Date: 19980610 Docket: C.A. 143981

NOVA SCOTIA COURT OF APPEAL
Cite as: Wilson v. K.W. Robb & Associates Ltd., 1998 NSCA 117
Pugsley, Hart and Hallett, JJ.A.

BETWEEN:

CHARLES F. WILSON Appellant - and - K.W. ROBB & ASSOCIATES LIMITED, a body corporate Respondent	Peter L. Coulthard for the Appellant David G. Coles and Peter J. Driscoll for the Respondent Appeal Heard: May 13, 1998 Judgment Delivered: June 10, 1998

THE COURT: Appeal allowed per reasons for judgment of Hallett, J.A.; Hart and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

The appellant engaged the respondent surveying company to do the necessary survey and engineering work to obtain approval from municipal and government regulatory authorities of a proposed subdivision of property owned by the appellant at East Petpeswick, Nova Scotia. The respondent performed the work over a period from December, 1986, to August, 1988. The respondent billed the appellant as work progressed through this period. In May of 1988 the appellant complained that the respondent's work was unsatisfactory. Ultimately a final approval of a number of lots was obtained. The record shows that the appellant did not pay an invoice rendered on December 31st, 1987, or any invoices issued subsequent thereto. The respondent's work was completed by August of 1988. The appellant made five payments on account; there was left a balance owing of approximately $12,000.00.

On June 10th, 1994, the respondent commenced an action against the appellant claiming the sum of $12,940.24, which included interest to September 1st, 1988. The respondent asserted in its statement of claim that:

> 5. The services were provided by the Plaintiff on credit to the Defendant pursuant to interest being payable at the rate of Two Percent (2%) per month or Twenty-four Percent (24%) per annum on all overdue accounts.
>
> . . . . .
>
> 8. .....pursuant to the terms of the agreement as between the Plaintiff and the Defendant it seeks the full principal balance of the aforementioned invoices together with interest thereon at the rate of Two Percent (2%) per month up to and including the date of Judgment together with the

costs of this action.

(Emphasis added)

On July 13th, 1994, counsel for the appellant filed a defence in which it was admitted that the appellant had engaged the respondent to perform the services and that the respondent had issued statements of account to the appellant but in all other respects the appellant denied the claim. The defence alleged that the respondent's work was negligently done and put the respondent to a strict accounting for the amount claimed.

The appellant counterclaimed for the cost of the work that had to be done to correct the work the appellant alleges was negligently done by the respondent.

On August 1st, 1995, counsel for the respondent filed a Certificate of Readiness advising the court that the respondent was ready to proceed to trial.

On January 7th, 1997, counsel for the appellant filed with the court a notice of intention that he would be acting in person; up to that time he had been represented by counsel.

On March 17th, 1997, at a Date Assignment Conference, the trial was

set for November 24th and 25th, 1997. After two days of trial Justice MacLellan, in an oral decision rendered at the conclusion of the trial, allowed the respondent's claim to the extent of $10,645.00 and awarded pre-judgment interest of 24% for six years and 12% for 3 years. The total judgment, as reflected in the court order dated November 28th, 1997, being for an amount of $39,482.50 inclusive of costs and disbursements.

Issues on Appeal

The appellant, who was represented by counsel on this appeal, asserts that the trial judge erred:

(1) in failing to explain to the appellant, an unrepresented litigant, the consequences of his not testifying at trial;

(2) in finding the appellant was liable to pay interest at a contractual rate or at all; and

(3) in failing to properly exercise his discretion pursuant to s. 41(k) of the **Judicature Act**, R.S.N.S. 1989, c. 240, to decline to award the interest claimed by the plaintiff or, alternatively, to reduce the rate of interest claimed by the plaintiff or reduce the period for which interest was claimed.

Summary of the Trial Proceedings

The transcript discloses that at the outset of the trial, after counsel for the respondent and the appellant had agreed that two volumes of exhibits would be introduced by consent without the requirement to prove each document, the following exchange took place between Justice MacLellan and the appellant:

> THE COURT
>
> Mr. Wilson, since you are unrepresented, I take it you are familiar with the way the trial will proceed.
>
> MR. WILSON
>
> No, I'm not, sir.
>
> THE COURT
>
> Okay. The Plaintiff will call their witnesses and either Mr. Coles or Mr. Driscoll will ask questions on examination in chief, after which you will have an opportunity to cross-examine the witness. That will continue through each witness until the Plaintiff's case is concluded, at which time you will be given an opportunity to call witnesses on your own, during which time you will ask direct examination or testify yourself, after which counsel for the Plaintiff will be given an opportunity to cross examine. Do you understand that?
>
> MR. WILSON
>
> Yes.
>
> THE COURT
>
> If you feel, during the course of any of the direct evidence from the Plaintiff, that any matters or anything has been done that is improper, you're entitled to object, after which I will rule as to whether your objection is valid or not. Okay? So we're ready to start.

During the cross-examination of Mr. Robb, the principal of the respondent company, counsel for the respondent objected to the appellant, in effect, giving evidence by way of asking questions. In response Justice

MacLellan stated:

> Thank you. Mr. Wilson, I would remind you that you are supposed to ask direct questions if at all possible. You are entitled to ask the witness to assume certain things or if he will agree, but see if you can make the questions more direct. You will have your opportunity to testify if you wish.

