toyota Defendants as set out in the original Statement of Claim was that the Toyota Defendants knew or ought to have known that its propane Series 6 lift trucks would be used in the transportation, storage and handling of tissue paper and paper products, that the design, manufacture and assembly of their lift trucks resulted in them having a propensity to accumulate paper within the body of their lift trucks and to ignite that accumulated paper debris. Scott had claimed that its ensuing loss and damages were caused by the negligence in the design, manufacture, assembly and distribution of lift trucks and in their negligent failure to warn of the danger of using their lift trucks to handle

paper. The particulars of the claims that were alleged against the Toyota Defendants included:

- (a) failure to design, manufacture and assemble its forklifts in such a manner as to minimize the risk of paper and paper debris accumulating within the body of its forklifts;
- (b) failure to design, manufacture and assemble its forklifts in such a manner as to minimize the risk of ignition of paper and paper debris;
- (c) failure to warn Scott, First, and Mason of the risk of accumulation of paper and paper debris, and the ignition thereof, inherent in the use of its forklifts in a facility such as the Warehouse;
- (d) failure to provide Scott, First, and Mason with parts, equipment or supplies, and advice regarding the use of the same, so that risks could be minimized.

ORIGINAL CLAIMS OF SCOTT AGAINST MASON

[35] A settlement was reached between Scott and Mason. In addition to granting leave to Scott to file a Notice of Discontinuance against Mason, leave was granted to Scott to file an Amended Statement of Claim which set out the following provision:

The Plaintiff expressly waives any and all rights to recover from the Defendants or any other party, any portion of its loss that may be attributable to the fault, tort, negligence, breach of contract, breach of bylaw, and/or the breach of any equitable, common law or statutory duty of ... Mason Lift Ltd. and any other individuals or corporations not named as defendants (collectively, the "Excluded Parties"), and for which the Defendants may reasonably be entitled to claim from any one or more of the Excluded Parties contribution, indemnity or an apportionment either at common law, in equity, pursuant to the Negligence Act, R.S.B.C. 1996, c. 333, and amendments thereto, or any successor legislation.

[36] Scott claimed in the original Statement of Claim that the Forklift was owned by Mason and, as at the date of the Fire, had been leased by Mason to First. Scott claimed that, prior to the date of the Fire, Mason knew that:

- (a) the Forklift was being used by First in the transportation, storage and handling of tissue paper and paper products;
- (b) that the operations of First were generating excessive amounts of paper debris;
- (c) that the design, manufacture and assembly of the Forklift had resulted in it having a propensity, when put to use in areas where paper debris was generated, to accumulate within its body, and potentially to ignite, paper debris.

[37] Scott claimed in the original Statement of Claim that the Fire and the ensuing loss and damages were caused by the negligence of Mason in the maintenance and distribution of the Forklift and in its negligent failure to warn, particulars of which include:

- (a) failure to take any or any reasonable steps to minimize the risk of paper and paper debris accumulating within the body of the Forklift;
- (b) failure to take any or any reasonable steps to minimize the risk of ignition of paper and paper debris;
- (c) failure to warn Scott, First, and the Toyota Defendants of the risk of accumulation of paper and paper debris, and the ignition thereof, inherent in the use of the Forklift in a facility such as the Warehouse;
- (d) failure to provide Scott and First with parts, equipment or supplies, and advice as to the use of the same so that risks could be minimized.

DEFENCES OF FIRST AND MR. BODNAR

- [38] In its Further Amended Statement of Defence, First and Mr. Bodnar (collectively the "Defendants") state that the agreement between Scott and First was contained in written terms exchanged between the parties as set out in a February 1, 2000 agreement ("Warehouse Management Agreement"), the terms and conditions of which were accepted by Scott through its conduct. The Defendants state that the Warehouse Management Agreement included a provision requiring Scott to obtain insurance including "insurance of its inventory and property within the Warehouse" and that such insurance was to name First as an additional insured and was to stand as the primary insurance coverage. The Defendants state that, by the terms of the Warehouse Management Agreement, Scott is barred and otherwise estopped from claiming against First to the extent of the indemnity which would have been provided by such insurance. The Defendants state that it was an express or implied term of the Warehouse Management Agreement that the parties would restrict recovery between them for any loss or damage to the amount of available insurance and that Scott is therefore barred by the terms of the Warehouse Management Agreement and is otherwise estopped from claiming against the Defendants in total or, in the alternative, to the extent of the indemnity that would have been provided by the insurance that Scott was obliged to obtain and maintain under the terms of the Warehouse Management Agreement.
- [39] The Defendants also state that the provisions of the Warehouse Management Agreement expressly or impliedly preclude claims in tort and in contract now being made by Scott because Appendix "C" to the Warehouse Management Agreement contains terms and conditions which exclude or limit the liability of First.
- [40] First claims that the "MCL Standard Contract Terms" within Appendix "C" were developed by the International Warehouse Logistics Association as its "Canadian Standard Contract Terms and Conditions for Merchandise Warehouseman" and seeks rectification so that the text of the MCL Standard Contract Terms in Appendix "C" matches the text set out in the Canadian Standard Contract Terms and Conditions for Merchandise Warehousemen.

- [41] In the alternative, First submits that, if the form of the Warehouse Management Agreement does not constitute the entire contract between the parties, then the MCL Standard Contract Terms within Appendix "C" stands as the agreement between the parties as these were the terms and conditions accepted by Scott through its conduct. First submits that the Canadian Standard Contract Terms and Conditions for the Merchandise Warehousemen excludes liability for loss and damage due to fire, inherent defects, lack of special care or precaution, and injury to articles insufficiently protected or arising from the nature of the goods so that the alleged loss and damage claimed by Scott is excluded.
- [42] Regarding the alleged duty of care under the Act or as an occupier of the Warehouse under the Occupiers Liability Act, First states that it has satisfied any duty of care owed by it to Scott. In further answer, First states that Scott specified and directed that First use a Toyota forklift truck to perform work at the Warehouse and was at all times aware of the use by First of such a forklift truck and the risks inherent with its use. First also states that Scott at all material times had knowledge equal to or superior to that of First relating to the risks associated with the use of such trucks. In this regard, First submits that Scott operated several such forklifts every day at the Plant without wrapped pipes in identical or worse conditions of debris, Mason had never wrapped an exhaust pipe on a forklift other than the Original Forklift, Toyota never recommended or required that exhaust pipes of forklifts be wrapped, Toyota had not established the wrapping of exhaust pipes to be a solution to the problem of paper debris, and the "blow down" procedure used by First's staff was identical to the procedures employed by the personnel of Scott at the Plant.
- [43] It is the submission of First that, despite the arrangements that were in place between First and Scott regarding the storage of product at the Warehouse, Scott retained all control over planning, inventory, stacking configuration, choice and specifications of equipment, and all aspects of cost related to the operation of the Warehouse. Prior to occupying the Warehouse, various individuals at Scott met to determine how much product could be stored at the Warehouse. It is alleged by First that it was determined that the space available at the Warehouse was the same as the space that had been available at one of the previous warehouses managed by First and used by Scott. Because Scott had stored approximately six million pounds of parent roll material at the previous location, First states that Scott concluded that the same amount of product could be stored at the Warehouse if the parent rolls were stacked as high as 22-1/2 feet if 90 inch rolls were stacked three high and 60 inch rolls were stacked four high.
- [44] First pleads and relies upon the provisions of the Negligence Act, R.S.B.C. 1996, c. 333, as amended. In further answer to the Amended Statement of Claim, First states that any loss or damage suffered by Scott was due to its own negligence. In particular, Scott failed to wrap the parent rolls in order to avoid paper sloughing off the rolls creating a housekeeping issue and fire hazard, it required the storage of parent rolls in such a quantity and configuration at the Warehouse with the knowledge that such quantity and configuration created an increased fire hazard, it sent parent rolls to the Warehouse in such quantities that Scott

knew could not be stored safely or in compliance with "instructions" that Scott had received from its insurer, FMG Global, it demanded that First utilize a Toyota Series 6 forklift at the Warehouse when they knew or ought to have known the dangers of using such a forklift, and that Scott failed to warn First about the risks inherent with the use of Toyota Series 6 forklift trucks, including the Forklift.

THE DEFENCE AND THE THIRD PARTY NOTICE OF THE DEFENDANTS AGAINST THE TOYOTA DEFENDANTS AND AGAINST MASON

[45] In the Further Amended Statement of Defence and in the Amended Third Party Notice, First alleges that any losses and damages of Scott were caused by the negligence of the Toyota Defendants in the design, manufacture, assembly and distribution of the Toyota Series 6 Forklift and in the negligent failure of the Toyota Defendants to warn, particulars of which include:

- (a) failure to design, manufacture and assemble the Forklift in such a manner as to minimize the risk of paper and paper debris accumulating and igniting within the body of the Forklift;
- (b) failure to warn Scott, First, and Mason of the risk of accumulation of paper and paper debris, and the ignition thereof, inherent in the use of the Forklift in the paper warehouse trade;
- (c) failure to provide Scott, First, and Mason with parts, equipment or supplies, and advise regarding the use of the same to minimize risks;
- (d) failing to properly assess the characteristics of the Forklift prior to the putting it into service in the paper warehouse trade;
- (e) failing to properly assess the risks of the Forklift, including the risk of accumulation of paper and paper debris, and the ignition thereof, inherent in the use of the Forklift in the paper warehouse trade;
- (f) failing to modify the Forklift when it knew or ought to have known of the dangers presented by the Forklift in the paper warehouse trade;
- (g) failing to design, manufacture or assemble the radiator overflow system of the Forklift in order to insure that the radiator overflow hose could not come into contact with the exhaust system; and
- (h) failure to notify distributors and users of the Forklift that a failure to properly reinstall the radiator overflow system and/or radiator overflow hose could result in the radiator overflow hose coming into contact with the exhaust pipe thereby creating the risk of combustion.

[46] In the Further Amended Statement of Defence and in the Amended Third Party Notice, First alleges that Mason knew the purpose for which the Forklift was to be used and, prior to July 31, 2001, Mason knew that: (a) the Forklift were being used by First in the transportation, storage and handling of tissue paper and paper products at the Warehouse; (b) the design,

manufacture and assembly of Toyota's Series 6 forklift trucks including the Forklift had resulted in these trucks having a propensity to potentially ignite paper debris; and (c) the risk of fire could have been significantly reduced through the installation of safeguards and, in particular, through venting the engine cowling mount and wrapping of the exhaust pipes.

- [47] First states that they made known to Mason the particular purpose for which the Forklift was required, that First relied on the skill and judgment of Mason in supplying the Forklift, that the Forklift constituted goods of a description that were in the course of the business of Mason to supply so that there was an implied condition that the Forklift was reasonably fit for the purpose for which it was intended. In this regard, First pleads and relies upon the provisions of the Sale of Goods Act, R.S.B.C. 1996, c. 410 as amended.
- [48] First states that the Fire was due in whole or in part to the negligence of Mason in the supply, maintenance and distribution of the Forklift and its negligent failure to warn. First provides the following particulars of the alleged negligence of Mason:
- (a) failure to take any or any reasonable steps to minimize the risk of paper and paper debris accumulating within the body of the Forklift;
 - (b) failure to take any or any reasonable steps to minimize the risk of ignition of paper and paper debris;
 - (c) failure to warn First of the risk of accumulation of paper and paper debris, and the ignition thereof, inherent in the use of the Forklift in a paper warehouse facility such as the Warehouse;
 - (d) failure to provide First with parts, equipment or supplies, and advice regarding the use of the same to minimize risks;
 - (e) failure to ensure that the engine cowling/mount of the Forklift was vented prior to delivery to First or after delivery when it became apparent that the repairs to the Original Forklift would take longer than expected;
 - (f) failure to wrap the exhaust pipes of the Forklift prior to delivery to First or after delivery when it became apparent that the repairs to the Original Forklift would take longer than expected;
 - (g) delay in the repair of the Original Forklift normally operated by First when Mason knew or ought to have known of the danger posed by the Forklift;
 - (h) in general, failing to exercise all due care and attention in the supply and/or maintenance of the Forklift;
 - (i) failure to properly maintain the Forklift which resulted in a fire igniting within the Forklift;

- (j) failure to properly reinstall or inspect the radiator overflow system and/or the overflow hose so as to ensure that it was installed as originally manufactured and that it did not come into contact with the exhaust system of the Forklift;
 - (k) failure to notify First that there was a risk of the overflow hose in the radiator overflow system coming into contact with the exhaust pipe thereby creating the risk of combustion; and
- (I) failure to ensure that the Forklift was reasonably fit for the purpose for which it was intended.

[49] In the circumstances, the Defendants in their Amended Third Party Notice seek the following declarations: (a) "a declaration that the loss and damages claimed by the Plaintiff in this action were caused by the fault or negligence of other parties including but not limited to Toyota or Mason Lift"; (b) "a declaration as to the degree of fault of other parties including but not limited to Toyota and Mason Lift in that regard"; and (c) "a declaration that Mason Lift is liable to [the Defendants] ... pursuant to the Sale of Goods Act, R.S.B.C. 1996, c. 410, for any amounts due and owing to the Plaintiff from [the Defendants] ...".

WHAT CAUSED THE FIRE?

- [50] The exhaust system of the Original Forklift was known to get hot enough that paper that came in contact with it could smoulder and ignite. That was why it was decided by First to have Mason wrap the exhaust of the Original Forklift. Because First was handling domestic parent rolls that were not "wrapped", there was paper product in the aisles and against the bottom of the stacks of parent rolls in the Warehouse. Mr. Bodnar had immediate concerns regarding the Forklift: "Sure enough, it started overheating right away."
- [51] I find that it was paper debris coming into contact with the unwrapped exhaust system of the Forklift that caused the Fire. Burning tissue debris was seen by Mr. Nijjar to be trailing behind the Forklift. The fact that the burning paper was outside the Forklift, allows me to conclude that the paper had not been sucked up into the Forklift. This incident occurred only days after the Forklift had gone into service to replace the Original Forklift. This spatial and temporal proximity between the use of the Forklift with the unwrapped exhaust system and the burning paper is sufficient to allow me to come to the conclusion that the Fire was caused when paper came into contact with the unwrapped exhaust of the Forklift.
- [52] An inspection of the Forklift following the Fire disclosed no evidence of fire within the Forklift. I find this to be further evidence that the Fire was caused by paper coming into contact with an external part of the Forklift. I find that the unprotected exhaust of the Forklift came into contact with paper debris, either in the location where Mr. Bodnar had deposited a parent roll or in the aisle as he moved the Forklift back to that part of the Warehouse where he was to pick up another parent roll. I find that the heat of the unprotected exhaust of the Forklift caused the paper which was in the aisle or which had been blown into the aisle from debris at the foot of a stack of parent rolls to ignite, the ignited paper landed at the base of a stack of parent rolls, the paper transferred the flame to

the parent rolls, and the fire spread from there.

