Date: 19971117 Docket: CA134758

NOVA SCOTIA COURT OF APPEAL

Chipman, Pugsley and Flinn, JJ.A.
Cite as: The Co-Operators General Insurance Co. v. Canada Trustco Mortgage Co., 1997 NSCA 178

BETWEEN:

THE CO-OPERATORS GENERAL INSURANCE COMPANY, a body corporate Appellant	)	Clarence A. Beckett, Q.C. for the Appellant
- and -	)	
CANADA TRUSTCO MORTGAGE COMPANY, a body corporate Respondent	)	W. Dale Dunlop, Esq. for the Respondent
	)	Appeal Heard: October 7, 1997
	)	Judgment Delivered: November 17,1997

THE COURT: The appeal is dismissed, the cross-appeal allowed, per reasons for judgment of Pugsley, J.A.; Chipman and Flinn, JJ.A. concurring.

Pugsley, J.A.:

This appeal involves a dispute between two insurers, each of whom issued policies, or endorsements, to the respondent covering the same property interest against loss or damage by fire.

The principal issues are whether the trial judge erred when he concluded that:

- The appellant failed to establish the respondent's employees had committed fraud or made a wilfully false statement in a statutory declaration contained in a Proof of Loss;
- Both policies constituted valid and collectible insurance on the property at the time of the loss requiring each of the two insurers to contribute to the loss.

Background:

In March, 1992, the appellant, Co-operators General Insurance Company, (Co-op) issued a standard Home-Guard residential insurance policy to Diane Jamieson, in force for a period of 12 months, covering the property to a limit of $200,000 for direct loss or damage caused by fire (the Fire Policy).

The respondent, Canada Trustco Mortgage Company (CT) held a first mortgage of approximately $100,000 on the Jamieson property. Its interests were protected pursuant to a standard mortgage clause issued by Co-op as an endorsement to the Fire Policy.

On September 15, 1992, Co-op hand delivered a notice to Ms. Jamieson, as well as to CT, cancelling the Fire Policy effective September 20 at 12:01 a.m.

On September 18, CT requested insurance on the property pursuant to a policy already existing, through the agency of Marsh & McLennan, insurance brokers. The property was covered against all risks of physical loss or damage from any cause, with certain exceptions, up to a limit of $150,000 (the Subscription Policy). The start date of the Subscription Policy was expressed to be September 18, 1992.

The Jamieson residence was destroyed by fire at about 2:30 a.m. on September 19. The Fire Marshall determined the fire was "incendiary in nature".

CT filed a Proof of Loss with Co-op in January, 1993, but failed to disclose, as it was required, the existence of the Subscription Policy.

CT commenced action against Co-op in early April, 1993. Later that month, CT's solicitor, after reviewing his client's file for the first time, notified Co-op of the existence of the Subscription Policy. Co-op then amended its defence to plead that CT had contravened the provisions of Statutory Condition 7 of the Fire Policy.

In March, 1994, the Subscription Insurers paid to CT the loss it suffered arising out of the fire, less a $5,000 deductible. Exercising rights of subrogation, the Subscription Insurers continued the action against Co-op, and joining with CT for its deductible, proceeded to trial in February, 1996.

Justice Haliburton of the Supreme Court, in a judgment filed September 12, 1996, determined that Co-op had not satisfied the burden of establishing that CT had contravened Statutory Condition 7, that Co-op should pay to the Subscription Insurers 50% of the amount paid by them to CT, as he found both policies in force at the time of the loss, as well as pay to CT the $5,000 deductible.

Co-op appeals from this judgment.

CT has filed a cross-appeal.

Co-op's Grounds of Appeal

Counsel for Co-op submits that the trial judge erred in the following respects:

1. In finding that CT had not contravened Statutory Condition 7 of the Fire Policy;

2. In failing to distinguish between the issue of subrogation and contribution, and, in particular, in finding that Co-op's submissions "would impose an extremely legalistic conclusion entirely at odds with a just resolution", and in concluding that the rights of the parties "were frozen in time by the commencement of the action by CT";

3. In interpreting s.169 of the **Insurance Act of Nova Scotia**, R.S.N.S. (1989) c.231 (the **Insurance Act**);

4. In awarding pre-judgment interest to CT;

5. In awarding costs to CT.

Cross-appeal advanced by CT

CT submits the trial judge erred:

1. In finding that s. 169 of the **Insurance Act** was applicable to the Subscription Policy;

2. In finding that as a result of policy wording, or the **Insurance Act,** Co-op was not obliged to respond to the loss in its entirety.