At another point in the cross-examination of Mr. Robb, counsel objected to a question. Justice MacLellan stated:

> I think you'll have to lead that by way of your own direct evidence, Mr. Wilson.
>
> BY MR. WILSON
>
> Thank you, sir. .....

At the conclusion of Mr. Robb's evidence counsel for the respondent tendered extracts from the appellant's discovery evidence and closed the respondent's case. The transcript discloses the following discussion between the court and the appellant:

> THE COURT
>
> Mr. Wilson, do you intend to call evidence?
>
> MR. WILSON
>
> No, sir.
>
> THE COURT
>
> You're not planning on calling any evidence? I'm not suggesting that you have to call evidence. I'm just -- I thought we had had some discussions that you were planning to. So your position is that you simply -- you're not going to call evidence and we're going to have summations at this point. Is that your understanding, Mr. Wilson?
>
> MR. WILSON
>
> Well, the evidence -- I don't understand what

you mean by evidence.

THE COURT

Well, calling witnesses, either yourself or other witnesses.

MR. WILSON

No, sir. It will be just summation.

THE COURT

Certainly you can rely on the evidence that's already in and the exhibit books. ...

Court was adjourned at 12:07 and reconvened for summations at 1:31. Upon reconvening Justice MacLellan stated:

THE COURT

Before we start, Mr. Wilson, I just want to make sure that you understand that summation is for argument. It's not for giving evidence, that you cannot give evidence in summation. All you can do is argue based on the evidence that's already presented. Do you understand that?

MR. WILSON

The argument being everything that I've crossed?

THE COURT

Yes.

MR. WILSON

Yes, sir.

THE COURT

Thank you.

The Court then heard argument from counsel for the respondent and from the appellant. The latter's brief submission focused on the lack of competency of Mr. Robb.

The submissions to the trial judge of counsel for the respondent, with

respect to the interest issue, are set out, in part, as follows:

> ..... With respect to the issue of interest claimed at 24% per annum, 2% per month, this claim of the Plaintiff remains unchallenged. There is no evidence -- and again, no challenge -- to the claim of the Plaintiff for interest on the outstanding principal due and payable.

The respondent's counsel referred the trial judge to the appellant's discovery evidence and quoted to the trial judge the following excerpts from that discovery:

> Q. But you, sir, have testified earlier that you haven't paid him anything since May of 1988.
> A. That's right.
> Q. So ---
> A. But I paid him five thousand about -- just about six thousand prior to that for work that was supposedly done.
> Q. So when you, sir, indicated to him or led him to believe that he would continue to work and he would get paid for that work, you didn't intend to pay him new funds. You intended to set that off as against past debts.
> A. That's right.
> Q. But you never expressed that to him.
> A. No, I did not.
> Q. And in fact --- "
>
> And that's -- those are the references I'd like to submit to Your Lordship. I then refer Your Lordship to page 120, line 5:
>
> > Q. Since May of 1988 you have never questioned or raised any objection or, indeed, discussed at all with Mr. Robb any of these various bills and invoices.
> > A. No, I have not."

Counsel for the respondent submitted to the trial judge that this was a

simple collection action, the principal and interest are owing, the defendant had presented no evidence and that the trial was a two day exercise that was, in effect, a waste of the court's time.

Justice MacLellan adjourned for half an hour and then rendered an oral judgment. After summarizing the facts, the learned trial judge reduced the respondent's claim by $500.00. He concluded his decision with the following:

> I find that there's absolutely no evidence here that Mr. Robb's work in dealing with the subdivision was negligent in any way. The process allows for revisions and, clearly, Mr. Robb made revisions only when necessary to meet an objection raised by government officials. I believe that Mr. Robb acted at all times in the best interests of his client, Mr. Wilson, and in consultation with him. I agree with the suggestion by counsel for the Plaintiff that, basically, this trial was a waste of time. The Defendant offered no evidence in support of his position and offered no evidence on his counterclaim. I would therefore dismiss the counter-claim and allow the Plaintiff's claim for his accounts totalling in the amount of eleven thousand, one hundred and forty-five minus five hundred dollars ($500). I also award costs to the Plaintiff. The question of interest causes me considerable difficulty and I wish to hear further from counsel on that point before proceeding.

Disposition of Issue 1

A review of the transcript satisfies me that Justice MacLellan did not err in failing to advise the appellant of the possible consequences of his not testifying. The burden was on the respondent to prove its claim for principal and interest and answer the questions arising from the defence that was filed. The

evidence supports a finding that the total of the invoices for work done by the respondent for the appellant (exclusive of interest) less payments on account was $11,145.00. The trial judge reduced the claim by $500.00 for the reasons he stated. Thus the claim he allowed was $10,645.00. In his cross-examination of Mr. Robb, the appellant did a thorough job of questioning him about the deficiencies alleged in the respondent's work. However, the trial judge accepted Mr. Robb's evidence in face of what would have been clear to Justice MacLellan were the appellant's complaints about the work done.

It would have been helpful to the appellant had the trial judge, in making it clear to the appellant that he could testify, had also advised him of the possibility that his failure to testify could work against him. A trial judge is not required to, and ought not to, act as counsel for an unrepresented litigant. The fact that the trial judge did not advise the appellant of the possible ramifications of not testifying, does not warrant the ordering of a new trial as sought by the appellant. The evidence supports the trial judge's findings that the work was done satisfactorily; final approval was obtained and that the balance of the principal amount for the work performed (exclusive of interest claimed) is $10,645.00. The concerns the appellant raises with respect to the interest issues can be addressed by this Court. I would dismiss the first ground of appeal.