WERE THERE OTHER POSSIBLE CAUSES OF THE FIRE?

- [53] There were theories elicited from witnesses called by First that there were other causes of the Fire. Mr. West gave evidence concerning the possible role played by a melting plastic radiator coolant overflow hose within the Forklift. It was alleged that this overflow hose had been installed by Mason other than in accordance with the instructions from the Toyota Third Parties. Mr. West noted that a similar hose melted during "testing" and suggested that this could promote adhesion to tissue debris. However, Mr. West acknowledged that, given the proximity of the hose to the exhaust system, the hose would have undergone this melting within a short period of time after having been installed. There was no evidence as to when the overflow hose in the Forklift had been installed. I cannot conclude that the plastic radiator coolant overflow hose melted at the Warehouse where the Forklift had been used for less than a day and a half or that the alleged faulty installation caused or contributed to causing the Fire. No theory was presented how paper two to three feet long might have come in contact with the plastic radiator coolant overflow hose, been ignited, and then expelled from the Forklift in order that it would be streaming behind the Forklift.
- [54] Mr. Lee gave evidence at Trial that the Warehouse contained metal halide lights which had been known to rupture and cause fires in other locations. I can find no facts which would allow me to conclude that such a rupture occurred and caused the Fire. There was no evidence that the lights in the Warehouse had ruptured. In particular, no witness testified that they saw a light fixture rupture or that they saw burning fragments from a ruptured bulb fall from the ceiling, either in the vicinity of the parent rolls, the Forklift or elsewhere. There is no evidence that a light failure occurred in the time leading up to the Fire. The existence of the unshielded metal halide lights at the Warehouse was addressed by a field engineer from FM Global during a May 2000 inspection. The field engineer spoke to representatives of First and advised them that turning off the lights on weekends would be a satisfactory response to the existence of the metal halide lights because, when metal halide lights are cycled on and off on a regular basis, a light which is nearing a failure point will not turn back on. The evidence of Mr. Shaw of First was that the lights were cycled on and off on a daily basis and on the weekends.
- [55] I also reject the hypothesis presented on behalf of First that the Toyota Third Parties were liable for the Fire because tissue paper was drawn into the body of the Forklift as a result of the negative air pressure created by the exhaust fan and that, after coming into contact with an exposed portion of the exhaust pipe, caught fire and escaped from the body of the Forklift. I am satisfied that this theory is disproven on the evidence due primarily to the inability of paper to escape once it has entered the body of the Forklift and the inability of ignited paper to move past the radiator fan to outside of the Forklift. I accept the evidence of Jeff Colwell, a professional engineer, that paper, once inside the body of a forklift, is drawn upwards towards the radiator with significant force so that the paper cannot get past the radiator and outside the vehicle unless manually forced past the radiator. I also take into

account that there was no evidence of fire damage within the body of the Forklift after the Fire. I find that it would not have been possible for paper to be drawn into the Forklift, ignited and then expelled from the Forklift.

- [56] I find that any hypothesis that the Fire was caused by an alleged improperly installed coolant hose, by ruptured metal halide lights or by paper igniting once in the body of the Forklift is pure conjecture. The only conclusion that I draw from the facts is that the Fire was caused by the Forklift either running over or into the paper that then caught fire after making contact with the unwrapped exhaust system. I find that ignition of paper debris on the exposed exhaust pipe was the only cause of the Fire. This cause of the Fire is completely consistent with the observations of Mr. Nijjar. The question which then arises is whether First can be held liable for the Fire.

WHAT CONTRACTUAL OBLIGATIONS WERE IMPOSED ON FIRST?

- [57] The obligations of First to Scott arise as a result of any contract between them, the common law duty of care, and the duties of care imposed upon First as a party providing warehousing services.

BACKGROUND TO THE QUESTION OF WHAT CONTRACT WAS FORMED BETWEEN THE PARTIES

- [58] First submits that the conduct of Scott was a clear acceptance of the terms contained within what was forwarded to it by First. Scott submits that the contract between the parties was partially in writing and partially oral, and that what was forwarded only existed in the form of a proposal and that there was no "meeting of the minds" sufficient to bind the parties to all of the terms contained in what was forwarded and that, in any event, First and Scott did not act as if what was forwarded was in force.
- [59] In the late 1990s, a decision was taken by Scott to centralize a number of its functions including warehousing and distribution. Maurice Silcock was hired as the V.P. of Logistics for Scott and was charged with securing all required warehousing space for Scott. Discussions took place between Mr. Silcock of Scott and Mr. Chicoine of First. The decision was reached that warehousing services would be provided by First in Toronto and Calgary on a "cost plus" basis. A Memorandum of Agreement was prepared in November of 1998 in anticipation of a more formal agreement between the parties relating to Toronto and Calgary warehousing. This Memorandum of Agreement was never signed by the parties. Despite that, the parties proceeded with the planning and implementation of warehousing operations in Toronto and Calgary.
- [60] I find the financial basis of the agreement between the parties relating to the Warehouse is set out in an October 15, 1999 email between Mr. Nanji of First and Mr. Silcock of Scott. The email states in part:

As to operating the building, we are very open as long as we have no risk and make a reasonable margin. ... The best all around option that I would suggest is that we do it the same way as Toronto on a cost plus basis with a productivity and a continuous improvement guarantee.
[emphasis added]

- [61] By a February 14, 2000 email transmission, First informed Scott that it would provide various draft agreements for each of the three operations "that [Scott] are waiting upon so that [the parties] may review them together". Jordan Slatt of First was asked by Mr. Nanji of First to draft the agreements relating to the Toronto, Calgary and Vancouver warehouses. Mr. Slatt sent a copy of a template agreement to counsel for First on February 25, 2000. Counsel made some comments regarding the agreement and Mr. Slatt incorporated some of these changes in the template agreement. Mr. Chicoine of First stated at Trial that he contacted Mr. Silcock of Scott and told him that he had a draft agreement and that he wanted to discuss it. They arranged to discuss the draft after an operations meeting in the late spring of 2000.
- [62] Mr. Chicoine presented the draft to Mr. Silcock after the operations meeting. Mr. Chicoine states that he went through each page of the draft and pointed out the various headings to Mr. Silcock. Mr. Silcock was told that the draft was to be a template for each of the operations in Calgary, Toronto and the Warehouse. Mr. Chicoine stated at Trial that they did not talk about the "content of the agreement, but that he went through it and "showed him what was in here". Mr. Chicoine stated at his Examination for Discovery that it was his expectation that Mr. Silcock would eventually get back to him with affirmation that the proposed terms were acceptable or, alternatively, would raise any concerns so that the parties could then negotiate further. The recollections of Mr. Silcock are no longer available as Mr. Silcock died shortly after the Fire.

WAREHOUSE MANAGEMENT AGREEMENT

- [63] What was provided to Mr. Silcock was a "Warehouse Management Agreement" having an effective date of February 1, 2000. The agreement was to terminate on March 31, 2005 but with Scott having the option to extend the agreement so that the term of the agreement would then expire on June 30, 2010.
- [64] Paragraph 1(Scope of Agreement) provided that no amendments or understanding modifying, amending or otherwise varying the agreement would be effective unless in writing and signed by both parties. Paragraph 1 also contained the following sentence: "A copy of the Contractor's [First's] standard warehouse receipt is attached hereto as Appendix C - the terms of the warehouse receipt shall govern except to the extent of a conflict with the body of this Agreement, in which event this agreement shall prevail." I find that no Appendix "C" was attached to what was initially provided to Mr. Silcock. There was no Appendix "B" attached to the Warehouse Management Agreement. No Appendix "B" appears in subsequent drafts of the Warehouse Management Agreement.
- [65] Paragraph 3 of the Warehouse Management Agreement dealt with "Management Services":

The Contractor [First] shall, in accordance with this Agreement and all expressly incorporated attachments, and professional warehousing management practices, manage the day-to-day operation of the Warehouse and without limited the generality of the foregoing, provide the services of the physical handling and storage of Scott goods and materials (collectively the "Management Services") and in accordance with the performance standards set out in Appendix A.

[66] In paragraph 7(A) of the Warehouse Management Agreement, First made the following representations:

- (i) each of the Contractor [First], its managers, supervisors, employees, agents and any sub-contractors it retains has and will at all times have the requisite experience, capacity, expertise and training necessary to perform the Management Services and shall perform the Management Services in an efficient, effective and professional manner, and properly, safely, efficiently and professionally operate and manage the Warehouse for the purposes herein described, all in accordance with the highest industry standards;
- (ii) The Contractor will not take any action which will cause or contribute to undue or accelerated damage of such goods and products, nor will it fail to take any action reasonably required to preserve the condition, of such goods and products.
- (iii) The Contractor, its managers, supervisors, employees, agents and any sub-contractors it retains shall utilize all equipment, including but not limited to electric and/or propane lift trucks, properly, safely, efficiently and professionally and shall keep all equipment in good working order at all times;
- (iv) The Contractor will properly and safely maintain, and keep in sanitary, neat and orderly condition, all goods and products as Scott may from time to time tender for storage at the Warehouse.
- (v) The Contractor may in its sole discretion refuse to accept product which in their reasonable opinion will contaminate the other products stored in the warehouse.

[67] Paragraph 12 of the Warehouse Management Agreement dealt with "Indemnification" and provided as follows:

The Contractor and or Scott will indemnify and hold harmless (i) each to each other Scott, its affiliated, related, parent and subsidiary companies and their respective shareholders, directors, officers, employees, servants, agents, appointees, successors and assigns (collectively the "Indemnified Party"), from any and all losses, damages, expenses, claims, demands, causes of action, legal proceedings, fines, penalties, costs and fees, and any other liability or obligation whatsoever other than a liability that arises by virtue of the Indemnified Party's own misconduct, in connection with;

- (i) any action which the Contractor and or Scott, its directors, officers, employees, servants and agents takes or fails to take which directly or indirectly impairs, disrupts, closes or slows the operation of the Warehouse or the level of service to Scott' customers;
- (ii) the Contractor's and or Scott breach of any term, condition, warranty, representation or obligation arising from or relating to this Agreement; or
- (iii) any claim arising from personal injury or death, or property damage, that relates to any act or omission, including without limitation negligence, of the Contractor and or Scott or any of its shareholders, directors, officers, employees, servants and agents, its and their affiliated, related, parent and subsidiary companies, its and their appointees, successors and assigns, including the violation of any applicable law, rule or regulation relating to this Agreement and/or the violation of any third party's trade secrets, proprietary information, trademark, copyright or patent rights in connection with the performance of the Management Services; or any fines, penalties and legal costs and fees incurred by Scott as a consequence of any violation of the Occupational Health and Safety Act, R.S.O. 1990, chapter 0.1 as amended, and the Regulations thereunder, relating to any act or omission on the part of the Contractor and or Scott, its directors, officers, employees, servants and agents or any sub-contractor.

[68] Paragraph 17 (A), (B), and (D) of the Warehouse Management Agreement dealt with "Insurance". It should be noted that no one appears to have noted that there was no paragraph "C" in paragraph 17.

[69] Under paragraph 21 of the Warehouse Management Agreement, the "applicable law" was stated to be governed by the laws of the Province of Ontario. The parties appear to have ignored this provision and have throughout dealt with all questions which arise on the basis that British Columbia Law is applicable.

[70] Appendix "A" to the Warehouse Management Agreement was attached to what was given to Mr. Silcock. Appendix "A" provided:

I. STANDARDS FOR PERFORMANCE OF CONTRACTOR;

MINIMUM COMPETENCIES REQUIRED

The following standards of performance and competencies are established to reflect the Scott desires for a world class operation in the logistics network. The standards are intended as minimum performance levels of the key Management Services to be provided by the Contractor. The Contractor should strive at all times to exceed these standards. In the event that a standard is not being achieved, a plan of action must be established by the Contractor to evaluate the standard and implement corrective actions. Operating conditions may change from time to time and in the event that a change has an impact on these standards, the Contractor is responsible to communicate with Scott to validate the issues and seek a new and acceptable standard.

1. Performance Standards

Contractor shall maintain the Warehouse in food grade condition and cleanliness at all times.

Productivity standards will be defined based on the best available information taking into consideration the special operating conditions that are inherent to a specific location. The operator will at all times strive to maintain staffing and scheduling to attain the most efficient and productive operation based on volume forecasts as provided by Scott

Contractor will issue specified order/shipment status reports and/or other specified reports representing status of daily operations. All reports shall be accurate, timely and formatted per Scott'[s] requirements. All daily shipment confirmation shall be reported to Scott by 9:00 a.m. the following business day.

Contractor will perform in accordance with the Final Operating Budget.

Routine Quality Assurance (Q.A.) audits of the warehouse as performed by Scott must be satisfactory to Scott.

Contractor will establish and maintain total quality controls/systems that meet or exceed professional warehousing management practices.

Inbound trucks shall be unloaded and received in a timely manner

Contractor at all times will strive to keep product loss to a minimum, whether due to inventory shrinkage, damage or any other reason under Contractor's control.

APPENDIX "C" (MCL STANDARD CONTRACT)

[71] As an Appendix "C" was not attached to what was initially provided to Mr. Silcock, Mr. Slatt forwarded a document on May 26, 2000. In his letter, Mr. Slatt set out the following notation: "a copy of our warehouse receipt" is being forwarded:

This is the text of the receipt that would apply as Appendix "C" to our warehouse operating agreement. FYI -- this is the text that was developed by the International Warehouse Logistics Assoc. and is in general use through the industry. Please feel free to call if you have any questions.