Representations and Actions of Ms. Jamieson

The parties have agreed that the circumstances surrounding the fire, and Ms. Jamieson's representations to Co-op prior to the loss, were not relevant issues before Justice Haliburton.

The agreement resulted from the interpretation placed on Section 1 of the Standard Mortgage Clause by the Supreme Court of Canada in the case of **National Bank of Greece (Canada) v. Katsikonouris**, [1990] 2 S.C.R. 1029, sub. nom. **Panzera et. al. v. Simcoe & Erie Insurance Co. et. al.**

Section 1 of the Standard Mortgage Clause entitled "Breach of Conditions by Mortgagor or Occupant", provides in part as follows:

> THIS INSURANCE AND EVERY DOCUMENTED RENEWAL THERE OF - AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN - is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the Mortgagor, owner or occupant of the Property insured ....

Justice LaForest, on behalf of the majority, noted, at p. 200, that the effect of the Standard Mortgage Clause was to create an independent contract between the Insurer and the Mortgagee, a determination that is of relevance to some of the issues in this case.

FIRST GROUND OF APPEAL - THE TRIAL JUDGE ERRED IN FINDING THAT CT HAD NOT CONTRAVENED STATUTORY CONDITION 7.

The Proof of Loss form submitted by CT to Co-op was in the standard form. It required CT to respond to a number of questions, including the following:

> OTHER INSURANCE: There is no other contract of insurance written or oral, valid or invalid, except (companies and amounts) -

CT's employees inserted "none".

Statutory Condition 7 reads:

> FRAUD: Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration.

The trial judge determined that after the fire there were communications among David Fiander, manager of the Dartmouth branch of CT, and two other employees (Angela Paddock, and Nancy During) concerning the necessity of advising Co-op of the existence of the Subscription Policy.

Justice Haliburton concluded on this point that the three:

> ...knew that there were two policies of insurance in force on the Property, but it has not been established that they knew or understood

> that the existence of two policies diminished the obligation of Co-op, or resulted in any obligation by the Subscription Insurers to pay, except or unless for some reason, the Co-op policy was voided.

The Proof of Loss was signed on behalf of CT by Alan Turner, Manager of Mortgage Administration.

The trial judge accepted Mr. Turner's evidence that this was his first experience with a fire loss, that he had never completed a Proof of Loss, and that he did not believe there was any other insurance.

Co-op does not take issue with these findings, but points out that Mr. Fiander, who was responsible for supervising the Mortgage and was involved in "almost every aspect of the claim" was not called to give evidence. It is urged, on behalf of Co-op, that an adverse inference should be drawn against CT for failing to produce this critical witness.

Counsel relies upon the decision of the Supreme Court of Canada in **Levesque v. Comeau et al,** [1970] S.C.R. 1010, to support his submission.

In **Levesque**, **supra** the plaintiff sued for damages as a result of injuries suffered in a motor vehicle accident. She, and her husband, testified that she was in good health before the accident. She called one medical witness in support, but his examination took place more than a year after the accident. She had, in fact, been examined by several doctors in the meantime. None of these physicians was called.

Counsel for Co-op stresses the following comment of Justice Pigeon, speaking on behalf of the majority, at p. 1012:

> In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case.

Justice Pigeon noted, however, that the circumstances disclosed that the plaintiff "alone could bring before the Court the evidence of those facts and she failed to do it".

The circumstances in the present litigation are not comparable. The transcript reveals that Co-op's counsel conducted an oral examination for discovery of Angela Paddock on December 7, 1994. Ms. Paddock's trial evidence, and hence, presumably, her discovery evidence, disclosed in considerable detail the part that Mr. Fiander

played with respect to the supervision of the Mortgage and the decision taken not to advise Co-op of the existence of the Subscription Policy.