The Second and Third Issues

These two issues can most effectively be dealt with together, that is, whether the trial judge erred in finding the defendant was liable to pay interest at a contractual rate or at all and that he erred in failing to properly exercise his discretion pursuant to s. 41(k) of the **Judicature Act** to decline to award interest as claimed or, alternatively, to reduce the interest claimed or reduce the period for which interest was claimed by the respondent.

It is clear from a review of the statement of claim that the respondent's claim to interest is founded on an assertion that the respondent had a contractual right to interest at the rate of 2% per month or 24% per annum on all overdue accounts. The respondent's claim put forward at trial was for approximately $94,000.00 as the respondent had compounded the interest for the full period of nine (9) years at the rate of 24%.

At the conclusion of his decision on the negligence issue, Justice MacLellan stated that he was having "considerable difficulty" on the question of interest. Following the rendering of his decision on the liability issue he said to the respondent:

> THE COURT
>
> > The first question -- and the questions I guess I would like addressed is, No. 1, why did this case take almost eleven years to get here and, secondly, is it reasonable for the Plaintiff to expect to get 24% interest?

After getting less than a satisfactory response from counsel, the trial judge stated:

> THE COURT
>
> But I guess the difficulty I have there, Mr. Coles, is that between '88 and '94, which is, what, six years, in effect, why should the Plaintiff profit because he's getting 24% interest and simply wait till the limitation period's just about over?

Counsel for the respondent replied as follows:

> MR. COLES
>
> My lord, I have two answers to that. The first answer is, of course, you phrased that as if this is all up to the Plaintiff. Of course, it's not. We are dealing in a situation here where that's part of the invoice, part of the contract. The Defendant knows he's facing that as part of the charge. It's right there. Never dropped. It continues. .....

Counsel for the respondent also submitted that as the appellant had consented to an order withdrawing that part of his defence which asserted that the action had been commenced out of time that it was not open to the trial judge to do anything but award interest for the six year period between 1988, when the action arose, and 1994 when the action was commenced. Justice MacLellan responded:

> THE COURT
>
> But just because you're entitled to proceed with the action doesn't mean you're going to get interest.

Counsel for the respondent submitted:

MR. COLES

> I understand that. And what I'm trying to phrase for you is this thesis, is that the Defendant has the invoices. He's been presented with them. They call for this rate of interest. Mr. Robb has complied with the statutory scheme enforced in the province and registered and got all of these things to be entitled to charge interest. You can say why does the Plaintiff delay. You could also say why doesn't the Defendant settle up. In other words, this is before him as much as it is with Mr. Robb. The reality of the charge continues. ...

Mr. Coles was referring to the fact that the respondent is registered under the **Consumer Protection Act**, R.S.N.S. 1989, c. 92 as amended.

Justice MacLellan stated to the respondent's counsel that obviously the appellant was disputing the accounts:

MR. COLES

> Well, I appreciate he was disputing the account, but then I say two more things. I take you back to the pleadings and back to what he says about them. He doesn't challenge the interest rate in this pleading. He doesn't challenge the propriety of collecting that. There is no assertion that this was not agreed to or that this was not proper. In other words, I guess I place the balance or the burden on the other side and say the charge is running as per law, the invoice has been issued, he's elected to do nothing. .....

The trial judge was having difficulty accepting the position advanced on behalf of the respondent, particularly the argument that was being put forward

that because the respondent was registered under the **Consumer Protection Act**, this somehow validated the interest claim of 24%.

After hearing submissions from counsel for the respondent, the court addressed Mr. Wilson as follows:

> THE COURT
>
> .... Mr. Wilson, the suggestion is that you have not, in your pleadings or even, in fact, here or your summation or otherwise raised the issue of the amount of interest claimed here. And I guess I have indicated some concern about the rate and the numbers it results in and I'm prepared to hear from you on that issue.
>
> MR. WILSON
>
> Sir, in some of the accounts it specifies that the accounts bear interest at a legal rate. I don't believe that 2% per month or 24% per year is a legal rate.
>
> . . . . .
>
> THE COURT
>
> ..... But Mr. Coles says that you were aware that the interest was ticking on here and I guess my question is, do you have anything to say as to whether I should simply adopt his position and apply that interest rate as suggested?
>
> MR. WILSON
>
> Because of the feeling of -- my feeling that there was wrongdoings in the process of subdivision is I did not think that the interest rate was applicable, sir.
>
> THE COURT
>
> What do you mean by that?
>
> MR. WILSON
>
> Because of the timeframe of the proceedings -- the original proceedings should have started some time in [1988], I believe, and that's when conferences were being held and nothing proceeded from there.

THE COURT

> The figures, Mr. Coles -- and I go back to you. The numbers that are in the brief, I'm not quite sure how they were arrived at and maybe you could assist me there because I'm not quite sure if you started in 1988 or you started ---

Counsel for the respondent explained that interest was calculated, not on the sum of $11,145.00 as claimed but on $12,940.20 which sum included interest on the invoices outstanding up to September 1st, 1988. The interest from that point on was compounded at 24% per annum. Counsel also advised the trial judge that simple interest on the sum of $12,940.20 at 24% would be $3,105.64 per year calculated from September 1st, 1988.