[72] While this document is referred to in the May 26, 2000 letter as being Appendix "C", there is no such indication on the document that was forwarded. What was described as being Appendix "C" was referred to as being from the International Warehouse Logistic Association ("IWLA").

[73] Mr. Slatt had previously obtained a copy of the IWLA Canadian Standard Contract Terms and Conditions for Merchandise Warehousemen and had a First employee transcribe the terms into a Word format document. It was the transcribed document which was forwarded to Scott.

[74] The document forwarded on May 26, 2000 is headed "MCL Standard Contract Terms and Conditions for Merchandise Warehousemen" ("MCL Standard Contract"). The initials "MCL" refer to "Metro Canada Logistics", the parent company of First. The provisions in the MCL Standard Contract included the following:

2. Contract

Subject always to legislation in force governing warehouse receipts in the province where the goods covered by this Receipt are stored, this Receipt including the Terms and Conditions hereinafter set out, when delivered or mailed to the owner or depositor of the goods at his address last known to the warehouseman, shall constitute the contract between the owner or depositor and the warehouseman; provided that the owner or depositor may within twenty days after such delivery or mailing, notify the warehouseman in writing that he does not accept the contract and forthwith thereafter shall pay the warehouseman's lien for charges and remove the goods. If such notice is not given then this Receipt constitutes the contract. This contract may be cancelled by either party upon 30 days written notice and is cancelled if no storage or other services are performed under this contract for a period of 180 days.

9. Liability of Warehouseman

- a. The responsibility of the warehouseman is the reasonable care and diligence required by the laws of the province where the goods are stored.
- b. The quality, condition, contents and value of goods stored are not known to the warehouseman except as declared by the storer and described on the face of the Receipt.
- c. Goods covered by this Receipt are not insured by the warehouseman.
- d. Without limiting the generality of the foregoing, it is specifically declared that:

I. All goods are stored at the owner's risk of loss, damage or delay in the delivery caused by or through inaccuracies, obliteration or absence of marks, numbers, address or description, act of God, irresistible force, enemies of the Queen, civil or military authorities, insurrection, riot, strikes, picketing or any other labour trouble, water, steam, sprinkler leakage, floods, rain, wind, storm, fire, frost, vermin, heating or corruption, deterioration, drainage, dampness, rust, decay, collapse of the building, inevitable accident, depreciation or perishing by elapse of the time, changes in temperature, contact with or odors from other goods, inherent defects, lack of any special care or precaution, injury to articles insufficiently protected or arising from the nature of the goods, loss in weight, insufficient cooperage, boxing, crating or packing, ordinary wear and tear in handling, leakage, concealed damage or any cause beyond the control of the warehouseman or failure to detect any of the foregoing. All storage and other applicable charges must be paid on goods stored for an additional time, or lost or damaged by any of the above causes.

II. The legal liability of the warehouseman shall be strictly limited to the lesser of the monetary amount of the damage incurred or 25 times the monthly storage rate on any one package or stored unit with the contents (or, in cases where the warehouseman's charges are calculated for other than actual storage, maximum \$50.00 per unit) unless the owner specifically request a higher limit in writing and declares an excess value, in which case the warehouseman may, at his option, accept liability and assess an additional charge to the monthly storage or other applicable rate.

- e. Where loss or injury occurs to stored goods, for which the warehouseman is not liable, the storer shall be responsible for the cost of removing and disposing of such goods and the cost of any environmental cleanup and site remediation resulting from the loss or injury to the goods.
 - f. The warehouseman shall not, in any event, be liable for any claim of any type whatsoever with respect to the stored goods unless such claim is presented in writing within a reasonable time, not exceeding 30 days after the storer learns of, or, in the exercise of reasonable care, should have learned of the loss, damage or destruction of said goods.
10. General
- j. Warehouseman shall not be liable for any loss or [sic] profit or special, indirect, or consequential changes [sic] of any kind.

FOLLOW UP TO OBTAIN A WRITTEN AGREEMENT

[75] Subsequent to their Spring 2000 meeting, Mr. Chicoine followed up with Mr. Silcock on numerous occasions to obtain an agreement. Mr. Silcock gave a number of excuses regarding why no comments were being forwarded. Throughout this time period, the Warehouse was being operated by First and Scott continued to forward product to the Warehouse.

[76] On September 27, 2000, Mr. Silcock forwarded a letter stating that:

We are in possession of the Contracts as developed by ... [First] and are currently reviewing them for content and accuracy. We confirm to you that the financial terms of the Contracts are agreeable to us. It is expected that our Legal Counsel will have completed its review within the next 4 to 6 weeks.

[77] At the expiry of the 6 week period, Scott did not voice any objection to the content or accuracy of the draft. No evidence was presented that internal or external legal counsel were ever involved in reviewing the agreement.

[78] In late 2000, Mr. Chicoine of First was replaced by Don Whilsmith. Despite the ongoing operation of the Warehouse, no agreement had been signed at that point. Mr. Whilsmith requested copies of the agreements for the Calgary and Warehouse locations. In January of 2001, Mr. Slatt of First reloaded his computer with a copy of the draft agreement and

reprinted a copy for internal distribution and discussion within First. Once Mr. Slatt received comments back from Messrs. Whilsmith and Shaw of First, Mr. Slatt made further amendments to the draft. I cannot conclude that these changes made to the draft agreement were ever forwarded to Scott for comment or approval.

- [79] In early 2001, First was notified by Scott that Scott wanted a change in the relationship. Scott had been engaged in grievances with its unions over the operation of the Warehouse since shortly after it opened in January of 2000. Mr. Lebel of First subsequently became involved in negotiations to shift the relationship between the parties relating to the Warehouse from contract warehousing to a landlord-tenant relationship.
- [80] In March of 2001, separate agreements for the Calgary, Vancouver and Toronto operations were created. While these agreements were distributed internally within First, Mr. Slatt could not say whether the agreement relating to the Warehouse was ever provided to Scott.
- [81] In July 23, 2001 correspondence, Mr. Lebel of First outlined the agreement said to have been reached between the parties regarding operations at the Warehouse. Mention was made to the contract warehousing agreement between the parties for the Warehouse as follows: "The Operating Agreement will be cancelled as of September 30, 2001, midnight. ..." The "Operating Agreement" was defined in this correspondence as the "450 Derwent warehouse management agreement." None of the copies of the Warehouse Management Agreement in evidence are dated subsequent to September 30, 2009.
- [82] The July 23, 2001 letter to Mr. Silcock of Scott dealt not only with the Calgary operation but also a proposed three-year agreement on behalf of Scott relating to the storage and distribution levels in Ontario and Quebec and a right of first refusal in favour of First for five years relating to the "external storage and distribution needs within Canada" of Scott. While there is a purported cancellation of the Warehouse Management Agreement, no agreement by Scott to be bound by the July 23, 2001 letter is in evidence.

WHAT WAS THE CONTRACT?

- [83] It is clear that the Warehouse Management Agreement and Appendix "C" had many deficiencies. Some of the drafting is incomprehensible. There was no Appendix "B". There was no paragraph 17(C). There was no indication that the changes made internally by First in January 2001 were ever communicated to Scott. Finally, Scott never executed a copy of the Warehouse Management Agreement. Despite that, I am satisfied that the draft Warehouse Management Agreement, Appendix "A" to the Agreement and Appendix "C" to the Agreement accurately reflect the contract which existed between First and Scott relating to the operations at the Warehouse and the obligations which existed between the parties.
- [84] I find that the conduct of Scott after the Warehouse Management Agreement and what was referred to as Appendix "C" were forwarded amounts to an acceptance of the terms contained within the Warehouse Management Agreement. The "financial aspects" set out in the Warehouse Management Agreement were expressly accepted by Mr. Silcock and the

parties acted in accordance with those "financial aspects". At no time did Scott state that any of the terms set out in the Warehouse Management Agreement were unacceptable or did not reflect the agreement between the parties. From January 2000 to the date of the Fire, First provided the services described in the Warehouse Management Agreement, including providing operating budgets and the provision of services for the handling and storage of the products of Scott. Scott paid in advance each month, First prepared a reconciliation between the amount paid and the amount owed, and there was an adjustment between the parties if Scott had overpaid or underpaid. The Warehouse Management Agreement contained terms that both parties would obtain and maintain insurance and both parties did so.

[85] Even though nothing was ever signed by both parties and even though Scott did not write or verbally accept the terms set out in the Warehouse Management Agreement, I find that the conduct of the parties was such as to incorporate the matters set out in the Warehouse Management Agreement. Subject only to paragraph 1 of the Agreement that the Warehouse Management Agreement would prevail over anything to the contrary in Appendix "C" and that no amendments or understanding modifying, amending or otherwise varying the Warehouse Management Agreement would be effective unless in writing and signed by both parties, what was set out in Appendix "A" and Appendix "C" to the Warehouse Management Agreement also form part of the contract between the parties. Accordingly, what are the provisions in the contract between the parties which affect the questions which arise in this Action?

(a) Contractual Standard of Maintenance

[86] Appendix "A" to the Warehouse Management Agreement provides for "STANDARDS FOR PERFORMANCE OF CONTRACTOR - MINIMUM COMPETENCIES REQUIRED". Appendix "A" required First to "maintain the Warehouse in food grade condition and cleanliness at all times". I find that Appendix "A" to the Warehouse Management Agreement forms part of the contract between the parties.

[87] Mr. Shaw was the Director of Operations at the Warehouse for First. Mr. Shaw admitted under cross-examination that the Warehouse did not meet the standard set out in Appendix "A":

Q. And food grade condition, a phrase that you used on your examination for discovery, food grade condition means super clean?

A. Correct.

Q. And this First warehouse on Derwent Place was not kept in food grade condition was it?

A. It was not super clean as a result of the parent rolls, correct.

- [88] Under paragraph 7(a) of the Warehouse Management Agreement, First represented that it would perform the services required under the Warehouse Management Agreement: "... in an efficient, effective and professional manner, and properly, safely, efficiently and professionally operate and manage the Warehouse for the purposes herein described, all in accordance with the highest industry standards;" I find that the provisions regarding cleanliness set out in Appendix "A" is not in conflict with the provision of cleanliness set out in paragraph 7(a) of the Warehouse Management Agreement. I am satisfied that "food grade condition and cleanliness" is in accordance with the "highest industry standards". I make this finding in the absence of expert opinion in this regard. If I am incorrect in arriving at this conclusion, then I also find that the condition in the Warehouse could not be described as being in accordance with the "highest industry standards".
- [89] In support of its defence to this Action, evidence was presented by witnesses for First regarding the housekeeping procedures which were said to be in effect: (a) First had a daily cleaning procedure in place whereby forklift truck operators were required to sweep the parent roll storage sections of the Warehouse clean at the end of the day shift; (b) Forklift truck operators were also required to sweep various areas of the Warehouse including the loading/unloading dock areas and the parent roll storage sections throughout the course of their shift where time permitted; and (c) Forklift truck operators would as necessary pick up large pieces of parent roll debris from the floor of the Warehouse.
- [90] The operations in the parent roll storage areas led to considerable tissue paper debris. That debris was an obvious potential fire hazard. Mr. Klann, who was the supervisor in the Warehouse for First until early 2001, testified that employees under his supervision would sweep the Warehouse "continuously during the day if it needed to be done" and that he would also sweep in the Warehouse. Mr. Woykin, who succeeded Mr. Klann in that position, gave similar evidence. Mr. Shaw, their superior at First, made this acknowledgement during his cross-examination:

Q. And it's fair to say, sir, that if your employees had not been continually sweeping during the shift, the debris problem could very well have gotten out of hand?

A. Correct.

- [91] I have concluded that First was of the belief that what they had put in place was in accordance with the "highest industry standards". However, I find that what was actually happening in the Warehouse varied from the testimony of Messrs. Woykin, Klann and Shaw. At his Examination for Discovery, Mr. Bodnar confirmed that, once the Warehouse became full so that there were considerable parent rolls of Scott's stored at the Warehouse:

There is quite a bit of debris around. ...

It flakes off the rolls from the pressure of clamping it; cracks the paper; rips the paper. From driving by because these - you travel quite fast in these machines. Just from the wind going by would unravel the roll. There's many sources, reason why paper comes off. The way they come from the factory, they've only got one little piece of paper holding it closed and they can come undone, unravelled. Just basically from clamping, unclamping them. They have moved so many times.

As the roll came unravelled not much you can do about that amount of rolls, but anything that fell on the floor, pieces of paper, you didn't want to be driving over big pieces and stuff. Nothing you can do about small, like hand-size, pieces of paper and stuff. They always continuously - generally bits of pieces we got off the machine, pick them up. Throw them in the garbage. At the end of the day we gave the warehouse a complete sweep up and down every aisle. In between the rolls almost. The warehouse floor was pretty spotless at the end of the day.

Not much time for picking up small pieces [during the day].

[92] Mr. Bodnar admitted that the parent roll area would not be regularly swept during the day, that he and Mr. Nijjar would stop their vehicles occasionally to remove very large pieces of debris, but that paper debris would accumulate on either side of the aisles and would pile up at the base of the stacks of parent roll. Mr. Bodnar also stated that the forklifts produced considerable exhaust which had the effect, in the words of Mr. Bodnar, of the wind going by and unravelling the rolls.

[93] In these regards, Mr. Bodnar was asked the following questions and gave the following answers at his Examination for Discovery:

Q. Again, just to get a sense of how significant this problem was with the accumulation of paper debris, is it the case that at virtually every row of rolls of paper that started along the aisles you would look at the bottom of rolls and see some paper debris lying at the bottom of those rolls?

A. Oh, yes. That is where it would all blow from, from the forklifts driving by. It would all blow towards the sides. That was the paper that we didn't worry about because it doesn't get in your way at all; it was blown off to the side. If it was something, anything that was big enough to stay in the middle of the aisle, basically, you didn't want to be running over it and dragging it below your machine.