Counsel for Co-op, who conducted both the trial and the appeal, is an experienced counsel. It was, accordingly, reasonable to infer in the light of Angela Paddock's evidence, that counsel would have examined Mr. Fiander on discovery prior to trial.

Indeed, counsel acknowledged at the hearing of this appeal that he had examined Mr. Fiander on discovery. Co-op was therefore in a position to have fully explored the state of Mr. Fiander's knowledge concerning the matters in issue prior to trial.

The transcript suggests that Mr. Fiander continued as manager of the Dartmouth office until 1995, when he was fired. Any evidence favourable to Co-op developed in a discovery examination that occurred prior to his termination, could have been introduced by Co-op at trial pursuant to the provisions of **Civil Procedure Rule 18.14(1)(b)** (see comments of Hallett, J. in **Midland Doherty Limited v. Rohrer** (1981), 62 N.S.R. (2d) 73 at 75).

Co-op also had available to it the opportunity to frame appropriate questions by way of interrogatory and introduce the answers at trial, pursuant to the provisions of **Civil Procedure Rule 19**.

There is no evidence to suggest Mr. Fiander was incapable of responding to a subpoena to attend to give evidence at trial. Co-op had the means, therefore, to require Mr. Fiander to attend the trial and respond to questioning.

For these reasons, I would not draw an adverse inference against CT for failing to call Mr. Fiander.

The comments of Lord Justice Kay in **Angus v. Clifford,** [1891] 2 Ch.D. 449 (CA) at p. 479 are pertinent:

> It seems to me that it is impossible for any Court to assume anything to assist a plaintiff to make out his cause of fraud. Every step - every material step in the evidence which makes out a case of fraud, it is incumbent upon the plaintiff who alleges fraud to prove by sufficient evidence.

Justice Haliburton referred to the judgment of this Court in **Short v. Guardian Insurance Company of Canada** (1984), 62 N.S.R. (2d) 1, and in particular, the comments of Chief Justice MacKeigan, on behalf of the Court, at p. 7:

> To establish such a defence [i.e. under Statutory Condition 7] . . . the insurer has a heavy burden to produce evidence that is "clear and satisfactory and leaves no room for any reasonable inference but that of guilt" ...

Justice Haliburton ruled out any suggestion that CT's employees handled the claim and prepared the Proof of Loss for the purposes of personal gain, or to enable CT to collect double the insurance, or to give a preference to either insurer. He concluded that:

> In view of those words appearing in the Subscription Policy, and in view of the context in which the claim was put forward, [Co-op] has not satisfied that heavy burden of producing clear and satisfactory evidence that [CT], through its employees, acted **wilfully and knowingly** to claim the benefit of coverage to which [CT] was not entitled.

I consider these comments were of a general nature in support of the conclusion that Co-op had not established CT had either committed any fraud or made any wilfully false statement (to track the language of Statutory Condition 7) when it completed the Statutory Declaration in the Proof of Loss. I do not take Justice Haliburton's comments to suggest that it was necessary for Co-op to establish motive in order to succeed in its defence under Statutory Condition 7. (See **Perell** Fraud: Elements of Deceit and Fraudulent Misrepresentation (1996), 18 *Advocates' Quarterly* 23 at 26).

It is clear from a reading of the judgment as a whole, that the trial judge was satisfied that Co-op had not established CT had committed any fraud or made a wilfully false statement when it competed the Statutory Declaration. In coming to this conclusion, Justice Haliburton did not commit any error in law, or any palpable and overriding error which affected his assessment of the facts.

I would accordingly dismiss the first ground of appeal.

SECOND GROUND OF APPEAL - THE TRIAL JUDGE ERRED IN FAILING TO DISTINGUISH BETWEEN THE ISSUES OF SUBROGATION AND CONTRIBUTION

The subscription insurers, after paying CT's loss in March, 1994, elected to step into the shoes of CT, and pursue a subrogated claim against Co-op, rather than frame their action against Co-op on the basis of contribution.

Section 172(1) of the **Insurance Act** provides:

> The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.

A claim for contribution by one insurer against another is recognized by virtue of s. 169 of the **Insurance Act**.