The transcript then discloses the following discussion between the Court and the appellant:

THE COURT

> Okay. Thank you. That's helpful. So basically we're talking nine years since '88 and so it'd be about twenty-seven thousand, plus. Mr. Wilson, do you have anything further to say about that? Basically the claim is if I don't compound it, it's twenty-eight thousand dollars ($28,000) and change interest on the twelve thousand dollar ($12,000) claim or thirteen thousand dollar ($13,000) claim.

MR. WILSON

> I have nothing to say.

THE COURT

> You have nothing to say about that? Okay.

Justice MacLellan then rendered his decision which is as follows:

> What I'm going to do here, gentlemen, is this. And as I said before, I guess it's me that has to sign the Order and I do -- and I guess I would say probably -- I say to Mr. Robb and I probably would say to Visa that 24% over this period of time does appear a bit excessive. I think -- I don't know, but I would suggest that the prevailing interest rate over that time is probably about half of that, 12% -- 10 to 12%. So what I'm going to do is do something in the middle, here. I'm not going to allow the entire amount. I'm going to do it by simple interest, as opposed to compound. I'm prepared to grant 24% up to the time the action was started, which was 1994, so that will be six years. Six years. And the other three years would be at half of that, 12%. I'd like counsel to compute that.

After further discussion between the court and counsel for the respondent the following explanation for the calculation of interest was put to the Judge and accepted by him:

MR. DRISCOLL

> My lord, just so I can explain how I came to that particular calculation -- the calculation I'll read off in a moment. Taking the twelve thousand, four hundred and forty dollars, twenty cents ($12,440.20), multiplying that by 24%. I'll just run through it to double check it. That equals two thousand, nine hundred and eighty-five dollars and sixty-four cents ($2,985.64) per annum by six is seventeen thousand, nine hundred and thirteen dollars and eighty-four cents ($17,913.84). And taking the principal amount again, twelve thousand, four hundred and forty dollars, twenty cents ($12,440.20), multiplying that by 12% is one thousand, four hundred and ninety-two dollars and eighty-two cents ($1,492.82) per annum times three years is four thousand, four hundred and seventy-eight, forty-six. Adding that amount to the

> seventeen thousand, nine hundred and thirteen dollars and eighty-four cents ($17,913.84) and adding that total to the twelve thousand, four forty and twenty cents ($12,440.20) is thirty-four thousand, eight hundred and thirty-two dollars and fifty cents ($34,832.50).

The trial judge stated that judgment would include the principal amount and the interest as calculated by the respondent's counsel plus costs to be awarded based on that total figure ($34,832.50) on the basic scale provided in the Tariff plus disbursements to be taxed.

Interpretation of Trial Judge's Decision on the Interest Claim

The only reasonable inference to draw from the trial judge's decision and the discussions leading up to it, is that he awarded interest at the rate of 24% per annum for six years between 1988 and 1994 on the basis that the respondent had a contractual right to interest at the rate of 24% per annum. I reach this conclusion because the trial judge stated in his reasons that the prevailing rate in the six year period in question, 1988 to 1994, was in the 10 to 12% range. Had he been simply exercising the powers conferred on him under ss. 41(i) and (k) of the **Judicature Act**, he would, no doubt, have used a rate in this range. The trial judge, however, found the 24% was excessive for the full period from 1988 to 1997 so he did exercise his discretion under s. 41(k) in reducing the award for the three year period between 1994 and 1997 to 12%. Although the trial judge does not make any express reference to s. 41(i) or (k) of the **Judicature Act**, he clearly

had it in his mind and I would infer that he found there was an unreasonable delay in the litigation that was the responsibility of the respondent and that this warranted a reduction in the interest rate for the latter three year period.

Counsel for the appellant alleges that the trial judge erred in finding the defendant liable to pay interest at a contractual rate or at all and erred in the exercise of his discretion under s. 41(k).

The Law Relevant to the Issues Raised in Grounds 2 and 3 of the Appeal

Section 41(i) and (k) of the **Judicature Act** provide:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> . . . . .
>
> (i) in any proceeding for the recovery of any debt or damages, the court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> . . . . .
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by

> virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.

Section 41(i) is an express direction from the Legislature to the courts to award interest as part of a judgment for a debt or for damages at such rate as the court thinks fit for the period of time described in the subsection, that is, from the date the cause of action arose until judgment or subsequent appeal. However, this mandatory direction to award interest is subject to the discretion conferred on the court by s. 41(k) to either decline to award interest under the authority of s. 41(i) or reduce the rate of interest or the period for which it is to be awarded if one or more of the three circumstances described in s. 41(k) exist.

It is difficult to determine what the Legislature intended in enacting s. 41(k)(i). It may be that the subsection was included so as to indicate that if a plaintiff is entitled to interest by agreement or by law, the plaintiff is not also to be awarded pre-judgment interest as mandated in s. 41(i). On the other hand, it may mean that even if interest is payable as of a right or by virtue of an agreement or otherwise by law, the Court may still decline to award interest or may reduce the rate or the interest period. It would seem to me that only if a rate was

unconscionable at the time it was agreed upon should a Court refuse to award contractual interest.