Q. But I suppose the paper debris that is getting sucked up by vacuum effect from the bottom of the lift truck, that's quite possibly paper debris that is sitting at the bottom of those rolls?

A. Possibly. I never really took notice where it was coming from. There was paper debris up against the bottom of the rolls. But there was always paper debris in the middle of the aisles that hadn't been blown to the side yet. I never took notice where it was coming from.

Q. Again, as you have told me, it simply wasn't practical to stop your lift truck, get out, push that paper out of the way?

A. No. No.

Q. There wasn't anyone around designated with the job of sweeping the aisles and keeping them clean?

A. It would have been far too dangerous to be in that area. Right.

[94] Although it may have been the intent of the management of First to have employees continually sweeping up debris during shifts, I find that this did not occur and that the debris problem did get "out of hand". As well, I find that neither Mr. Nijjar nor Mr. Bodnar stopped to pick up or sweep aside the large piece of paper that caught fire. As a result of the large piece of paper catching on fire and landing at the accumulated debris at the bottom of a parent roll, the fire spread and resulted in the destruction of the product of Scott at the Warehouse. While the floor of the Warehouse may well have been "pretty spotless at the end of the day", it was clear that, in the words of Mr. Bodnar there was "quite a bit of debris around" lying at the bottom of the parent rolls. I believe that it is more than speculation to assume that the fire would not have spread as rapidly if there had not been accumulated debris at the bottom of the stack of parent rolls.

[95] In view of what was actually happening at the Warehouse, I find that First failed to maintain the Warehouse in a condition that met or exceeded professional warehousing management practices, and certainly not in what could be described as "food grade condition and cleanliness". Rather, First operated the Warehouse and the storage of goods in such a manner as to create excessive waste paper and paper debris during shifts at the Warehouse. It allowed excess waste paper and paper debris to accumulate during a shift, it did not allow forklift drivers to sweep up debris during shifts, it failed to warn Scott that the degree of accumulation of paper debris and the operation of the Forklift created an unreasonable risk of fire, and it failed to warn Scott that the Forklift would be operated in the Warehouse with no or insufficient safeguards to minimize the build up of paper debris and the possibility it would catch on fire.

(b) Contractual obligations relating to the Storage of Product

[96] Under the Warehouse Management Agreement, First made the representation that it would manage the Warehouse "in an efficient, effective and professional manner ... all in accordance with the highest industry standards" (at para. 7), that it would not take any action which would cause or contribute to "undue or accelerated damage of such goods and products" (at para. 7(ii)), and would "properly and safely maintain, and keep in sanitary, neat and orderly condition, all goods and products (at para. 7(iv)). Under Appendix "A" of the Warehouse Management Agreement, First agreed to "strive to keep product loss [of product under the control of First] to a minimum, whether due to inventory shrinkage, damage or any other reason".

[97] First was aware of the smouldering problem, and took steps to deal with the overheating of the engine of the Original Forklift. At his June 1, 2005 Examination for Discovery, Paul Klann, the former manager for First at the Warehouse was asked the following questions and gave the following answers:

Q Were you also aware that Mr. Bodnar could smell paper smouldering inside his lift truck; within the body of his lift truck?

A Yes, I was.

Q So in addition to the overheating you were aware that one of the consequences of this accumulation of paper debris was that paper could have been heating and smouldering due to contact with hot metal surfaces within the lift truck?

A That's correct.

Q Was that a concern of yours as well?

A Yes, it was.

Q Was that a concern of Mr. Bodnar's, as far as you could appreciate?

A. Yes, it was.

Q Was that one of the factors that led you to deciding to contact Mason Life and ask them for assistance?

A Yes. ... What I recall is them sending somebody to the location and looking inside the machine and finding an area that would have created the heat. ... After what I believe was some trial and error we found it to be the pipe, the exhaust pipe of the machine itself.

Q After Mason Lift came to your warehouse and wrapped the exhaust pipes did that remedy or ameliorate the overheating problem with the lift trucks to any extent?

A I don't believe it remedied the overheating.

Q Did it remedy the smouldering problems?

A Yes.

Q Why do you say that? What recollection do you have of that being the case?

A They had tried a couple of things in the past and the moment it didn't work I called Mason Lift again to bring a mechanic in and the last wrapping the pipe after that point there were no more smouldering issues and basically we thought we had it fixed.

Q Is what you're telling me you were told by Terrence Bodnar after the exhaust pipe was wrapped the smouldering has gone away, so that's how you know it solved the smouldering problem?

A I know it solved the smouldering one. I never saw any smouldering since that point.

[98] First knew of the hazard presented by the storage of unwrapped parent rolls of tissue paper. Mr. Shaw was asked whether the unwrapped rolls created a debris or housekeeping problem for the operations of First and he answered: "Yes, they did". Mr. Shaw admitted at Trial that First was aware of the flammability of the paper debris:

Q. And you understood, Mr. Shaw, that Scott was looking to First to store its inventory safely?

A. Correct.

Q. You knew, Mr. Shaw, or at least you came to understand from your, over the course of your first months in the warehouse, you knew tissue paper is a very flammable substance?

A. Correct.

Q. You knew that it is easily ignited?

A. Correct.

Q. And you knew how important it was to avoid exposing Scott inventory in your warehouse to the risk of catching fire?

A. Correct.

[99] Mr. Bodnar and therefore First was well aware of the problem of paper coming into contact with the exhaust system of the Original Forklift. In this regard, Mr. Bodnar was asked the following questions and gave the following answers at his Examination for Discovery:

Q. Your understanding prior to July 31st, 2001 was that the temperature of the exhaust system on the lift truck was hot enough - I'm talking about the surface of the exhaust pipes ... of the exhaust manifold was hot enough to ignite tissue paper?

A. Yes.

Q. Was that something that you had observed or discussed before or was that just an assumption you made?

A. We hadn't discussed it. I observed it. Yes.

Q. Where did you observe it? In what circumstances?

A. Operating the machine. It overheated. The temperature - there wasn't air coming out at the bottom but the temperature was really high on it and I smelt something smouldering, smoke. The first time I ever smelt it that's when I stopped, turned the machine off, opened the bonnet and the paper under there - it wasn't really on fire; it was smouldering. It was turning brown kind of.

Q. Where was this paper located that was turning brown?

A. That is the part I have difficulty with, is where the exhaust - I can see part of the exhaust between the engine compartment and the radiator and there was a piece of paper like touching, but I think it was part of the exhaust.

Q. Around the muffler? That far back?

A. Yes. Yes.

Q. That is on the opposite side of the radiator in the shaker screen, is it?

A. It wasn't the muffler; it was the exhaust pipe. If I remember - like you're saying the muffler was on the opposite side of the - toward the back of the machine. I can't recall what it looks like now.

Q. But was it your experience that paper debris could get sucked up and get sucked through the shaker screen and the radiator into that back area where the tail pipe and the muffler were located?

A. It has to come up past the exhaust pipe first to get to the shaker screen and the radiator. And being such a suction I guess since it's happened earlier, no paper had ever gotten stuck by the exhaust pipe, it all went to the shaker screen. The radiator blocked the flow of the air and the machine overheated. It's only a matter of time before it starts - you know, before it got near the exhaust. Sooner or later it was bound to happen, which it did. That's when I opened the bottom and it's smouldering and there was a brown piece of paper there.

Q. And this incident happened when? How long before the July 31st fire?

A. I can't remember. Quite a few months before. I'm not sure.

Q. You have a clear recollection, though, that it really - "hey, this is a problem; a fire could start"?

A. Not really then. It was a concern. I mean - like because I had been operating the machine quite a bit, it had overheating problems, so this was just one time - it's like a little bit of paper got stuck near the exhaust. So it wasn't a big concern. I had brought it up with my supervisor and that was noted. And we just kept the machine clean, back to work. If it overheated we stopped again and did the same routine.

Q. So before the wrap was installed how many times a day on average were you stopping the forklift because of the smell of smouldering paper? Would it happen every day?

A. Smouldering of paper, no. There was a toss-up between overheating and smouldering of paper. There was always an issue every day if it wasn't overheating then there was smouldering. Sometimes it could overheat four days in a week, one day, a bit of a smouldering smell. Or it could smoulder two or three days in week and overheat the rest or both together.

[100] Mr. Bodnar and therefore First was well aware of the fire risk created by paper debris accumulating in the engine compartment of the Original Forklift as well as the smouldering of papers due to the high temperature of the exhaust system:

Q. Tell me about that, about getting the exhaust pipes on the forklift wrapped. How did that come about?

A. Well, after how many times we had these issues about smouldering paper we thought this could get out of hand if we're not careful. We had a mechanic come in one day. Not for that issue; he was there and somehow the issue came up: Well, you can wrap these pipes with this special material, asbestos. I'm not sure who looked into that; whether it was my supervisor, my manager. And a little while later a mechanic came back had wrapped the pipes for us. Didn't take him very long.

Q. You started off by saying "we thought this could get out of hand." You're referring to the smouldering of the paper?

A. Yes.

Q. When you said "we" again do you mean you individually or is this something you had been discussing with other people at First?

A. With my supervisor, Dan [Woykin] or Paul [Klann]. Yes.

[101] Mr. Shaw testified regarding the steps taken by First to address fire risks. Mr. Shaw agreed that he was "hypersensitive" to these risks. Mr. Shaw acknowledged that he regarded these smouldering incidents in the Original Forklift as a serious problem:

Q. And then, Mr. Shaw, after that propane lift truck went into operation, you began hearing of the lift truck drivers experiencing what we've been calling thermal events, including smouldering of paper debris; correct?

A. Correct.

Q. You regarded this smouldering as a serious problem?

A. Yes.

[102] Under the contract between the parties, First was obligated to perform in an "effective and professional manner ... while in accordance with the highest industry standards" and was obligated to properly and safely maintain all goods and products of Scott. First addressed the smouldering and fire risk by having the exhaust pipe of the Original Forklift wrapped. First also purchased an air compressor so that the lift truck operators could use it to "blow down" their lift trucks to rid the engine compartment of paper that had been sucked up onto the shaker screen of the radiator.

[103] I find that First was in breach of the contract between the parties when it failed to wrap the exhaust of the Forklift. By failing to do so, First did not perform its services in an "efficient, effective and professional manner", did not operate and manage the Warehouse "in accordance with the highest industry standards", failed to wrap the exhaust of the Forklift so as to not "cause or contribute to undue or accelerated damage" of the goods stored by Scott at the Warehouse and failed to keep the Forklift "in good working order at all times".

[104] The damages incurred by Scott flow from the breaches of the contract by First when it failed to maintain the Warehouse in food-grade condition and cleanliness at all times and when it failed to maintain and protect the product of Scott in accordance with the highest industry standards. The question which then arises is whether First also failed to meet the duty of care that it owed to Scott.

WHAT DUTY OF CARE WAS OWED BY FIRST?

[105] To establish a claim for negligence, Scott must satisfy the onus of showing that First owed it a duty of care, that First breached that duty of care, and that damages resulted from the breach. I find that, at common law and pursuant to the provisions of the Warehouse Receipt Act, First owed Scott a duty of care. The question which arises is whether First breached the relevant standard of care, whether any breaches caused the Fire, and whether any breaches resulted in damages being suffered by Scott.

[106] The burden is on Scott to demonstrate that the practices of First fell short of the general industry practice. The Defendants assert that the applicable standard of care should be based on the standard practice of the industry, being the warehousing and handling of paper products. Because the Defendants produced no independent or reliable evidence with respect to the appropriate standard of care and because I am not in a position to conclude that the care can be anything less than what is set out in s. 2(4) of the Warehouse Receipt Act ("...that care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances"), I am satisfied that the duty of care is as a "careful and vigilant owner". In this regard, s. 2(4)(a) provides that any warehouse receipt cannot contain a term or condition that is "contrary to any provision of this Act ...". Accordingly, any attempt in the contract between the parties to reduce the care and diligence that had to be shown by First as a "careful and vigilant owner" cannot prevail.

[107] The question which arises is whether any breach by First of the duty of care imposed upon it caused the damages suffered by Scott. The test for causation and negligence are set out in paragraphs 18 through 28 in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, where the Chief Justice on behalf of the Court stated that the "but for" test requires the Plaintiff to demonstrate, on a balance of probabilities, that the damage would not have occurred but for the negligence of the Defendant, and that there must be substantial connection between the acts of the defendants and causation of the damage.

[108] The standard imposed on a warehouser is greater than one of "reasonable" care, such as is found in other legislation including the Occupiers Liability Act, R.S.B.C. 1996, c. 337, where s. 3(1) sets out that the care is that in all the circumstances is reasonable. Accordingly, I am satisfied that, if the standard of care set out in the Warehouse Receipt Act is not found to be the care exercised by First, the lesser standard imposed under the Occupier's Liability Act is not met as well.

[109] The standard of care of a warehouseman is greater than a duty simply not to act negligently. In *Seattle First National Bank v Calder Storage & Cartage Ltd. et al* (1962), 40 WWR 28 (B.C.S.C.), Verchere J. stated that this statutory provision codifies the higher duty of care imposed upon a bailee for reward at common law (at pp. 33-34) which is summarized at paragraph 225 in 3rd Halsbury's Laws of England Vol. 2 ("Bailment"):

A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances.