That section provides in part:

> **Contribution Among Insurers**
>
> **169** (1) Where, on the happening of any loss or damage to property insured, there is in force more than one contract covering the same interest, the insurers under the respective contracts shall each be liable to the insured for its rateable proportion of the loss unless it is otherwise expressly agreed in writing between the insurers.
>
> **Statute Overrides Contract**
>
> (2) For the purpose of subsection (1), a contract shall be deemed to be in force notwithstanding any term thereof that the policy shall not cover, come into force, attach, or become insurance with respect to the property until after full or partial payment of any loss under any other policy.

Co-op submits that the subscription insurers, by electing to "make use of subrogation" in an effort to recover from Co-op 100% of their payments to CT, have placed themselves "in a position where they are bound by any acts, or misdeeds, of CT, and are governed by the provisions of the standard mortgage clause".

There are, in my opinion, no acts or misdeeds of CT that are relevant to this issue; however, s. 3 of the standard mortgage clause provides:

> If there be **other valid and collectible insurance** upon the property with loss payable to the Mortgagee - at law or in equity - then any amount payable thereunder shall be taken into account in determining the amount payable to the Mortgagee. [emphasis added]

Co-op argues that the Subscription Policy constituted "other valid and collectible insurance" on the property, and therefore the amount payable under the Subscription Policy should be deducted from any amount Co-op is obliged to pay CT.

To assist in an understanding of this issue it is necessary to consider that which "fairly reflects" the intention of the parties when entering into the contract.

Justice LaForest, in **Panzera, supra** stated at p. 1056:

> In discussing the principles governing the construction of contracts of insurance in **Scott v. Wawanesa Mutual Insurance Co.**, **supra**, at p. 1454, I adverted to the approach set out by this Court in **Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Co.,** [1980], 1 S.C.R. 888. There it was made clear that in the construction of a contract of insurance a court must seek the interpretation which most fairly reflects what can reasonably be supposed to have been the intention of the parties when entering into the contract. [emphasis added]

(See also the comments of Freeman, J.A. on behalf of the majority in **Commercial Union Assurance Company of Canada v. The Bank of Nova Scotia** (1993), 123 N.S.R. (2d) 58, at p. 65, N.S.C.A.)

Two pages from CT's administration manual were introduced as a trial exhibit. They prescribe that if a customer does not provide evidence of replacement insurance,

or it comes to the branch's attention that adequate insurance is not in place, or if CT plans to foreclose on a mortgage, CT's employees should then arrange local insurance coverage or obtain "forced placement property" insurance through Marsh & McLennan.

Justice Haliburton found:

> David Fiander was served with a notice of cancellation of the fire insurance coverage of Co-operators on or about September 15. As a result, he visited the premises, ... and gave instructions that foreclosure proceedings should be commenced and insurance should be placed on the property under the Subscription Policy for the purpose of protecting Canada Trustco. In accordance with that request and company policy, Angela Paddock requested coverage under the Subscription Policy on Friday, September 18. I accept on her evidence that placing such insurance is automatic when foreclosure is instituted; that the coverage was to take effect immediately and that her intention was "to make sure Canada Trustco was covered". I accept the evidence of Nancy During that corporate policy required that when a decision was taken to commence legal action, insurance would be placed on mortgaged premises to protect the interests of Canada Trustco. I accept that she understood from Angela Paddock that the Mortgagor's policy was "expiring on the weekend..."

The trial judge noted that after the fire there were discussions among the three employees (Fiander, Paddock and During) about the necessity of advising Co-op of the existence of the Subscription Policy.

The trial judge found:

> Angela Paddock's evidence was "I understood Co-op was first and that two insurance companies will not pay", "Co-op was still in place" ... I accept the evidence of Nancy During that she "thought" the "blanket insurance" was not needed because the Co-op coverage was still in place in spite of the fact she knew of the overlapping coverage.

Nancy During also testified:

> We thought we were lucky that we had placed insurance on it just in case, you know, the other insurance had lapsed . . . and the property would have been unprotected. [emphasis added]

Justice Haliburton continued:

> The reasonable inference is simply that they followed corporate policy to obtain coverage under the Subscription Policy as "backstop" insurance only. There is some suggestion that they may have believed that the subscription insurers were liable only at 12:01 a.m. on September 20, although careful reading of the policy makes it clear that the coverage went into effect "immediately". [emphasis added]

The trial judge accepted the evidence of the CT employees that no one of them had any "actual knowledge of or access to the specific terms of either policy", but went on to say that "certain provisions of the policy supported the view that the Subscription Policy was effective only after the effective cancellation of the Co-op policy".

