

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

**Hallett, Matthews and Freeman, JJ.A.**

Cite as: Hartford Insurance Group v. Guardian Insurance Company, 1992 NSCA 35

**BETWEEN:**

THE HARTFORD INSURANCE	)	Ross H. Haynes
GROUP, a body corporate, HARTFORD	)	for the Appellants
FIRE INSURANCE COMPANY, a body	)	
corporate, FRASER-BRACE, DIVISION	)	Carman G. McCormick, Q.C. and
OF PIGOTT CONSTRUCTION LIMITED,	)	David Farrar
a body corporate, DELTA ELECTRIC CO.	)	for the Respondent
LTD., a body corporate, HER MAJESTY	)	
THE QUEEN, IN RIGHT OF THE	)	
PROVINCE OF NOVA SCOTIA	)	
	)	
Appellants	)	
	)	
- and -	)	
	)	
GUARDIAN INSURANCE COMPANY	)	Appeal Heard:
OF CANADA	)	December 4, 1992
	)	
Respondent	)	Judgment Delivered:
	)	December 4, 1992
	)	
	)	
	)	
	)	
	)	

**THE COURT:** Appeal dismissed with costs to the respondent to be taxed per reasons for judgment of Hallett, J.A.; Matthews and Freeman, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

HALLETT, J.A.

This is an appeal from a decision of Richard, J. declaring that the respondent Guardian was not liable to contribute to payment of a fire loss that was insured against by the appellant Hartford.

The Province of Nova Scotia had entered into a contract with Fraser-Brace for the construction of a hospital. The contract allocated the risk for fire loss to Fraser-Brace and required Fraser-Brace to obtain fire insurance to protect the parties against fire loss. Hartford issued a builder's risk policy to Fraser-Brace; such a policy includes coverage for loss caused by fire. The cover was just over \$27,000,000.00.

Fraser-Brace contracted the electrical work to Delta; there was no requirement that Delta obtain fire insurance but due to a misunderstanding by Delta it obtained a builder's risk policy from Guardian. The coverage was just under \$4,000,000.00. The named insured was Delta with loss, if any, payable to the Province. There was a fire. Hartford sought contribution from Delta's insurer, Guardian.

Without acknowledging liability Guardian paid some \$400,000.00 to Hartford to facilitate progress payments to Delta by Fraser-Brace. Guardian sued to recover its money with interest from Hartford on the basis that it was not liable to contribute.

The learned trial judge found the Guardian policy had been issued under the mistaken belief by Delta that it was required to carry builder's risk insurance. The learned trial judge found that the building was never at the insured's risk; that the policy was void and that Guardian was not liable to contribute to the fire loss. He ordered Hartford to repay Guardian the advances with compound interest. Several issues have been raised on appeal.

The appeal on the main issue ought to be dismissed. There is no evidence nor even a suggestion that Delta caused the fire. Guardian had no obligation to Delta to pay the fire loss as

Delta, under its subcontract with Fraser-Brace, was never at risk for fire loss to the Province's property. The obligation to insure the risk had been allocated to Fraser-Brace by the contract with the Province. As Delta did not cause the fire loss it had no liability to the Province or Fraser-Brace for causing the fire loss. Delta was not at risk for the fire loss of the Province's property as there was no allocation of the fire risk to Delta by the contract documents. In summary, there was no tortious or contractual liability of Delta for which Guardian was required to respond as Delta's insurer. The Guardian policy provided that the insurance attached when the property became at the risk of the insured. In this case it never did. On these facts Guardian had no obligation to respond to under the terms of the policy issued to Delta.

Furthermore, there was no contractual relationship between Guardian and the Province, nor between Guardian and Hartford which could give rise to any obligation on Guardian's part to contribute towards the fire loss suffered by the Province and insured by Hartford.

We reject Hartford's argument that there should not be an award of pre-judgment interest; Hartford had the use of Guardian's money pursuant to an agreement that implied the money would be repaid if Hartford was wrong in its assertion that Guardian was required to contribute to the fire loss. In our opinion the money owing was in the nature of a debt; therefore, the trial judge had jurisdiction to award pre-judgment interest. Hartford is required to reimburse Guardian for the amount paid by Guardian to Hartford with pre-judgment interest as fixed by the trial judge but not compounded as there was no evidence to support a finding that compound interest should be paid. Evidence on this issue is required. (**606327 Ontario Limited and The Polar-Freez Limited Partnership v. ACA Cooperative Association Limited et al.; Associated Freezers of Canada Inc. v. ACA Cooperative Associate Limited et al.** (N.S.S.C.) A.D., unreported June 5, 1992).

We will not interfere with the exercise of the trial judge's discretion on the award of costs at trial. The appellant has been unsuccessful other than with respect to the minor issue of compound