[110] In *Brabant & Co. v. R.*, [1895] AC 632 (P.C.), where goods had been unloaded from a ship and stored by a government-controlled warehouseman near the water's edge without contemplating the possibility of floods, the Privy Council stated that the warehouseman's liability was not diminished by reason of the bailor's knowledge of the character of the storage arrangements:

"It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, had had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating the vexed maxim "*Volenti non fit injuria*" have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of his bailee". (p. 641)

[111] In *Beverage Sales Ltd. et al. v. Woodward's Limited* (1977), 13 Nfld. & P.E.I.R. 395 (C.A.), Gushue J.A. on behalf of the Court stated:

The bailee must exercise the same care and diligence with respect to the bailed goods as a careful and vigilant person would exercise over his own similar goods in like circumstances. Thus, he does not insure the goods against all exigencies or circumstances, but basically his responsibility extends to that which he, being careful and vigilant, could or should reasonably foresee". (at pp. 397-398)

[112] The second principle arising from the Warehouse Receipt Act is the reverse onus imposed on the warehouseman which is also a codification of the common law rule in bailment cases. In *Coast Crane Co. Ltd. v Dominion Bridge Co. Ltd. et al* (1961), 28 D.L.R. (2d) 295 (B.C.S.C.), Verchere J. adopted the reasoning of *Atkins L.J.* regarding the rationale for the rule set out in *The "Ruapehu"* (1925), 21 Ll. L. Rep. 310, as quoted by *Thorson P.* in *The Queen v Halifax Shipyards Ltd.* (1956), 4 D.L.R. (2d) 566 at p. 571:

The original principle seems to be grounded on a common sense view of the facts. The bailee knows all about it: he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take

care, result in the obligation on the bailee to show that that duty has been discharged. Applying this to a case like the present, where for the period of the working hours the ordinary conditions of a complete bailment in fact prevail, and the bailee's servants are in charge and know all about it, but during the rest of the 24 hours the bailor's servants are in charge and know all about it, it would seem to follow that the onus of proof cast upon the bailee only applies to damage originating during the period of working hours. It seems to me impossible to throw upon a bailee the onus of accounting for injury happening while he and his servants are away and the bailor is there: and at the same time unreasonable to alter the rule if the injury happens while the bailee or his servants are there and in charge, even though some of the bailor's servants may be there as a term of the bailment.

[113] In *BCFP Coast Sawmills Ltd. v. Tritow Systems Ltd.*, [1989] B.C.J. No. 1473 (C.A.), Southin J.A. stated:

In *Spurling Ltd. v. Bradshaw*, [1956] 2 All E.R. 121 at 125, Denning L.J. as he then was, in a passage with which I agree, said:

A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law), or if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause.... [emphasis added] (at para. 8)

[114] In *Calkins & Burke Ltd. v. Empire Stevedoring Co.*, [1976] 4 W.W.R. 337 (B.C.S.C.) at page 343, the Court relied on the standard of care set out in Halsbury's:

When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property. If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred. [emphasis added]

[115] Regarding the preparations that were taken regarding dealing with fires, the evidence on behalf of First was as follows: (a) employees conducted fire drills; (b) employees were shown how to use the fire hoses and fire extinguishers in the Warehouse; (c) annual inspections of the Warehouse were performed by the Delta Fire Department, a private contractor, and by the subrogated underwriter; (d) employees were instructed not to stack any goods in front of fire extinguishers, fire hoses or emergency exits; (e) there was signage throughout the Warehouse indicating where fire hoses, fire extinguishers and emergency exits were located; (f) there were fire hoses and fire extinguishers placed throughout the Warehouse; and (g) Employees and management held monthly health and safety meetings. I find that First fulfilled its obligation regarding fire fighting. At the same time, I find that reasonable steps could not have been taken by Messrs. Nijjar and Bodnar once the Fire had taken hold.

- [116] However, First owed a duty of care to Scott not to allow paper debris to build up and to maintain the Warehouse as a "careful and vigilant owner". A careful and vigilant owner would and should have foreseen that there was a risk of fire igniting due to smouldering paper debris coming into contact with various parts of a propane lift truck and if the Warehouse was not kept in a "food-grade condition" so that paper debris was allowed to accumulate at the base of the stored parent rolls during each shift. A careful and vigilant warehouseman in the position of First would have taken steps to sweep up the paper debris not only in the aisles but also at the base of the stacked parent rolls on a regular basis and not just after each shift. I find that these failures amount to a breach of the duties owed by First to Scott. I am satisfied that Scott has demonstrated on a balance of probabilities that the damage which occurred would not have occurred but for the negligence of First in this regard. First has not shown that the duty that it owed to Scott has been discharged. As the standard of care is higher than merely not acting negligently, First has not met the onus of showing that the duty imposed upon it has been discharged. Scott has met the onus of showing that First did not discharge the duty that it owed to Scott.
- [117] I also find that the failure to wrap the exhaust system of the Forklift was a breach of the duty owed by First to Scott. A careful and vigilant warehouseman in the position of First, with its knowledge of the risk that had been created when operating the Original Forklift and in the particular environment of the parent roll storage area in the Warehouse, would have appreciated the risk of operating the Forklift without a wrapped exhaust, whether or not bound by the "standards for performance of contractor - minimum competencies required" set out in Appendix A to the Warehouse Management Agreement.
- [118] Once the Forklift was used in the Warehouse, Mr. Bodnar stated that the situation was "right back to square one", and that the smouldering and overheating issues returned. Despite that, Mr. Bodnar's previous practice of only "blowing out" the radiator and shaker screen when the Forklift overheated did not change to reflect the additional risk posed by the unwrapped exhaust on the Forklift.
- [119] In this case, the elimination of much of the risk posed by the unwrapped exhaust would have been a simple matter - all that would have been required was an instruction to Mason at the time the "replacement" unit was ordered; or, failing that, a request to Mason to have a mechanic attend and wrap the exhaust pipes once the Forklift had been delivered. This step would not have been complicated. As noted during the examination in chief of Mr. Larsen of Mason, the wrapping process would have taken less than two hours. A careful and vigilant warehouseman in the position of First would have undertaken the wrapping of the exhaust pipes before the Forklift was used in the Warehouse. By failing to do so, First failed to fulfill the obligations that it owed to Scott.
- [120] The Defendants cannot satisfy the duty of care imposed on them by claiming that they were storing the inventory in the same manner as Scott. First, it is not clear that Scott was using the same model of forklift in its warehousing operations. Second, there is no evidence that Scott was ever advised that the amount of debris generated by its own operations would

have made it desirable to wrap or shield the exhaust systems of the lift trucks it was using in order to protect its product from fire at locations other than the Warehouse. Third, the experience of Scott with smouldering and fire stands in distinct contrast to the experience of First. In this regard, Mr. Bodnar stated that, before the exhaust pipes were wrapped, smouldering would occur on a weekly basis and, sometimes, up to twice a day.

- [121] The fact that Scott did not wrap the exhaust pipes on its forklifts should not be regarded as the industry standard and the standard against which the conduct of First should be measured. I cannot conclude that the conduct of First in wrapping the exhaust of the Original Forklift was an extraordinary measure given the recommendation of Mason and the experience of First with smouldering and fires. I am satisfied that First cannot ignore its own experience. I am satisfied that its conduct cannot be excused by falling back on a standard which may or may not be reflected in the practice of others, including Scott.
- [122] In any event, I cannot conclude it is the law that a bailee may simply point to the bailor's own conduct as the standard to be applied. The storage and handling practices of Scott may be reasonable and meet industry standards without necessarily achieving the same level of care as that required of a "careful and vigilant owner".
- [123] I find that First did not act throughout as a careful and vigilant owner despite the fact that it had an obligation to do so pursuant to the obligations imposed at common law and under the Warehouse Receipt Act. Scott has met the burden of proving its losses and damages were caused through the negligence of First.
- [124] In due course, I will deal with the question of whether the fault of First is excluded by the exempting provisions of the Warehouse Management Agreement, of Appendix "C" and of the warehouse receipts which are alleged by First. However, the next question which arises is whether the Toyota Defendants and/or Mason are liable to Scott as a result of what they did or did not do so that the liability of First must be shared.

IS TOYOTA LIABLE FOR THE DAMAGES CAUSED?

- [125] Because there had been a discontinuance against the Toyota Defendants, the evidence that might have been available if the Toyota Defendants had still been parties to the Action was not available. Nevertheless, I have come to the conclusion that the fire was not caused by anything that the Toyota Defendants did or did not do.
- [126] While First pleads negligent design, manufacture and assembly on the part of Toyota, there is no evidence to support this allegation. There is no evidence regarding industry standards and no evidence on the question of design. I cannot conclude that Toyota failed to meet the requisite standard of care with respect to the design and manufacture of the Forklift.
- [127] The Defendants also plead a failure to warn on the part of Toyota. This allegation cannot stand. There is no duty to warn of the obvious. The heat of the exhaust systems and the flammability of tissue paper were obvious. I find that there was no duty to warn of circumstances which are already within the knowledge of First and within the knowledge of

Mason. I also find there was no duty to warn Scott as a renter of equipment from Mason or as a party who had knowledge that First was renting Toyota equipment from Mason. I find that the knowledge of First that the exhaust system would have to be wrapped, shielded or otherwise protected to safeguard against the risk of fire and the decision to proceed to use the Forklift in spite of the known danger, breaks the chain of causation between the alleged negligent failure to warn and the loss.

- [128] The loss was not caused by any failing on the part of the Toyota Defendants. Rather the loss was caused by the decision of First to operate the Forklift with an unshielded exhaust. By using the Forklift without wrapping the exhaust, First proceeded with full knowledge of the risks, and must now bear liability alone for having done so.
- [129] I find that none of the loss of Scott can be attributable to the fault, tort, negligence, breach of contract, breach of bylaw and/or the breach of any equitable, common law or statutory duty of the Toyota Defendants. I cannot come to the conclusion that Scott would have been in a position to look to the Toyota Defendants for the damages arising as a result of the Fire.
- [130] At that same time, I dismiss the Third Party claim of First against the Toyota Defendants. I cannot conclude that First has proven on a balance of probabilities that it is in a position to look to the Toyota Third Parties for contribution or indemnity as I cannot conclude that there was any fault, tort, negligence, breach of contract, breach of bylaw and/or the breach of any equitable, common law or statutory duty by the Toyota Defendants.

IS MASON LIABLE FOR THE DAMAGES CAUSED?

- [131] First submits that the service personnel at Mason were aware of radiator tank overflow tubes coming into contact with the exhaust pipe and charring. It was their evidence that they believed the correct installation of such a tube to be on the "outboard" side of the exhaust tank, contrary to the design and instructions by Toyota to have the tube positioned inboard of the radiator tank affixed to a clip on the frame. However, I cannot find that any contact between the radiator overflow tank tubes and the exhaust pipe caused the Fire. Accordingly, I cannot find that Mason was responsible for the Fire as a result of what is alleged to be faulty installation.
- [132] I cannot find that Mason was responsible to Scott for the Fire. First, there was no contractual relationship between Mason and Scott. Second, even if a duty of care was owed by Mason to Scott, I cannot conclude that Mason breached that duty of care when it leased the Forklift to First, even with the knowledge that the Forklift would be used in the Warehouse where the parent rolls and other products of Scott were stored. I find that none of the loss of Scott can be attributed to the fault, tort, negligence, breach of contract, breach of bylaw and/or the breach of any equitable, common law or statutory duty of Mason.

- [133] Regarding the third party claim of First against Mason, First relies on the provisions of the Sale of Goods Act. However, s. 1 of the Sale of Goods Act specifies that the only type of lease that the Act deals with is one "where the lessee is acquiring the goods that are being leased primarily for personal, family or household purposes". The Sale of Goods Act does not apply to this commercial rental agreement between Mason and First. Assuming that I am incorrect in arriving at that conclusion, I now deal with the provisions of the Sale of Goods Act which are relied upon by First.
- [134] Section 18(a) of that Act provides that, where a lessee makes known to the lessor the particular purpose for which the goods are required so as to show reliance and the goods are of a description that it is in the course of the lessor's business to supply, then there is an implied condition that the goods are reasonably fit for that purpose.
- [135] First submits that Mason had knowledge of the specific application of moving parent rolls with a propane forklift and of the debris problems inherent in such activity and had specific knowledge of the problem created by the Series 6 forklift in drawing paper debris into the body of the machine, thereby causing overheating and smouldering problems. First submits that Mason was called upon to find a solution to those issues for the Original Forklift and that it was equipped with vents and its exhaust pipe was wrapped with asbestos or fibreglass tape on the recommendation of Mason. First submits that Mason was aware of all of this when it was asked to provide a replacement while the Original Forklift was with it for repair.
- [136] First submits that it was relying on Mason and Mason appreciated that First would rely on it to provide an appropriate forklift and that, in providing the Forklift, Mason breached s. 18 of the Sale of Goods Act. Despite the knowledge of Mason, Mason provided the Forklift to First without any of the modifications that had been implemented to deal with the ongoing problems experienced by First. To the extent that the Defendants now seek to allege indemnification arising from a "fitness for purpose" condition implied by common law, this is a claim which is not set out in the pleadings as amended or otherwise. In any event, I cannot conclude that there was a breach of warranty of fitness for purpose.
- [137] In order to find a breach of the warranty of fitness for purpose, the circumstances of the transaction must be such that the purchaser brings home to the vendor the fact that the purchaser is relying on the vendor's skill and judgment. In this regard, I refer to and adopt the statement of Cowan Co. Ct. J., as he then was, in *Industrial Door Co. v. Shanahan's Ltd.* (1985), 14 C.L.R. 303 (upheld by the Court of Appeal, (1987), 23 C.L.R. 134) applying the reasoning of Lord Wright in *Cammel Laird & Co., Ltd., v. Manganeze Bronze & Brass Co., Ltd.*, [1934] A.C. 402:

Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation. (at p. 423)

[138] I cannot make the finding that First placed any reliance on Mason when it leased the Forklift. There was nothing about the circumstances under which that lease was concluded to bring home to Mason the probability that First was relying on it. Mr. Woykin of First testified that he was the person who contacted Mason to arrange for the replacement lift truck. Mr. Woykin recalled no details of that conversation: he did not remember who he spoke to, what number he called and whether there were any discussions about whether the exhaust should be wrapped. Additionally, there was no reason for him to believe that the person at Mason to whom he gave the order would have been familiar with the history of other Mason trucks leased by First.

[139] I cannot find that there was reliance by First on what Mason said or did. First made a decision to use the Forklift without the wrapping of the exhaust pipes. Mr. Woykin of First advised Mr. Bodnar to proceed with the exhaust unwrapped. First is bound by that decision. First proceeded to use the Forklift even though it knew the previous procedure of blowing down the machine with compressed air was not sufficient protection for the smouldering paper problem previously diagnosed, even though it knew that the exhaust system became very hot when the Original Forklift was in use, and even though it knew that paper had caught fire when it came into contact with the exhaust of the Original Forklift.