Angela Paddock testified that on the morning of September 18 she forwarded by e-mail a request to Marsh & McLennan for coverage to start September 18. She, as well

as her fellow employees, assumed that coverage for the property under the Subscription Policy would be in place as soon as her request was received.

Marsh & McLennan's e-mail response was not sent until Monday, September 21. It disclosed in part :

> This is to certify that insurance has been effected as shown below...
>
> > This certificate of insurance neither affirmatively nor negatively extends or alters the coverage afforded by the policy scheduled herein. It is furnished as a matter of information only, and is issued with the understanding that the rights and liabilities of the parties will be governed by the original policy or policies that may be lawfully amended from time to time...
> >
> > Policy Number MMF/1023
> > Amount of coverage requested - $150,000
> > Start Date 1992-09-18
> > Expiry Date 1993-01-31
> > Premium $268.28 . . .
> >
> > This certificate . . . is subject to all the terms and conditions of the above policy as it now exists or may hereafter be amended.

This wording makes it clear, in my opinion, that the coverage is determined by the provisions of Subscription Policy MMF/1023, and is not extended or affected by the words of the certificate.

The trial exhibits disclose that Subscription Policy MMF/1023 was, in fact, in force from April 30, 1992 to April 30, 1993. A"deposit premium" of $50,000 was charged to CT at inception. This was a provisional charge and was subject to quarterly premium adjustments on receipt of advice concerning the insurable value of those properties on which coverage was existing, or requested, during the course of the policy period, based on specific policy rates.

The Subscription Policy provides under Section A - General Insurance Agreements - that coverage shall:

> ...attach effective the date requested by the Named Insured, which date will be either the date of possession of the security by the Insured or the date the Insured becomes aware that the property is inadequately insured or uninsured and legal action to obtain the security has been initiated. [emphasis added]

The provisions of Section A were not specifically responsive to the request for coverage. CT had not, as of September 18, obtained possession of the property. Ms. Paddock could have requested the Subscription Policy to cover as of the time the cancellation notice became effective, but with an abundance of caution, she understandably requested coverage as of September 18.

Ms. Paddock was aware on September 18 that the property would become uninsured when Co-p's cancellation notice took effect. Put another way, she was not aware the property was, in fact, uninsured until Co-op's cancellation took effect. It was at that point in time that the coverage attached.

This interpretation is supported by the description of Property Insured found in Section B - Property Damage, Clause 1, of the Subscription Policy which reads as follows:

> The Interest of the Insured only in Property of Every Description as reported by the Insured, except as excluded specifically elsewhere in this Policy on which the Insured holds a Mortgage or Foreclosed Properties prior to title being obtained by the Insured, and where there is no other insurance or inadequate insurance on the property or evidence of insurance has not been provided. [emphasis added]

The interest of CT in property under the Subscription Policy is only insured on property on which there is no other insurance. That arose at 12:01 a.m. on September 20 when the Co-op cancellation became effective.

This interpretation finds further support when one examines Clause 3 of the Insuring Agreement contained in the Subscription Policy where it is provided that:

> THIS POLICY DOES NOT COVER THE FOLLOWING PROPERTY:
>
> (e) Property for which there is other valid and collectible insurance.

The Co-op policy constituted valid and collectible insurance on the property until September 20 at 12:01 a.m.

This view is supported by the actions, and evidence, of CT's employees before and after the loss. It is consistent with their opinion that CT was not obliged to advise Co-op of the existence of the Subscription Policy, and it is also consistent with counsel's action to recover from Co-op by way of subrogation rather than by commencing an action for contribution.

I recognise that there are other clauses of the Subscription Policy which seem to have been lifted, willy-nilly, from other insurance contracts, which suggest that concurrent insurance, or policies providing overlapping coverage, may be permitted.

For example, under s. 3 and s. 8 of the General Conditions of the Subscription Policy, permission is granted for further "concurrent insurance", and also for arbitration pursuant to the "Agreement of Guiding Principles" in the event of a dispute arising out of overlapping coverages.