Unlike the Nova Scotia legislation, the Ontario legislation is clear. It specifically states that the provisions of the **Courts of Justice Act** dealing with the award of pre-judgment interest do not apply where interest is payable by a right other than under the pre-judgment interest section (s. 128(4)).

In view of the conclusion that I have come to with respect to this appeal it is not necessary to resolve this question of interpretation of s. 41(k)(i).

Under s. 41(i) the Legislature has given the court an extremely broad discretion to set a rate as it thinks fit. By implication, this should be a reasonable rate for the period in question. In determining what the rate should be in any particular case involves a consideration of rates prevailing at that time and most importantly whether the rates should be the rate a party would have to pay to borrow money for the relevant period or the investment rate that the creditor could obtain in the period in question had the claim been paid when it arose. As recognized by Practice Memo 7, the Supreme Court of Nova Scotia considers that pre-judgment interest should be awarded on the basis of a reasonable rate of return on the investment of the money rather than a rate charged on borrowed funds. However, if it were shown that the creditor had indebtedness to a bank or

a creditor grantor on which he was paying interest and which indebtedness was, in part, due to the failure of the debtor to have paid his account in such circumstances the rate of interest being paid by the creditor in the period for which pre-judgment interest was to be calculated might be an appropriate rate.

I wish to emphasize that the discretion that a trial judge may exercise with respect to pre-judgment interest is extremely broad and it is one that an Appeal Court will not lightly interfere with when exercised in a reasonable manner. I would also stress the fact that the interest rate chosen by the trial judge can, at best, be an approximate rate. This is particularly so, as very often, the issue of pre-judgment interest rate is not a subject-matter that has been gone into in any depth before the trial judge.

As a general rule, if the parties to the action have expressly agreed to a contractual rate of interest that would be payable on an outstanding account, or if the Court considers it an appropriate case in which to imply a term that interest be paid at a particular rate, the court should not exercise its discretion under s. 41(k)(i) as the creditor would be entitled to interest on a contractual basis.

With respect to the power conferred on the Court by s. 41(k)(ii), it is self-explanatory and this issue would turn on the evidence in any particular case.

With respect to 41(k)(iii), the court may reduce the rate that it would have otherwise deemed fit or reduce the period for which interest is awarded if the claimant has been responsible for undue delay in the litigation. It would seem to me that insofar as the plaintiff in a debt action is entitled to interest at a rate the court thinks fit pursuant to s. 41(i), that the onus would be on the debtor to show that the plaintiff was responsible for undue delay in the litigation. That is not to say that the debtor would necessarily have to advance evidence. It may appear from the record that the only reasonable inference that one could draw, if there has been a lengthy delay in the litigation, is that the plaintiff would be responsible for the undue delay in the absence of some explanation from the plaintiff. For example, in this proceeding there clearly has been an undue delay in the litigation as nine years passed from the time the cause of action arose until the trial commenced.

This appeal on the interest issues is an appeal from the exercise of a discretionary power by a trial judge. It is trite to state that an appeal court will not interfere with the exercise of a discretionary power unless wrong principles of law have been applied or a patent injustice has resulted. Counsel for the respondent relies on the oft quoted statement from Justice Chipman's decision in **Minkoff v. Poole & Lambert** (1991), 101 N.S.R. (2d) 143 at p. 145:

> At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice would result. The

> burden on the appellant is heavy: **Exco Corporation Limited v. Nova Scotia Savings & Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54, 253 A.P.R. 54, at 57.
>
> Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters. See **Charles Osenton and Company v. Johnston** (1941), 57 T.L.R. 515; **Finlay v. Minister of Finance of Canada et al.** (1990), 71 D.L.R. (4th) 422; and the decision of this court in **Attorney General of Canada v. Foundation Company of Canada Limited et al.** (S.C.A. No. 02272, as yet unreported).

As noted by Justice Chipman, the Court does consider the consequences of an order. In these proceedings we are not dealing with an interlocutory order but an order that arises from a final decision of a trial judge in the exercise of his discretion.

In this appeal, this Court is required to look at the factual basis which led the trial judge to exercise his discretion to award interest for nine years and at the rates of interest he fixed as being fit. The law is very clear that an Appeal Court will not interfere with a trial judge's conclusions on matters of fact unless he

has made an overriding error that has affected in an important way the conclusions he reached. An oft quoted authority respecting the extent of an Appeal Court's power in this respect is the decision of Madame Justice McLachlin in **Toneguzzo-Norvell (Guardian *ad Litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at p. 121:

> It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, at pp. 188-189 (per L'Heureux-Dubé, J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-389 (per Wilson, J.), and *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie, J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of the evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

Disposition of Appeal Grounds 2 and 3

In my opinion, the trial judge made a serious and overriding error that dictates that his finding on the interest issue be set aside. The trial judge erred in that he appears to have accepted the submission of counsel for the respondent that the respondent had a contractual right to interest at 24%. Counsel apparently relied on Mr. Robb's assertion that all invoices to the appellant contained a notation at the foot of the invoice that interest was being charged at 24% and that these invoices were accepted without complaint by the appellant.