[140] I dismiss the Third Party claim of First against Mason. I cannot conclude that First has proven on a balance of probabilities that it can look to Mason for contribution or indemnity. I can find no fault, tort, negligence, breach of contract, breach of bylaw and/or the breach of any equitable, common law or statutory duty that Mason owed to First.

WAS THERE CONTRIBUTORY NEGLIGENCE?

[141] First submits that Scott bears a significant proportion of the responsibility for the circumstances of the debris which gave rise to the fire and the impairment of the fire-fighting system within the Warehouse due to their decisions to leave the domestic parent rolls unwrapped and their decision regarding the stacking height of parent rolls and inventory. It is submitted by First that Scott had knowledge of the following: (a) that unwrapped parent rolls created debris by sloughing and unwrapping which was unavoidable and ordinary in the handling of parent rolls with clamp roll trucks; (b) debris created from the parent rolls would get into lift trucks as a result of the vacuum suction created by the operation of the lift trucks; and (c) debris in lift trucks could smoulder and potentially ignite from a number of hot structures within the vehicle.

[142] It is also submitted by First that, notwithstanding the knowledge of Scott in these regards, Scott made the following decisions: (a) It insisted that First utilize a Toyota propane forklift; (b) notwithstanding that Scott knew that its underwriters, FM Global, had set a stacking limitation of 15 feet on parent roll material, Mr. Burdon of Scott advised Mr. Handford of First to stack according to the previous stacking guideline of 22.5 feet; (c) It instructed First to stack parent roll material in Zones 3 and 4 within the Warehouse even though those zones were not sprinklered for that purpose; (d) Scott disregarded its own planning for the

Warehouse and sent parent roll inventory at a level exceeding 8 million pounds and that, if Scott was adhering to the FM Global suggested limitation of stacks of 15 feet, Zones 5 and 6 were calculated to hold a maximum of 4 to 4.5 million pounds and, even at 22.5 feet, the maximum calculated capacity for Zones 5 and 6 by Scott would have been 6 million pounds; (e) Scott made a decision to leave its "domestic" parent rolls unwrapped while wrapping parent rolls which were destined for export markets, even with knowledge that unwrapped parent rolls created a debris problem in its own facilities and that the costs of wrapping the rolls was essentially offset by product saved and other efficiencies; and (f) the decisions of Scott concerning inventory, stacking guidelines and the failure to wrap its domestic rolls created a situation which Scott knew, or should readily have known, was a dangerous situation.

- [143] I cannot make a finding that Scott "insisted" that First use a Toyota propane forklift truck. There is no evidence to that effect. As well, that would not explain the fact that First utilized both a propane forklift and an electric forklift. I also find that it has not been shown that the unwrapped parent rolls, the amount of product at the Warehouse, or the configuration of storage of product within the Warehouse are causally connected to the losses of Scott even if it could be shown that Scott was directing First in those regards.
- [144] While there is evidence that wrapping of parent rolls in a Kraft paper covering might reduce the risk of fire as the sloughing of paper would be reduced if not eliminated, there is no evidence of industry standards which apply to the circumstance of parent rolls being manufactured and then being held in inventory in a warehouse. Scott did wrap its parent rolls destined for sale and "export" to other converters. However, there is no evidence that the wrapping of parent rolls only for the period of time in which they would be stored until needed by Scott would appreciably impact the probability and probable extent of a fire loss.
- [145] There was evidence from Mr. Shaw of First that the issue of debris in the Warehouse was raised with Scott in the course of discussions regarding the possibility of having all parent rolls wrapped with a protective plastic covering as was done with the "export" parent rolls being sold to other paper converters. However, I am satisfied that these discussions were not in the context of the risk of fire. At Trial, Mr. Shaw stated: "The major concern was a productivity-related issue. If the operators were sweeping the floors because of the debris, they weren't moving rolls, and we were judged based on our productivity."
- [146] Scott made the decision that "local" parent rolls would not be wrapped. Once that decision was made, it was incumbent upon First to sweep the floors with sufficient frequency that debris would not accumulate. The contractual obligation on First was to see a cleaning of the Warehouse in accordance with the highest industry standards and in food grade condition and cleanliness "at all times". That contractual obligation was not to be in effect only at the end of each shift. While there would have been pressure on First to reduce its costs, the contractual relationship between the parties was that First was working on a cost plus basis so that any additional cost to sweep the floors would have been a cost that would have been passed on to Scott.

- [147] As well, these discussions about wrapping the parent rolls occurred in the context of Scott and First proceeding on the assumption that all risks of fire in the Warehouse had been addressed. I find that Scott was not advised either of the frequency of the smouldering problems with the Original Forklift which First began to use in August 2000 or that First had found it advisable to wrap the exhaust of the Original Forklift.
- [148] I find that the Fire was not in any way inevitable or caused as a result of an inherently dangerous characteristic of the goods. The "unwrapped" rolls had been stored safely at the warehouses of Scott and had been stored safely at First. Part of the contract of First required it to store unwrapped rolls. First was under an obligation to take whatever steps were within its power to limit the exposure of Scott products to the risk of fire.
- [149] I have reached a similar conclusion regarding the submission of the Defendants relating to the stacking height of parent rolls. Before the Warehouse was occupied, FM Global as the property insurer of Scott analyzed the sprinkler system of the Warehouse and recommended a maximum storage height of 15 feet for parent rolls. What was recommended was described as follows: "for best protection, the following storage limitation should be implemented" and that the storage height of unwrapped parent rolls on end "should be kept to a maximum height of 15 ft for Zones 5 and 6". It is further noted:

For storage scenarios different than described above some sprinkler systems will need to be reinforced/redesigned. It is therefore very important that these guidelines be followed to ensure that you are adequately protected.

- [150] These were recommendations only. These recommendations were followed for a short time but I find that instructions were later received from Scott to return to the former storage heights so that the 60-inch parent rolls would be stored four high so 20 feet in height and the 90-inch parent rolls would be stored three high so 22-1/2 feet in height.
- [151] Mr. Pamplin was called as an expert on behalf of the Defendants. Mr. Pamplin acknowledged that the storage height of paper rolls is not regulated in British Columbia (except for a 9-metre height restriction which applies to storage in general) that the applicable laws and codes in British Columbia do not require paper rolls to be wrapped. There was no evidence of the standards in the paper or warehousing industries. Mr. Pamplin referred to U.S. guidelines for paper storage formulated by the National Fire Protection Association but there is no evidence that those guidelines have been adopted in Canada or in the industry generally.
- [152] While Mr. Pamplin was of the opinion that the Warehouse's sprinkler system "was capable of controlling the fire" if parent rolls were not stored above 20 feet, that the sprinkler system was "overwhelmed" by the Fire, and that the "fast spreading of the fire" was caused by storing the parent rolls in excess of 20 feet, I have not found his opinion of assistance as I find the following incorrect facts and assumptions underlie the opinion: (a) while Mr. Pamplin assumed that the parent rolls were being stored "from 22.5 feet to 24 feet", there is no evidence to support this; (b) Mr. Pamplin acknowledged under cross-examination that,

even in situations where the sprinklers and the storage of the roll paper are all according to US guidelines, the possibility still exists that, without intervention by the fire department, a fire could get out of hand; (d) there is no evidence regarding what steps were or were not taken by fire fighters and no evidence about whether the Fire having gotten "out of hand" as a consequence of the particular storage of parent rolls, as opposed to the risks which are inherent in the storage of paper; (e) Mr. Pamplin undertook no analysis of whether the storage configuration contributed to the damages because of loss of the inventory as he conceded that, even if the Warehouse had been saved, there still would have been water damage and smoke damage; and (f) there is no evidence that the loss would have been any less than what actually occurred, even if the storage configuration had met the heights suggested by Mr. Pamplin or by FM Global.

[153] I accept the submission of Scott that First, relying on its own judgment and experience, must have been of the view that the storage configuration in the Warehouse was a reasonable and safe means of coping with the inventory sent to the Warehouse. At Trial, Mr. Shaw was asked about the instructions to increase storage heights that he received from Scott through Mr. Handford, the Production Planning and Procurement Manager of Scott:

Q. Do you recall getting that instruction, sir?

A. Yes.

Q. And did you comply with that instruction?

A. Absolutely.

Q. Did you offer up any resistance or problems with complying with that?

A. No.

Q. And, Mr. Shaw, then with all of this paper in the warehouse with the east/west aisles having been taken up with product for storage, even with all of this excess product in the building you did not believe that the condition of the inventory was unsafe in any way did you?

A. No, I did not.

Q. You had done your best to control the fire hazard and you continued to believe that the parent rolls were being stored safely?

A. Correct.

[154] The Defendants submit that a request made to Scott for additional personnel to assist in the housekeeping function at the Warehouse was denied so that First could only adopt a program of sweeping the Warehouse clean at the end of every shift and picking up any large pieces of paper during the shift. I find that neither Mr. Shaw nor anyone else from First ever told someone from Scott words to the effect: "we are going to need more resources for housekeeping", or "we are going to have a serious fire hazard on our hands". I cannot conclude that Scott turned down a request to add additional resources for housekeeping

purposes.

[155] It was submitted by First that sweeping the Warehouse once a day and picking up large pieces of paper which impeded operations was the "identical program in place at Scott". Al Smith was the Materials Handling and Fibre Supervisor at the Plant of Scott. I accept the evidence of Mr. Smith who on cross-examination was asked the following questions and gave the following answers:

Q. Sir, you talked about housekeeping at Scott's facilities, particularly the 04 Warehouse where the parent rolls were stored, and your evidence was that the warehouse would be swept at least once per day?

A. Correct.

Q. And if things got a little messy they'd - they'd apply themselves to the problem as they went through the day?

A. Correct.

[156] I find that there is no causal connection between the storage configuration in the Warehouse and the losses of Scott. I cannot find that the manner of storage of parent rolls in the Warehouse contributed to causing the fire or increasing the losses of Scott. I cannot find that anything done or not done by Scott contributed in any way to the Fire or the losses of Scott. I find no breach of contract by Scott produced the losses of Scott or the liability of First for those losses.

[157] While the Defence of First states that Scott specified and directed that First use a Toyota forklift truck and that Scott retained "all control over planning, inventory, stacking confederation, choice and specifications of equipment, and all aspects of costs related to the operation of the Warehouse", I cannot reach that conclusion based on the evidence at Trial. While Scott would naturally wish to keep expenses to a minimum, I cannot conclude that it controlled the operations of the Warehouse. In any event, it was incumbent upon First to act as a careful and vigilant owner and bring the contract with Scott to an end if what Scott was insisting upon was other than in accordance with that obligation and other than in accordance with the obligations which were set out in the contract between the parties.

[158] First has not met the burden of proving that the loss was caused without its fault: Spurling Ltd., supra, at p. 125, as cited with approval in BCFP Coast Sawmills Ltd., supra, at para. 8. The question which then arises is whether First has met the burden of proving that its fault is excluded by the various exemption clauses that First relies on.

ATTEMPTS TO LIMIT LIABILITY

[159] Being statutory, the duty of care cannot be modified by contract or as a result of the dealings between the parties. Under s. 2(4) of the Warehouse Receipt Act, a warehouser may not impair its obligation to exercise the standard of care and diligence of a careful and vigilant owner. Subject to the usual rules of contract law that any limitation on liability be clearly expressed and communicated, a warehouser may limit its liability but, in the words of McIntyre J., writing for the majority in *Evans Products Co. Ltd. v. Crest Warehousing Co. Ltd.*, [1980] 1 S.C.R. 83:

The combined effect of subs. (4) of s. 3 and s.14 is, in my opinion, merely to provide that the parties to a storage contract coming within the provisions of the Warehouse Receipts Act may not by private contract stipulate for some other and possibly lower standard of care, thereby relieving the warehouseman of his statutory duty. (at p. 93)

[160] Section 2(4) of the Warehouse Receipt Act states:

2. (4) A warehouser may insert in a receipt issued by the warehouser any other term or condition that
 - (a) is not contrary to any provision of this Act, and
 - (b) does not impair the warehouser's obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

[161] On the assumption that it is found liable for the damages suffered by Scott, First submits that a number of provisions within the contract and within the documents that First alleges are the warehouse receipts between the parties limits or eliminates any liability that they might have.

(A) Provisions within Appendix "C"

[162] First relies on a number of contractual provisions to take the position that any liability that it has to Scott is limited or eliminated. This position must be viewed in the context of the Warehouse Management Agreement. First, paragraph 1 dealing with the "Scope of Agreement" provides that: "No amendment or understanding modifying, amending or otherwise varying this Agreement shall be effective unless in writing and signed by both parties." In this case, there was nothing in writing signed by both parties which amended the provisions of the Warehouse Management Agreement. Second, paragraph 1 of the Warehouse Management Agreement provides: "A copy of the Contractor's standard warehouse receipt is attached hereto as Appendix C - the terms of the warehouse receipt shall govern except to the extent of a conflict with the body of this Agreement, in which event this Agreement shall prevail." There are a number of provisions attempting to limit liability which are set out in Appendix "C", which is referred to in paragraph 1 of the Warehouse Management Agreement as the "standard warehouse receipt". To the extent that

what is set out in Appendix "C" conflicts with what is in the Warehouse Management Agreement, the provisions of the Warehouse Management Agreement prevail. To the extent that they conflict with the obligation established under s. 2(4) of the Warehouse Receipt Act, the provisions of the Warehouse Management Agreement prevail.

[163] Paragraph 10(j) of Appendix "C" provides that the "Warehousemen shall not be liable for any loss or [sic] profit or special, indirect, or consequential changes [sic] of any kind". I assume that what was intended was the following wording: "Warehousemen shall not be liable for any loss of profit or special, indirect, or consequential damages of any kind." I cannot reach the conclusion that the parties would have agreed to the incoherency of what is set out in paragraph 10(j) as drafted. I cannot conclude that paragraph 10(j) should be rectified as I cannot conclude that there would have been an agreement between the parties that the paragraph should be rectified to reflect the mutual intent that First would not be liable for any loss of profit or special, indirect or consequential damages. I cannot conclude that liability is limited by paragraph 10(j) of Appendix "C".