Section 29, in addition, provides that:

> If there is any more specific and collectible insurance, this policy shall apply in excess of such insurance.

While these provisions could be viewed as inconsistent with the conclusion I have reached, in my opinion they should not affect the interpretation that I consider most fairly reflects the intention of the parties when entering into the contract.

There is, however, a further question that remains to be considered.

If coverage under the Subscription Policy did not attach until after the fire, how can it be said the Subscription Insurers were legally obliged to indemnify CT? If not legally obliged, how can the subscription insurers be subrogated to CT's claim against Co-op?

On April 16, 1993, Angela Paddock advised Marsh & McLellan:

> [CT] did not contact you immediately about the fire as we assumed we were to be paid out by original insurance company. They now are refusing to pay and we are continuing with our foreclosure action and will take an action against Co-operators Insurance for the deficiency. We will keep you advised as to our progress in this action.

Apparently discouraged about the progress of the action against Co-op, CT filed its Proof of Loss with the Subscription Insurers on February 21, 1994. Payment of CT's claim was received a month later. Whether payment was made as a consequence of the Subscription Insurers considering themselves legally bound or whether it was prompted by good customer relations, is not known.

Section 172(1) of the **Insurance Act**, provides that:

1. The insurer, upon making any payment or assuming liability therefor under a contract of fire insurance, shall be subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights. [emphasis added]

This wording is sufficiently broad to embrace an *ex gratia* payment.

This particular issue has not been raised by Co-op, but a somewhat similar situation was considered by the Privy Council in **King v. Victoria Insurance Company Limited,** [1896] A.C. 250.

The respondent insurers, after making payment under the policy, commenced action against officers and employees of the Government of Queensland for not

properly mooring its vessel and thereby causing damage to the goods of Victoria's insured.

Judgment of their Lordships was delivered by Lord Hobhouse who stated at p. 254:

> To their Lordships it seems a very startling proposition to say that when insurers and insured have settled a claim of loss between themselves, a third party who caused the loss may insist on ripping up the settlement, and on putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing upon his own wrongful act. It is not alleged that there was anything but perfect good faith in the claim made by the bank and satisfied by the insurance company. . . . But it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must show that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel as it is startling. . . As regards the question whether the loss was or was not within the terms of the policy, their Lordships will make no observation but this, that whatever might have been the result of the dispute between the parties to it, there is nothing to suggest that the claim was not one which the insured might not honestly and reasonably make, or to which the insurers might not honestly and reasonably accede. They will assume, as the Court below has assumed, that the bank could not by the terms of the policy have compelled the insurers to indemnify them. Still if, on a claim being made, the insurers treat it as within the contract, by what right can a stranger say that it is not so? [emphasis added]

I adopt the foregoing analysis as applicable to this issue.

Conclusions Respecting Second Ground of Appeal

In my opinion, Co-op should not be entitled to reduce its obligation to indemnify CT simply because Ms. Paddock requested coverage on Friday, September 18.

Ms. Paddock did not have a copy of the cancellation notice served by Co-op at the Dartmouth branch of CT, and accordingly was not aware of the precise time that cancellation would occur. Mr. Fiander had told her that the Co-op insurance was "going to expire on the weekend". If she had waited until Monday to notify Marsh & McLennan, the property, vacant, located in an isolated area, owned by a person with a poor payment record, would have been uninsured for a considerable number of hours.

There was no intention on the part of any of CT's employees to take out double insurance on the property; indeed, there was no advantage in so doing.

Ms. Paddock was not versed on the niceties of insurance law, and acted as a responsible employee should have acted in applying for coverage under the Subscription Policy.

The Subscription Policy served as a backstop policy, designed to come into effect at the instant the Fire Policy was cancelled.

It is not necessary to express any view on Justice Haliburton's comment that "the rights of the parties were frozen in time by the commencement of the action by CT".

I would dismiss the second ground of appeal.

THIRD GROUND OF APPEAL: THAT THE TRIAL JUDGE ERRED AND MISDIRECTED HIMSELF WITH REFERENCE TO HIS INTERPRETATION OF SECTION 169 OF THE *INSURANCE ACT OF NOVA SCOTIA*.

