N O V A S C O T I A
COUNTY OF HALIFAX C.H. 11701

I N T H E C O U N T R Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

D. ROBARTS PAINTERS AND DECORATOR LIMITED, a body corporate,

Plaintiff

- and -

COBURG GARDENS LIMITED, a body corporate, STEVENS & FISKE CONSTRUCTION LIMITED, a body corporate,

Defendants

James K. Allen, Esq., for the plaintiff.
D. A. Caldwell, Esq., for the defendant, Coburg Gardens Limited.
John D. MacIsaac, Esq., for the defendant, Stevens & Fiske Construction Limited.

1976, February 20, Anderson, J.C.C.:- In 1974 Stevens & Fiske Construction Limited were the general contractors for a building at the corner of Oxford Street and Coburg Road, in the City of Halifax. This building is a complex of offices and highrise apartments. Following some preliminary negotiations, (Cost Estimate as in Ex. P3, Discovery 3) D. Robarts Painters and Decorators Limited entered into an agreement with Stevens & Fiske Construction Limited by purchase order: (Ex. P3, Discovery 2)

> Painting for Coburg Gardens as & quote Feb. 20/74
> per plans - colors as selected by owner - 2 coat system
> and all to architects approval
> Touch up of damaged areas will be done where reasonable at no extra cost.

The total at that time was set forth as $39,623.00.

The work progressed through the following months and certain additional work was done by virtue of purchase orders and other work was done without the benefit of purchase orders.

On July 12, a meeting called by the general contractor because of the financial situation, the trades were told to desist operations and to leave the premises. Prior to that, on June 26, a letter was sent by Stevens & Fiske Construction Limited, Discovery 1, Ex.P3, setting forth a list of deficiencies which were completed as per evidence of Mr. LeMuir. Mr. MacLean, who is employed by Stevens & Fiske as project manager, supervised the project and spent a great deal of time on the site and indicated he had no complaints with the quality or workmanship of the plaintiff. Mr. Robarts testified, and his testimony was uncontradicted, that his undertaking to Stevens & Fiske was to paint drywall and wood. In the initial specifications, Ex. P2, called Room Finish Schedule, certain areas were to have a baseboard of rubber whereas, in fact, prior to the completion of the project this rubber baseboard was changed to wood baseboard and which necessitated Mr. Robarts painting it. A contraversy or argument arose with regard to the painting of the elevator doors, the project manager insisting this was part of the corridor wall and should be painted, and Mr. Robarts indicated it was a special item and he would require an additional payment. Consequently, someone else was engaged to do the painting.

Ex. D1 was submitted to the court, dated January 27, 1976: Costs to Stevens & Fiske Construction Limited on painting at Coburg Gardens which was not done by Robart's Plumbing & Decorating and which was a part of their contract. Those items we are claiming against this painting contractor are as follows:

1.	Storage room, main floor tower (former lounge) - not painted -	$ 96.00
2.	Elevator doors - 4 gallons paint $45.15 Labour 40 Hrs. x $10.00 = $400.	445.15
3.	Removing painters tape and protective paper from sprinkler pipes, lights, etc. in main stairway in tower - Labour 16 Hrs. x $10.00	160.00

4.	Part of the baseboards for penthouse which were not installed - 4 Hrs. x $10.00	40.00
5.	Cleanup and remove spray paint from all windows. This was not done by Robarts Painters and had to be part of the cleaning by O'Connor - Estimated at $5.00 an apartment x 120 apartments See notice sent to Robarts on April 25/75. Total claimed -	600.00
6.	Bank area to be painted - allow 1600 square feet paint area x .40 =	640.00
		$1,981.15

Some of this work, Mr. Robarts indicated, would have been done had he been allowed to finish the contract, and that the prices of some of the items are much higher then it would have cost him to do, which is understandable.

The plaintiff's initial claim was $48,863.48, of which a portion was paid and there remained an amount owing of $16,260.01 outstanding. On the 18th of November, 1975, the defendant herein paid into court an amount of $16,260.01 on the debt and $1,000.00 security for costs and the claim for lien, dated August, 1975, Book 2928, at page 496, against the land as described in said claim for lien was vacated, pursuant to section 28 of the Mechanics Lien Act.

On the 29th day of January, 1976 an Order was granted by this court authorizing the sum of $11,870.88 be paid out of court to the plaintiff, and that the remaining funds be held by the clerk pending further order of this court. A pre-trial conference was held, and it was agreed that the matter of existence of the lien was no longer in question as it had been vacated by Order that the amended statement of claim be the statement of claim in the proceedings and that the issues to be resolved were the matter of deficiencies, the matter of interest and the matter of costs. I have heard the evidence and the able submissions of counsel in this matter.

The first issue to be considered is that of the balance, if any, owed by the defendant to the plaintiff, and how this is affected by the list of deficiencies as set forth in Ex.D1. It is not disputed that there was, in fact, a contract between the parties and all went well except for the disagreement regarding the elevator doors until the financial crisis, resulting in the plaintiff being asked to terminate his work (together with the other trades) and was not requested to return and complete.

The plaintiff should not suffer as a result of the decision of the defendant, he was ready and willing to complete his contract and the balance of his claim in the amount of $1,870.00 is allowed, with no deduction for the list of deficiencies dated January 27, 1976.

The second issue to be considered is that of interest.

Macklem and Bristow (third edition), on page 384, refers to a decision of Anglin, C.J.C. in *R. v. MacKay*, [1928] Ex.C.R. 149; reversed as to interest [1930] S.C.R. 130, that "where interest is allowed it is on the grounds of contract, express or implied, or by virtue of a statute....Interest is really asked for here as damages for detention of the compensation money pending the ascertainment of what is due. As such it cannot be recovered."

Mr. Justice Dubinsky comes to a similar conclusion in *Hawker Industries Ltd. v. H.B. Nickerson & Sons Ltd.* (1970), 2 N.S.R. (2d) 608 where he states, having extensively reviewed the authorities, at page 612: "...I do not think that the judge, exercising his discretion judicially, can order the payment of interest merely because the amount has been wrongly withheld—even for a long period of time—and even though the amount is verified and certain, and a demand therefor has been coupled with notice that interest will be claimed."... In the instant case there is no evidence that there was an agreement, expressed

or implied, as to interest and no demand made in the original statement of claim. It was raised for the first time at the pre-trial, when a further amendment seeking interest was sought and refused.

The plaintiff stated that because his company being little in the nature of capital assets, it was necessary to borrow money from the Bank of Montreal in October of 1975, to remain solvent. He requested the defendant company to forward a letter to the bank indicating its indebtedness to the plaintiff. This was done on October 17, 1975 (Discovery 9 of Ex. P3) showing an amount from the defendant's records of $11,240.03 owing the plaintiff by the defendant for the Coburg Gardens job.

I have considered the *Colchester Developments Ltd. v. Leslie R. Fairn & Associates* (1974), 11 N.S.R. (2d) 399 and find that it is not applicable to this case and that interest is not recoverable.

Although it is true that counsel for the defendant did, by his initiative, bring this matter to a speedy conclusion the plaintiff will have his costs to be taxed.

Judge of the County Court of
District Number One