[164] Even if rectified, paragraph 10(j) is contrary to the provisions of the Warehouse Management Agreement and cannot prevail. It is contrary to the representations set out in paragraph 7(A)(i) of the Warehouse Management Agreement that First would perform the management services: "... in an efficient, effective and professional manner, and properly, safely, efficiently and professionally operate and management the Warehouse ... all in accordance with the highest industry standards". I cannot conclude that it would have been the intent of a properly drafted paragraph 10(j) of Appendix "C" that the parties would have agreed that "any loss of profit or special, indirect, or consequential damages of any kind" even if caused by the negligence of First and other than in accordance with the representations that it made to Scott would be excluded by that paragraph. A rectified paragraph 10(j) would also be contrary to paragraph 12 of the Warehouse Management Agreement which deals with "INDEMNIFICATION" and provides that First:

... will indemnify and hold harmless ... Scott ... from any and all losses, damages, expenses, claims, demands, causes of actions, legal proceedings, fines, penalties, costs and fees, and any other liability or obligation whatsoever other than an a liability that arises by virtue of ... [Scott's] own misconduct, in connection with ... the ... breach of any term, condition, warranty, representation or obligation arising from or relating to ... [the Warehouse Management Agreement as well as] ... any claim arising from personal injury or death, or property damage, that relates to any act or omission, including without limitation negligence, of ... [First] and relating to any act or omission on the part of ... [First], its directors, officers, employees, servants and agents or any sub-contractor.

[165] I find that indemnification under the Warehouse Management Agreement would not have been possible if, at the same time, loss of profit or special, indirect, or consequential damages could not be recovered. Indemnification without recovery is no indemnification.

- [166] Paragraph 9 of Appendix "C" states that all goods are stored at the owner's risk of loss, damage or delay in the delivery caused by or through, inter alia: (a) fire; (b) inherent defects; (c) lack of any special care or precaution; (d) injury to articles insufficiently protected or arising from the nature of the goods; or (e) any cause beyond the control of [First] or failure to detect any of the foregoing. The Defendants submit that losses due to fire, the inherent debris problem or special care or precautions required to respond to the parent roll debris are excluded. This provision is contrary to paragraphs 7(A)(i), 17(D) and 12 of the Warehouse Management Agreement and, therefore, it cannot prevail or govern the relationship between the parties. The Warehouse Management Agreement requires First to perform in accordance with "professional warehousing management practices", and to provide services in accordance with the performance standards set out in Appendix "A" to the Warehouse Management Agreement. Paragraph 9 of Appendix "C" is also an attempt to make meaningless the Indemnification set out in paragraph 12 of the Warehouse Management Agreement. In any event, I cannot conclude that the precautions that were required in order to store the particular goods of Scott can be classified as "special care or precaution".
- [167] In paragraph 7A(i) of the Warehouse Management Agreement, First provides a representation regarding "Performance" requiring First to perform the management services required of it in an "... efficient, effective and professional manner", and to "properly, safely, efficiently and professionally operate and manage the Warehouse for the purposes herein described, all in accordance with the highest industry standards." It also requires First to: "... not take any action which will cause or contribute to undue or accelerated damage of such goods and products, nor will it fail to take any action reasonably required to preserve the condition of such goods and products" and that First would "properly and safely maintain, and keep in sanitary, neat and orderly condition, all goods as Scott may from time to time tender for storage at the Warehouse". I find that paragraph 9 of Appendix "C" is also contrary to paragraph 7A(i) of the Warehouse Management Agreement and cannot prevail.
- [168] I find that the attempts within Appendix "C" to limit liability are unsuccessful. On the assumption that what was to have been attached as Appendix "C" was not the warehouse receipt contemplated by First pursuant to s. 1 of the Warehouse Receipt Act, the question which arises is whether other documents that are alleged by First to be the warehouse receipts successfully limit or preclude liability of First for the damages of Scott.

(B) Attempts under the Other Warehouse Receipts to Limit Liability

[169] On the assumption that Appendix "C" is not a warehouse receipt, I am still satisfied that paragraph 12 of the Warehouse Management Agreement ("Indemnification") overrides any subsequent attempt under any warehouse receipt that might have been in effect between the parties. The only way that a party can be indemnified and held harmless is if all losses, damages, expenses, claims, etc. are to be paid by the negligent party. In this case, that is First.

[170] The storage of product of Scott at the Warehouse was subject to the provisions of the Warehouse Receipt Act, including the following sections:

1 In this Act:

""receipt" means a warehouse receipt;

"warehouse receipt" means an acknowledgment in writing by a warehouser of the receipt for storage of goods not owned by the warehouser;

"warehouser" means a person who, for reward, receives goods for storage.

2 (1) A receipt must contain all of the following particulars:

- (a) the location of the warehouse or other place where the goods are stored;
 - (b) the name of the person by whom or on whose behalf the goods are deposited;
 - (c) the date of issue of the receipt;
 - (d) a statement either
 - (i) that the goods received will be delivered to the person by whom or on whose behalf the goods are deposited. or to another named person, or
 - (ii) that the goods will be delivered to bearer or to the order of a named person;
 - (e) the rate of storage charges;
 - (f) a description of the goods or of the packages containing them;
 - (g) the signature of the warehouser or the authorized agent of the warehouser;
 - (h) a statement of the amount of any advance made and of any liability incurred for which the warehouser claims a lien.
- (2) If a warehouser omits from a negotiable receipt any of the particulars set out in subsection (1), the warehouse is liable for damage caused by the omission.
- (3) A receipt must not be considered not to be a warehouse receipt because of the omission of any of the particulars set out in subsection (1).
- (4) A warehouser may insert in a receipt issued by the warehouser any other term or condition that

- (a) is not contrary to any provision of this Act, and
- (b) does not impair the warehouse's obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

6 (2) In the absence of a lawful excuse, a warehouse must deliver the goods referred to in a nonnegotiable receipt to the holder of the receipt on demand made by the holder and on the holder doing all of the following:

- (a) satisfying the warehouse lien;
 - (b) surrendering the receipt;
 - (c) acknowledging in writing the delivery of the goods.
- (3) If a warehouse refuses or fails to deliver the goods in compliance with this section, the burden is on the warehouse to establish the existence of a lawful excuse for the refusal or failure.

[171] At Trial, Pierre Lebel, the Vice President of Finance for the parent of First stated that they had three types of agreements which might be attached as Appendix "C": (a) where First would charge by the pound or by the day; (b) a contract which was used for long-term agreements such as the agreement First had with Scott; and (c) a "simple" agreement dealing with a situation like where there were subtenants.

[172] While Appendix "C" is referred to as a warehouse receipt in paragraph 1 of the Warehouse Management Agreement, I cannot reach that conclusion. It does not set out any of the criteria of a receipt required under s. 2(1) of the Warehouse Receipt Act. As well, what was to be attached as Appendix "C" was not being dealt with by First as the warehouse receipt. It can only be the case that other documentation between the parties constitutes a warehouse receipt.

[173] On the Bills of Lading forwarded by Scott to First, a common stamp was affixed by First confirming the number of "pieces" received. The stamp which was affixed had the following further provision:

ALL MERCHANDISE RECEIVED SUBJECT TO THE TERMS AND CONDITIONS DETAILED ON THE ORIGINAL WAREHOUSE RECEIPT.

[174] Mr. Lebel stated that the bill of lading which was in evidence was in use only for "public warehousing". He stated that it was generated by their software program, and that it was used to "keep track of inventory - by palette, by roll, by unit" and that First would "input whatever unit it is into the system".

[175] The evidence of Mr. Lebel was that this "Delfour Receipt" was a standardized pre-printed form which was generated by the software used by First. It was the testimony of Mr. Shaw of First that, if anyone from Scott had asked to see the "original warehouse receipt" referred to

in the document stamp on the bill of lading, the Delfour Receipt is the document they would have been given. This is further evidence that Appendix "C" was not dealt with by First as the warehouse receipt. The accounting employees of Scott were given the front page of the Delfour Receipt as part of the process of reconciling the inventory that was in the Warehouse. Scott was not provided with the part of the form that included the terms printed on the reverse side, which included this attempted limitation of liability:

The liability of the warehousemen arising from the legal responsibility caused by administrative errors or omissions in documentation or otherwise and for all services it provides...shall be limited to the declared value of the goods if indicated on the front hereof or the monetary amount of the damage incurred, whichever is the lesser, but in no case shall the liability exceed \$50 on any one package with the contents or 25 times the cost of its storage whichever is lesser.

[176] It is submitted on behalf of First that, if the Delfour Receipt formed part of the agreement between the parties, then: (a) there is no exclusion of liability for consequential damages or loss of profits, as no such limitation of liability is found in terms and conditions of the document; and (b) the recovery of Scott is limited to \$50.00 per package and parent roll in inventory as of the date of the Fire.

[177] I find that the provisions in the Warehouse Management Agreement relating to Indemnification prevail over what is set out in the Delfour Receipt. First, what is set out in the Delfour Receipt conflicts with paragraph 12 of the Warehouse Management Agreement which provides for "indemnification".

[178] Second, the Delfour Receipt conflicts with paragraphs 7(A)(i) and 17(D) of the Warehouse Management Agreement which required First to "properly, safely, efficiently and professionally operate and manage the Warehouse ... all in accordance with the highest industry standards" and required First to obtain and maintain "industry standard Warehouseman's Legal Liability Insurance" so that "damaged or lost inventory and products" would be insured at "Scott'[s] selling price to the trade". It can hardly be said that the attempt to limit liability in the Delfour Receipt is consistent with those provisions of the Warehouse Management Agreement.

[179] Third, any provision "modifying, amending or otherwise varying" the Warehouse Management Agreement had to be in writing and signed by both parties and it is clear that the Delfour Receipt was not signed by both parties.

[180] Fourth, it can hardly be said that liability could be limited under the Delfour Receipt even though the evidence allows me to find that Scott was never provided with copies of the reverse side of the Delfour Receipt. At Trial in this regard, Mr. Shaw confirmed that each bill of lading received from Scott "would be treated as an individual receipt and then once they got entered into our system, the warehouse receipt would be printed off when you confirmed it". Paper copies of the documents were then kept at the Warehouse but would have been lost during the Fire. On re-examination, Mr. Scott was asked the following questions and gave the following answers:

Q Mr. Shaw, were these documents ever issued to Scott, was a completed copy sent out to Scott in the normal course?

A I'm not 100 percent certain.

Q What happened to the ones you filled in?

A They would be filed with the original bill of lading from Scott Paper.

Q And were they ever, was anything ever done with them other than stuck in a drawer or put in the office?

A Not that I'm aware of.

[181] I am satisfied that the intent of the parties to provide for full indemnification as set out in paragraph 12 of the Warehouse Management Agreement is reinforced by the requirement in paragraph 17D of the Warehouse Management Agreement which required First to obtain and maintain "industry standard Warehouseman's Legal Liability Insurance" covering all risk of loss of inventory and property belonging to Scott with the proviso that the "Damaged or lost inventory and products" insured under that policy would be valued at the "selling price to the trade" of Scott. I am satisfied that this is further evidence of the intent that there would be full indemnification for losses of Scott.

[182] Paragraph 9(d)(ii) of Appendix "C" had a provision almost identical to the provision in the Delfour Receipt:

The legal liability of the warehouseman shall be strictly limited to the lesser of the monetary amount of the damage incurred or 25 times the monthly storage rate on any one package or stored unit with the contents (or, in cases where the warehouseman's charges are calculated for other than actual storage, maximum \$50.00 per unit) unless the owner specifically requests a higher limit in writing.

[183] A provision on the reverse side of the Delfour Receipt and the provisions set out in paragraph 9(d)(ii) of Appendix "C" does not impair the obligation of a warehouseman to act in accordance with the obligations imposed by s. 2(4)(b) of the Warehouse Receipt Act: *Evans Products Co. v. Crest Warehousing Co.*, [1980] 1 S.C.R. 83.

[184] In *Evans, McIntyre J.* on behalf of the majority dealt with a contract term similar to the contract between Scott and First the term provided:

The liability of the warehouseman arising from legal responsibility shall be limited to the actual value of the loss or damage of the stored goods and in no case shall the liability exceed \$50.00 on any one package or stored unit unless the storer, at or prior to the time the goods are placed in storage had declared in writing a value in excess of \$50.00 on such package or stored unit and has paid or agreed to pay a charge additional to the base storage rate to cover the excess valuation. When the value has changed after such declaration it will be incumbent on the storer to declare the new value to obtain any revision of charges. In no event shall the valuation exceed value of

the merchandise.

(at p. 86)

[185] The appellants in *Evans* argued that the clause was void because of what is presently s. 2(4) (b) of the Warehouse Receipt Act. The British Columbia Court of Appeal held that the clause did not impair the obligation of the warehouseman to exercise the standard of care required by the statute. Regarding the obligation to take care, McIntyre J. stated:

... the parties to a storage contract coming within the provisions of the Warehouse Receipts Act may not by private contract stipulate for some other and possibly lower standard of care thereby relieving the warehouseman of his statutory duty. I agree with the approach of McFarlane J.A. in the Court of Appeal when he said:

I look at the language of the statute itself, and I point out that it does not speak of impairing the liability or responsibility to pay damages for the failure to exercise care and diligence. It speaks of impairing the obligation to exercise care and the degree of care is set out in the statute. In my opinion, what this statute says is that a provision which impairs the obligation may not be included in a receipt. Now it is said that a clause limiting liability for breach may be such that it would incline the warehouseman to act carelessly and not take the care required by the statute with respect to the goods. It is said it follows from that that the obligation is thereby impaired. I do not agree. I think the impairment spoken of here is an impairment of the degree and nature of the care and diligence referred to in the section, and I am firmly of the opinion that a clause limiting the liability of a warehouseman to fifty dollars per package in the case of this plywood is not one which impairs that obligation.

(at pp. 93-94)

[186] If I am found to be incorrect in arriving at the conclusion that the Delfour Receipt did not limit the liability of First and that First was required to indemnify Scott for its losses, then I find that the liability of First can only be limited to the lesser of the monetary amount of damage incurred or twenty-five times the monthly storage rate on any one package or stored "unit".