It is convenient to consider under this head the two grounds raised by CT in its cross-appeal.

Section 169(1) provides:

> Where, on the happening of any loss or damage to property insured, there is in force more than one contract covering the same interest, the insurers under the respective contracts shall each be liable to the insured for its rateable proportion of the loss, unless it is otherwise expressly agreed in writing between the insurers. [emphasis added]

Justice Haliburton determined that the Subscription Insurers and Co-op should each contribute to the loss, on the grounds of "equity".

He concluded that:

> Both policies were in force at the time of the loss. Section 169 of the **Insurance Act** makes it clear that both insurers must contribute. [emphasis added]

It is clear from an examination of the reasons for judgment that the trial judge intended by the phrase "both policies" to include the contract between CT and Co-op arising out of the standard mortgage clause endorsement, (which is deemed to be an insurance contract separate from the contract in the Fire Policy - see **Panzera, supra**) as well as the contract between CT and the subscription insurers.

Justice Haliburton then determined that those two contracts were "identical" or, put another way, that they covered the same interests. I would interpret "same interests" in the same manner as the Appellate Division of the Alberta Supreme Court interpreted the phrase in **Industrial Development Bank v. Fayad** (1977), 71 D.L.R. (3d) 152.

Justice Morrow, on behalf of the Court, held at p. 157:

> I read "same interests" as used in s. 225(1) to mean interests similar in nature, arising out of similar or related types of contract, where the nature of the claims can be referred to as parallel.

I respectfully conclude, however, that Justice Haliburton erred when he concluded that the provisions of s. 169 of the **Insurance Act** were applicable to these two contracts.

Section 169 only comes into play if the two policies are "in force" at the same time. For the reasons set out in the second ground of appeal, I am of the view that the Subscription Policy was not "in force" at the time of the fire.

Counsel for Co-op directs our attention to three provisions in the Fire Policy which, it is submitted, are relevant to reduce, or eliminate, Co-op's participation in the loss suffered by CT.

Under the heading "Basis of Claim Settlement", it is provided:

> INSURANCE UNDER MORE THAN ONE POLICY
>
> If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, we will not pay any loss or claim until the amount of such other insurance is used up. In all other cases, our policy will pay its rateable proportion of the loss or claim.

Under the heading "Additional Conditions Applicable to s. 1 - Property Coverages, it is provided that:

> OTHER INSURANCE
>
> Other insurance covering the described dwelling building(s) and described personal property is not permitted except existing insurance for which credit is given in this policy or insurance against perils not covered by this policy.
>
> We will not be liable:
>
> - for more than the proportion of any loss or damage covered by this policy which the applicable amount of fire insurance provided by this policy on the property involved in the loss or damage bears to the total amount of all insurance covering such property against the peril of fire, irrespective of whether any other such insurance also provides, by endorsement or otherwise, insurance against the perils covered by this policy; . . .

Under the heading APPLICABLE TO SECTION II - LIABILITY COVERAGE, it is provided:

> INSURANCE UNDER MORE THAN ONE POLICY
>
> If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, our policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up.

In my opinion, none of these provisions is applicable to the circumstances of the present case for the reasons advanced earlier, namely that the Subscription Policy was not in force at the time of the fire.

I do not share Justice Haliburton's view that the Subscription Insurer should contribute to Co-op's obligation to indemnify CT, on equitable grounds.

Co-op issued a standard Home-Guard Policy insuring against a variety of risks, including fire. The Fire Policy was in force from March of 1992. Co-op had the use of the full premium until it decided in September of 1992 to give notice of cancellation. Before that notice became effective, the property was destroyed, or damaged, as a consequence of one of the perils insured against.

The Subscription Policy was not similar to, or designed to compete with, the Co-op Fire Policy. It was a blanket type of insurance covering CT which only came into effect after properties became uninsured, or inadequately insured.

I would dismiss Co-op's third ground of appeal, and allow the cross-appeal.

GROUND NO. 4 - THE LEARNED TRIAL JUDGE ERRED IN AWARDING PRE-JUDGMENT INTEREST TO CT.