It would appear to have been assumed by counsel for the respondent at the trial and the trial judge that the notation on the invoices, in itself, created a contractual right in the respondent to interest at 24%. This is not correct. But more importantly a review of the invoices does not support a finding that all of the invoices sent to the appellant contained a notation that interest was being charged at 24%. The vast majority of the invoices contained a notation that invoice was being charged at the “legal rate”.

A review of the seventeen invoices sent by the respondent to the appellant between January 20th, 1987, and August 29th, 1988, show that in all but the last three (which were for insignificant amounts of $165.00, $385.80 and $250.00) stated in print at the bottom of the invoices

accounts due when rendered
overdue accounts will bear interest at the legal rate.

The last three invoices contained a statement:

All accounts due when rendered.
Terms 2% per month or 24% per annum.
Interest charged on all overdue accounts

Counsel for the respondent questioned Mr. Robb on direct with respect to the invoices sent to the appellant. The invoices were in a joint exhibit book. Counsel began his examination of Mr. Robb by referring to an invoice dated December 31st, 1987, (Tab 12, Volume II, Exhibit 1). The invoice was for an amount of $2,650.00; it contained the printed words at the bottom that interest

was charged on overdue accounts at the legal rate. In his testimony, Mr. Robb explained the nature of the work represented by this invoice and that this was the invoice forwarded to the appellant. Counsel for the respondent directed Mr. Robb's attention to all of the outstanding invoices that contained a reference to the legal rate of interest and he testified that those were the invoices sent to Mr. Wilson. With the exception of the last three, all contained the reference to the "legal rate" of interest rather than 24%.

I will refer to one additional invoice which was the largest (for $5,500.00). It was Tab 10, Volume II, Exhibit 1 of the Joint Exhibit Book. It was dated January 18th, 1988, and contained the reference to interest being charged at the legal rate. The invoice also included a charge of "one mos int. Ma. '88 - $91.67 for a total invoice of $5,591.67. Subsequent statements of account for the same work cutting boundary lines, etc. were sent to the appellant over a period of months. However, all were dated January 18th, 88. Each of these successive accounts which would appear to have been sent out each month added a further month's interest. All were on invoices which contained the reference to interest at the legal rate, that is, until a statement of account for the same work ($5,500.00) included a claim for "seven mos int. Sep. '88 - $770.00". This statement contained the reference to 24% per annum. All the statements of account with respect to this work valued at $5,500.00 were dated January 18th, '88, but were obviously prepared subsequent to the rendering of the initial invoice, a copy of which does not appear to have been included in the exhibit book.

None of the initial invoices for the period January 20th, '87 to June 29th, 1988, that Mr. Robb testified to as having been sent to the appellant contained a specific charge for interest; only the reference to the legal rate. Subsequent statements of account following the original invoice did add a specific amount for interest on the statements but did not state a rate. However, a review of those interest charges shows that the interest being charged, although not stated, was 20% - not 24%.

Following the direct examination relating to the invoices sent to the appellant, Mr. Robb was asked the following question by his counsel:

> Q. Mr. Robb, are you registered under the Consumer Protection Act?
> A. Yes.
> Q. For what purpose?
> A. For charging interest on my invoices. I followed their procedure and I was registered a long time ago.
> Q. Was the Defendant aware of this, that you'd be charging interest?
> A. Every one of these little invoices have:
>
> > 'All accounts due when rendered. Terms 2% per month or 24% per annum interest charged on all overdue accounts.'
>
> No, they told me to put that on my invoices.
> Q. We reviewed in Volume 2, Tab 1 ---
> A. Consumer Affairs.

In summary, it is abundantly clear from a review of the invoices rendered to the appellant that all the invoices did not contain a statement that interest of 24% per annum was to be charged on overdue accounts, only the last three for relatively small amounts contained this reference. The learned trial

judge failed to appreciate the obvious incorrectness of Mr. Robb's testimony when he stated that each invoice sent to the appellant claimed interest at 24% per annum. This was a fundamental error that went to the root of the decision of the trial judge on the interest issue. It was not until all the work was virtually finished that Mr. Robb began to send statements of account claiming interest at 24% on overdue accounts.

The position of the respondent at trial was that there was a contractual right of interest to 24%.

There was no evidence of an express agreement between the respondent and the appellant when the respondent was engaged to do the services to pay interest at 24% or any other rate on overdue accounts. In reviewing the documents, it is clear that there was no consistency as to what was being claimed by way of interest. Most of the invoices claimed interest at the legal rate. Interest was calculated, apparently, at 20%. The respondent in these proceedings claims interest at 24%. The only reasonable inference from a review of the trial judge's reasons is that had he not felt the appellant was bound contractually to pay interest at 24% as advanced by counsel for the respondent, he would have fixed the interest rate at something in the range of 10-12% for the period 1988 to 1994.

In summary, the trial judge misapprehended the evidence in concluding

that the respondent was contractually entitled to interest at 24% per annum. His interest award is fundamentally flawed and must be set aside.

Therefore, it is necessary to decide what interest should be awarded to the respondent.

As previously stated there was no express agreement of the parties that the appellant would pay interest at the rate of 24% per annum on overdue accounts. Therefore, it is necessary to consider if we should imply such a contractual term as part of the oral contract entered into between the appellant and the respondent whereby the respondent would perform professional services and be paid for those services.

When Will a Court Imply a Term to a Contract?