[187] The question to be determined is what makes up a "package or stored unit". With respect to parent rolls, both First and Scott agree that the "package" is an individual parent roll. With respect to finished goods, there is no agreement. Scott submits that a unit is a case of finished goods. First submits that a unit is a "lift" or pallet: the assembly of stacked cases of finished goods shipped to the Warehouse. I find that a unit is a case of finished goods, not a lift or pallet of finished goods.

[188] From the beginning of their relationship at the Warehouse, Scott and First discussed the operations to be conducted by First in terms of the number of cases that First would handle. Subsequent correspondence continuously discussed the number of cases. There is no evidence of any written or oral discussion in which lifts or pallets were utilized as a unit of measure. Scott and First agreed to measure the productivity of the work within the

Warehouse through "Key Performance Indicators". Many of these Indicators were based on "per case" units of measurement. Again, there were no "Indicators" which measure activities or productivity in terms of "lifts" being handled.

- [189] The evidence of witnesses on behalf of First was consistent with an interpretation that the parties dealt with cases and not lifts or pallets. Mr. Klann freely acknowledged that, while finished goods products would be shipped from the Scott plant to the Warehouse in lifts, products were counted, tracked and inventoried in cases. The evidence of Mr. Lavik of First was to the same effect.
- [190] The unit of measure utilized by the parties in their daily operations was cases. The Bills of Lading prepared for shipments of product from Scott to the Warehouse signified the number of cases. As acknowledged by Mr. Woykin of First, once the shipments of cases had been received from Scott, First would fax back a stamped acknowledgment of the number of "pieces". The number of "pieces" corresponded to the number of cases set out in the Bills of Lading. When cases were shipped out of the Warehouse by First, the Bill of Lading prepared by First would again note the number of cases.
- [191] The customers of Scott ordered products by the case. The minimum order was 75 cases. There was no rule as to how any particular order of cases had to be made up. Filling these orders was one of the responsibilities of First. If a customer ordered a number of cases that did not correspond with a number of cases of that product on a lift, Warehouse employees would "break" apart a lift to make up the order. All remaining cases not used in the order would remain in the Warehouse in the form of a "broken lift".
- [192] If I am found to be incorrect that full indemnity is available from First, then I conclude that the liability of First is limited to the lesser of the monetary amount of the damage incurred or of twenty-five times the monthly storage rate on any one package or stored unit with the contents (or, in cases where the warehouseman's charges are calculated for other than actual storage, maximum \$50.00 per unit) with one unit being one parent roll or one case of product.

(C) Limitations by way of Insurance Provisions

- [193] Paragraph 17 of the Warehouse Management Agreement deals with "Insurance" and provides as follows:

A. Liability Insurance

The Contractor will maintain, throughout the Term of this Agreement, and any Extension Term, comprehensive general liability insurance and industry standard warehouseman's legal liability insurance. Scott will maintain general liability insurance, tenant's legal liability insurance, and insurance of its inventory and property within the warehouse.

All insurance shall name Scott or the Contractor as applicable as an additional insured against all liability for bodily and/or personal injury and property damage, arising from the insured's fault or negligence, or the fault or negligence of any of its or their shareholders, directors, officers, employees, servants and agents, its and their affiliated, related, parent and subsidiary companies, and its and their appointees, successors and assigns, in connection with the Management Services hereunder.

If the comprehensive general liability policy contains a general aggregate, that aggregate limit shall apply separately, per location, so that the Warehouse will have its own aggregate limit. All insurance policies contemplated hereunder shall constitute and respond as primary coverage to any insurance otherwise available Scott and any of its shareholders, directors, officers, employees, servants and agents, its affiliated, related, parent and subsidiary companies, or its and their appointees, successors and assigns.

All insurance must be with a licensed insurance company. The Contractor and Scott will provide one another with a copy of the insurance policy or policies and certificates of insurance, upon requests, which must evidence that the Contractor has procured the insurance required hereunder at the minimum limits specified in this Agreement.

B Insurance on Building Contents

Scott shall, at its own cost and expense, insure and keep insured any of its own property in, on or about the Warehouse, in which Scott itself has an insurable interest, including, without limitation, Scott'[s] inventory, furniture, fixtures; and equipment.

D. Warehouseman's Legal Liability Insurance

The Contractor shall obtain and maintain industry standard Warehouseman's Legal Liability Insurance that covers against risk of loss of inventory and property belonging to Scott or its divisions, subsidiaries, affiliated or related corporations, and arising from or relating to the Contractor's gross negligence, which insurance shall be in the amount of (Cdn.) five million dollars. Damaged or lost inventory and products insured hereunder will be valued at Scott'[s] selling price to the trade.

The Contractor will add both the Landlord and Scott as additional insureds. The Contractor will obtain and pay the premiums for such insurance coverage as an Allowable Operating Expense (payable by Scott as part of the "Cost - Plus" aspect of their contractual relationship).

[194] In the Further Amended Statement of Defence, First states that, by the terms of the Warehouse Management Agreement, Scott is barred and otherwise estopped from claiming against First to the extent of the indemnity which would have been provided by the insurance that Scott was to obtain ("of its inventory and property within the Warehouse") and that it was an "express or implied term of the Warehouse Management Agreement" that the parties would restrict recovery between them for any loss or damage to the amount of available insurance so that Scott is therefore barred and is otherwise estopped from

claiming against First in total or, in the alternative, to the extent of the indemnity that would have been provided by the insurance that Scott was obliged to obtain and maintain.

- [195] Regarding this latter proposition, I can find no specific provisions within the Warehouse Management Agreement that would support those positions. First presented no evidence in this regard and, in any event, there was nothing in writing signed by both of the parties which would override the clear provision for Indemnification provided by paragraph 12 of the Warehouse Management Agreement.
- [196] Instead, the question raised by First is said to arise as a result of the provisions in the Warehouse Management Agreement which impose upon First and Scott obligations to arrange for insurance.
- [197] First submits that the paragraph 17 insurance provisions of the Warehouse Management Agreement provide a complete bar to the claims advanced by Scott against First. First relies on the following Supreme Court of Canada decisions in this regard: *Agnew-Surpass Shoe Stores Limited v. Cummer-Yonge Investments Ltd.*, [1976] 2 S.C.R. 221; *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, [1976] 2 S.C.R. 35 [Pyrotech]; and *T. Eaton Company v. Smith*, [1978] 2 S.C.R. 749. This "trilogy" of cases dealt with the impact of insurance covenants in lease agreements.
- [198] *Agnew-Surpass* was decided on the basis that the provisions of the particular lease taken as a whole led to the conclusion that the landlord's covenant to keep the premises insured ran to the benefit of the tenant so that any subrogated claim of the landlord's insurer against the tenant failed, notwithstanding that the tenant's negligence was the cause of the loss.
- [199] In *Pyrotech*, the tenant had paid the premiums for the fire insurance coverage of the landlord and Laskin C.J. writing for the majority stated that the insurer of the landlord was barred from proceeding against the tenant:

Counsel for the appellant did not urge (indeed, he stated that it was not necessary to his position), that the landlord was in breach of a covenant to insure and that the covenant should have embraced risk of loss by fire resulting from the tenant's negligence. Rather, it was his contention that under the provision of the lease respecting payment of insurance rates by the tenant, the risk of loss by fire passed to the landlord, at least upon the presentation by the landlord of the insurance bill, and that the matter thereafter was between the landlord and its insurer. I agree with this contention ... (p. 39).

Counsel for the respondent contended that there was no exculpatory provision in the lease to relieve the tenant of liability for negligence nor could any such term be implied. Such a view is too sweeping in ignoring the effect of the provision as to payment of insurance rates. The tenant may well be liable to answer for negligence in other respects but, in my opinion, it is entitled to rest in respect of loss by fire on the discharge of its obligation to pay for fire insurance (p. 40).

[200] The decision in *T. Eaton Company*, supra, also concerned the covenant of the landlord to insure with the insurance premiums being paid by the tenant. For the majority, Laskin C.J. stated:

... The simple question before this Court is whether [the subrogating insurers] are precluded by the terms of the two Leases from succeeding in their claim, having regard to the fact that the landlords had each covenanted in the Leases to insure the premises against fire (at p. 752)

.... If [the tenant] can escape this liability in the present case, it can only be on the basis that the landlord's covenant to insure is a covenant that runs to the benefit of the tenant, lifting from it the risk of liability for fire arising from its negligence and bringing that risk under insurance coverage.

Had the landlord insured without giving a covenant to that effect in the Lease, the tenant's risk of liability for fire resulting from negligence would be unquestionable; and if the landlord collected from his insurer, the latter would have an equally unquestionable right of recovery from the tenant in a subrogated action. (at p. 754)

[201] These cases are generally recognized as standing for the proposition that, in the context of a commercial lease, a covenant to insure by a landlord should flow to the benefit of a tenant unless that result would be inconsistent with something in the lease itself: *North Newton Warehouses Ltd. v. The Alliance Woodcraft Manufacturing Inc.* (2005), 44 B.C.L.R. (4th) 227 (C.A.) at para. 33. This principle has also been extended to construction contracts: *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 (C.A.).

[202] Scott takes the position that First did not pay the property insurance costs of Scott so that the decision in *Pyrotech* has no bearing on the questions which are before the Court. Scott submits that these cases are of no assistance to the Defendants because: (a) there is no language in the Warehouse Management Agreement which suggests an intent that the property insurance policy of Scott should benefit First; (b) there is a valid commercial reason for the parties to a warehousing agreement to stipulate that it is incumbent upon the bailor to insure its property against loss; (c) there is a critical distinction between leases and construction contracts on the one hand and contracts of bailment on the other hand regarding the insurable interest of the parties in the bailed property; and (d) barring a claim against a bailee in respect of losses arising from a breach of its duty of care because of an insurance provision would effectively extinguish the rights of a bailor in entirety and such an interpretation of an insurance clause would contravene the common law obligations of a warehouseman and would make meaningless the requirement that First act as a careful and vigilant owner.

[203] Clauses in contractual relationship between bailors and bailees which stipulate that the bailee is not an insurer of the goods of the bailor and that the obligation to obtain insurance rests with the bailor are commonly found. I am satisfied that such clauses are simply a means of stipulating that the warehouseman does not accept the risk of loss to goods which may arise other than as a result of its own fault. In *Rose v. Borisko Brothers Ltd.*

(1981), 33 O.R. (2d) 685, aff'd (1983) 41 O.R. (2d) 606, the warehouse receipts provided that the goods were stored at the bailor's risk in case of fire and that the storage rates did not include insurance. On a review of authorities, including Pyrotech and T. Eaton Co., O'Brien J. concluded:

I am satisfied, on the basis of the cases to which I have been referred, that before an insurance policy will bar subrogation there must exist some special relationship between the insurer and the person against whom subrogation is sought. In general terms, the cases stand for the proposition that an insurer cannot assert against a third party any rights which the insured has by contract put beyond his own reach. In this case, I find neither any special relationship that should preclude subrogation nor any contractual terms that would prevent subrogation in this case.

(at p. 691)

[204] This conclusion was affirmed by the Court of Appeal:

Further, we agree with the trial judge that there was in this neither any special relationship between the parties nor any contractual term that would prevent or restrict the insurer's right of subrogation.

(at p. 606)

[205] I am satisfied that the landlord-tenant and construction project cases that have found a bar to subrogation can be distinguished from cases involving bailor and bailee. A warehouser does not have a generalized property interest in the goods which it stores. On the other hand, tenants have an insurable interest in the continuing existence and availability for use of demised premises. Similarly, the insurable interest of all trades and subtrades in a construction project is obvious and was recognized in *Commonwealth Construction Co. v. Imperial Oil Ltd.*, [1976] 1 S.C.R. 317.

[206] The right to claim under an insurance policy can only exist where the claimant has an insurable interest. First does not have an insurable interest in the goods of Scott. Instead, First had a lien on the goods and that is the extent of its interest. First expressly disclaimed all right, interest and title in the goods stored by Scott, but excepted from this disclaimer its rights under the statutory lien which was available to it.

[207] If adopted, I am satisfied that the submission of First would result in an impairment of the duty of care owed by First to Scott. There appears to be no Canadian decisions dealing with the question of the submission that First makes. In this regard, Scott relies on two United States decisions dealing with the interplay between the statutory duty of care and insurance provisions. The decisions confirm that no subrogation bar arises where the loss has occurred due to the fault of the warehouser. I adopt the following decisions and the conclusions that are reached in them.

- [208] In *Brown v Sloan's Moving & Storage Company*, 296 SW2d 20 (S.C.Mo., 1956), the warehouse receipt provided that the bailor "... assumes responsibility ... for ... fire The depositor must carry own insurance against fire and other losses or damage to property stored." The Court held: "It would seem that the provision in the storage order and warehouse receipt, insofar as the provision is construed as relieving the warehouseman-defendant from the exercise of the prescribed degree of care is invalid. The warehouseman may not avoid liability for his negligence." (at p. 25).
- [209] In *Kimberly-Clark Corporation v Lake Erie Warehouse, Division of Lake Erie Rolling Mill Inc.*, 375 NYS (2d) 918, 49 A2d 492, the warehouse's "Rate Schedule Agreement" provided that the warehouse would be exempt from liability when the bailor had secured insurance, and where the bailor had obtained a policy of all risks insurance. The New York State Supreme Court Appellate Division, overturning the trial judge, and held that the contract's exculpatory provisions were ineffective under the Uniform Commercial Code.
- [210] In addition to having the potential effect of impairing the duty of care owed by First to Scott, I am also satisfied that acceding to the submission made by First would make meaningless the indemnification contained in the Warehouse Management Agreement. Any such acceptance of the position advanced by First would have to be in very specific language. That specific language cannot be found in the Warehouse Management Agreement. Accordingly, I am satisfied that there is no bar to subrogation.

CONCLUSION

- [211] The claim of Scott is allowed.
- [212] Unless the parties wish to speak to the question of costs, the Plaintiff will be entitled to its costs on a Party and Party (Scale B) basis against the Defendant First Choice Logistics Inc.

The Honourable Mr. Justice Burnyeat

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