On this issue, Justice Haliburton commented:

> Pre-judgment interest is intended to compensate the plaintiff for the failure of the defendant to make prompt settlement of the sum ultimately found to be due and owing. Statutory Condition 12 provides that loss shall be payable "within 60 days after completion of the proof of loss, unless the Contract provides for a shorter period"...
>
> Both parties were responsible for some delay. I see no reason why others should be penalized in the circumstances here. Interest on the

> award will be payable by the insurer to the plaintiff for the period commencing 60 days after the proof of loss was filed.

Co-op submits that the trial judge failed to take into account that CT delayed filing its Proof of Loss with the subscription insurers until February of 1994, which delay resulted in payment being delayed until March of 1994.

This submission, in my opinion, has no merit.

Co-op has not established that Justice Haliburton committed any error in reaching his conclusion. I would, accordingly, dismiss this ground of appeal.

GROUND NO. 5 - THE TRIAL JUDGE ERRED IN AWARDING COSTS TO CT

Justice Haliburton ordered costs to CT on Scale 4 pursuant to Tariff A.

This Court will not interfere in the exercise of discretion by a trial judge unless a wrong principle of law has been applied or the decision is so clearly wrong as to amount to a manifest injustice (**Conrad v. Snair et al** (1996), 150 N.S.R. (2d) 215 (C.A.) at 216).

Co-op suggests that since the trial judge applied the principle of contribution, and awarded CT only 50% of the amount it was seeking, that CT should receive a percentage of costs normally granted.

Co-op further argues that the "false" Proof of Loss resulted from the misconduct or negligence of CT and that this conduct is a ground for disallowance of costs, citing Orkin, ***The Law of Costs***, 2nd Ed. 1996 at 2-28.

In exercising his discretion, the trial judge presumably took into account that Co-op's initial reason for denying CT's claim was based on the misrepresentations by Ms. Jamieson. That ground was later abandoned.

Co-op subsequently argued that CT's action should be dismissed because of CT's failure to advise Co-op of "material risks" known to CT prior to the loss (the debt payment history of the Jamiesons).

Justice Haliburton dismissed this argument, finding it was without merit. No appeal was taken from this decision.

I am not satisfied that Co-op has established Justice Haliburton applied wrong principles of law or that his decision respecting costs amounts to a manifest injustice.

I would, accordingly, dismiss this ground of appeal.

Deductible Under the Co-op Policy

Co-op submits that its policy contained a $5,000 deductible and that should be taken into account in calculating Co-op's obligation to indemnify CT.

Page 1 of the coverage summary of the Fire Policy discloses that Ms. Jamieson selected "broad coverage" with a limit of insurance of $200,000, subject to a deductible of $500 (i.e., not $5,000).

The only applicable reference in the Fire Policy is the following:

> The deductible amount which applies to the coverage is shown on p. 1. We pay only the amount by which the insured loss or damage exceeds the deductible amount in any one occurrence. The specific limits of coverage apply to that portion of the loss or damage which exceeds the deductible. For all losses over $5,000, the deductible will be waived.

In view of the last sentence in the deductible clause, I conclude that Co-op is not entitled to deduct any amount from the loss sustained.

Conclusions

I would dismiss all grounds of the appeal and allow the cross-appeal. I would order the appellant to pay to the respondent the additional sum of $42,153.79, together with interest on that amount for the period commencing 60 days after the Proof of Loss was filed, at a rate of 5.5% per annum.

The trial judge ordered Co-op to pay to CT trial costs in the amount of $4,500 plus disbursements. The calculation was based on Tariff "A", Scale 4. The amount was calculated on a recovery of $47,153.79. The conclusion I have reached results in a total award to the respondent of $89, 307.58. Trial costs calculated on the same tariff and the same scale should therefore be increased to $8,200, together with disbursements.

Since CT is entitled to its costs of successfully defending the appeal, as well as prosecuting the cross-appeal, I would fix its costs of the appeal and the cross-appeal at $4,000 plus disbursements.

Pugsley, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A. No.134758

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

THE CO-OPERATORS GENERAL INSURANCE COMPANY, a body corporate, Appellant - and - **CANADA TRUSTCO MORTGAGE COMPANY**, a body corporate, Respondent	)	REASONS FOR JUDGMENT BY: PUGSLEY, J.A.