General Principles

There are circumstances where a Court will be asked to and will imply a term or terms in a contract in order to give efficacy to the agreement reached between the parties. At times, parties will discover that a necessary term has been left out of an agreement and will seek the Court's assistance in addressing this deficiency.

In **Stewart v. Crowell Brothers Co. Ltd.** (1954), 35 M.P.R. 249, Justice Doull stated:

> The obligation to pay interest arises from contract but the words of Mr. Justice White in *Duffy v. Duffy* (1915), 26 D.L.R. 479 quoted by the plaintiff are in point:
>
> > I take it that the contract to pay interest may, like any other contract, be inferred from trade or mercantile useage or from a course of dealing between the parties.

In **Whitehall Holdings Ltd. v. Hawboldt Metal Fabricators Inc.** (1987), 78 N.S.R. (2d) 346 (N.S.S.C.A.D.). Pace, J.A. stated in paragraphs 15, 16 and 17 as follows:

> The power of judicial implication is not without restraint. The temptation to invoke the doctrine has been the topic of both textbook writers and the judiciary.
>
> In Cheshire and Fifoot's **Law of Contract** (8th Ed.), at p. 164, the authors state as follows:
>
> > This power of judicial implication is a convenient means of repairing an obvious oversight. But it may easily be overworked, and it has more than once received the doubtful compliment of citation by counsel as a last desperate expedient in a tenuous case. In a passage immediately preceding the words of Lord Justice MacKinnon, quoted above, the learned judge gave a warning against the abuse of the power, and especially against the temptation to invoke indiscriminately the relevant sentences of Bowen, J.J., in **The Moorcock**.
> >
> > > 'They are sentences from an <u>extempore</u> judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come

> to be a favorite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when **The Moorcock** is so often flushed for them in that guise.'

In **Trollope & Colls v. North West Metropolitan Regional Hospital Board**, [1973] 2 All E.R. 260, Lord Pearson at p. 268 stated:

> '... The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable mean if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.'

In **The Law of Contracts** (3rd edition), Fridman, in discussing whether a term should be implied, stated at p. 477:

> Quite obviously, that is a delicate matter of fact to be determined by reference to all the circumstances of a given case, bearing in mind the general qualification that the alleged implied term must be one that is reasonable, necessary, capable of exact formulation and clearly justified having regard to the intentions of the parties when they contracted.

In **Coastal Floorings & Wall Ltd. v. Chisholm** (1991), 104 N.S.R. (2d)

271, Justice Tidman was not prepared to imply a term to pay interest as the prior course of dealings between the parties did not include payment of interest as well as an express refusal to pay the account.

The term in the contract which would have to be implied in the instant case is a term for interest at 24% per annum. Is this an instance when the Court should imply such a term?

Disposition of question as to whether we should imply a term that the respondent is entitled to interest at the rate of 24% on the outstanding balance of its account

The implication of a term that would require the appellant to pay 24% interest on the outstanding account is not needed to give purpose and effect to the contract the parties entered into; it is not reasonably necessary nor is it capable of exact formulation. I reach this conclusion because the evidence simply does not warrant the implication of such a term given the inconsistency of the rates of interest being claimed on the invoices.

I agree with Justice Goodfellow's remarks in **Tannous v. Halifax (City)** (1995), 45 N.S.R. (2d) 13 at p. 32:

> .....however, modern practice is for almost all commercial accounts to have some reference to interest on overdue balances stated on invoices. The mere statement of an interest term on an invoice by itself raises no legal obligation for payment of such interest, and the Taxing Master was correct in declining any award of invoice

interest.

In short, the mere presence of a statement on an invoice that interest is claimed at a particular rate, standing alone, is an insufficient basis to warrant a finding that the debtor is obliged to pay interest; there must be something more in the course of dealings between the parties. If a debtor, for instance, has paid interest on prior accounts this could indicate an agreement to the payment of interest on overdue accounts. As a general rule, a court should be slow to imply a term in a contract and this is recognized by the general principle of law that I have set out. As a result of the provisions of s. 41(i) of the **Judicature Act** there is even more reason for the court to be slow to imply a term to pay interest as the courts are now mandated by the Legislature to award interest on all claims for debt. Absent this legislative directive, the reality of how business is conducted in the 1990s might very well warrant the courts implying such a term simply on the basis of accounts being rendered to the debtor containing a claim for interest on overdue accounts as cash flow into a business on a consistent basis is critical in today's business world. This was done in **Irving Oil Ltd. v. Whynot** (1978), 33 N.S.R. (2d) 92. In that case interest was clearly shown on the invoice as 1% per month or 12% per annum and there had been a long course of dealings between the parties. Cowan, C.J. concluded that there was an implied agreement to pay interest on overdue accounts at the rate stated in the statement sent out by the creditor as the customer had not objected. I would note that this decision was rendered prior to the enactment of s. 41(i) and (k) of the **Judicature Act**.

In **Bluenose Electric Ltd., D. & E. Industries Limited and Dartmouth Building Supply Limited v. Canadian Surety Company and All Wall Construction Limited** (1985), 68 N.S.R. (2d) 385 (N.S.C.A.) this Court in an action over a labour and materials bond affirmed the trial judge's decision to award interest on the account outstanding at 30% per annum on the basis that invoices delivered to the subcontractor by the supplier contained statements to the effect that interest would be charged at that rate on overdue accounts. There was no particular analysis other than a statement that as the subcontractor had not objected to the invoices when received, and that the surety could have avoided paying interest at the impliedly agreed rate if it had paid the claims when presented, that the trial judge's decision ought to be upheld. In **Bluenose** the implied obligation to pay interest was capable of exact formulation. In this case the rate of interest claimed on the invoices is not at all clear.

It will be a question of fact in any particular case whether or not, considering the dealings between the parties, a court will imply an agreement to pay interest at a particular rate based on the presence of such a statement in invoices rendered.

I tend to the view that without more than the statement on an invoice a court should not imply such a term, in circumstances where there is only one contract between the parties as opposed to a lengthy course of dealings as in **Irving Oil v.**

Whynot.

In the appeal we have under consideration with the exception of the last three invoices for small amounts there was no statement in the invoices as originally forwarded to the appellant that claimed interest at 24%. It was only subsequent statements of account that made this claim long after the accounts were overdue. By that time the appellant was clearly disputing the account and had no intention to pay the account let alone interest.

The original invoices for progress billings as the work progressed (with the exception of the last three invoices to which I have referred) stipulated only for interest at the legal rate, not 24% per annum.

The legal rate of interest in Canada is 5% per annum as provided in the **Interest Act**, R.S.C. c. I-18, s. 3 which states:

> 3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.

Therefore, if we were to imply from the course of dealings between the parties that interest was payable on the overdue accounts it would be at 5% per annum.

The fact that the respondent is registered under the **Consumer Protection Act** is irrelevant to the determination of the issue as to whether we should imply an obligation to pay interest at the rate of 24% per annum as claimed by the respondent.

The evidence respecting the five payments made by the appellant which I will summarize do not indicate he ever paid interest as claimed by the respondent. The payments were made by cheque. I would set them out in the following chronological order:

February 12, 1987 -	$935.00
May 26, 1987 -	$500.00
August 31, 1987 -	$1400.00
November 12, 1987 -	$1343.20
February 15, 1988 -	$500.00.

In summary: the evidence as to the interest rate to be charged as disclosed by the original invoices shows that one could not infer that the parties agreed that the appellant would pay interest on overdue accounts let alone at the rate of 24% per annum. The evidence to make such a finding does not exist. I would not be prepared to imply such an agreement as being reasonably necessary to give efficacy to the contract between the parties.

Secondly, there was no evidence at trial that providers of professional services invariably charge interest on overdue accounts and certainly not at the rate of 24% per annum. Therefore, this Court is not in a position to make a finding that it is a business usage or a custom in the professions to charge interest at such a rate

on overdue accounts nor is the practice so well known that the court could take judicial notice.

I reject the position taken by the respondent's counsel on the following matters:

(i) that the respondent's claim for interest was not an issue at trial and, therefore, should not be so on appeal. The respondent expressly claimed in the statement of claim a contractual right to interest at 24% per annum. The appellant put him to strict proof of his claim.

This was clearly an issue.

(ii) that interest may be a method of compensating a successful plaintiff for the fact that an award of party and party costs to a plaintiff does not reimburse the plaintiff for his actual solicitor and client costs.

There is no support anywhere for such a proposition.

(iii) that the fact that the appellant agreed to drop his defence that the action was not brought within the six year period required under the **Limitations of Actions Act** prevents the court considering if

interest should be reduced for any part of the six year period from the time the cause of action arose in 1988 until the action was started in 1994.

In my opinion, the order of the court made prior to the trial, which was made on consent, deleting the limitation defence has no effect other than to prevent the appellant from raising that defence at trial.

(iv) that there was evidence before the trial judge that justified his award of interest at 24% for six years and 12% for three years.

I have previously indicated the overriding error made by the trial judge in his assessment of the evidence.

(v) that the trial judge did not apply a wrong principle of law nor did his award constitute a patent injustice.

The trial judge erred in law in that he misapprehended the facts and this had the grave consequence of his concluding that he ought to award the respondent interest as claimed except for the reduction he imposed pursuant to s. 41(k). The interest award at 24% for six years plus 12% for three years is a patent injustice. It far exceeds what would be a reasonable rate of pre-judgment interest

for the period 1988 to 1997.

(vi) that we should consider as significant the acceptance by the trial judge of the submission by counsel for the respondent that the trial was a waste of time.

The respondent was claiming not only to be paid for his work ($11,145.00) but 24% compound interest for nine years for a total claim of about $94,000.00. The appellant was of the opinion the work was not done to an acceptable standard. The fact that the appellant acted for himself led to an inadequate cross-examination of Mr. Robb on the interest issue and an inadequate submission to the trial judge by the appellant on that issue. There was no merit in the appellant's claim that the respondent's work was negligently done. After reviewing the transcript I am satisfied that the appellant did not appreciate the difficulties that exist in dealing with government departments who must approve different aspects of a subdivision proposal and this led him to question Mr. Robb's competency. This misunderstanding by the appellant coupled with the fact that he made no submission on the interest issue probably led the trial judge to make the statement that the trial was a waste of time. That said, in my opinion this remark of the trial judge is totally irrelevant to the issues raised on the appeal.

Summary on Issues 2 and 3

The trial judge made overriding errors in his assessment of the evidence relating to the respondent's claim for interest. This caused him to err in the exercise of his discretion under s. 41(k). It is obvious that he considered the respondent had a *prima facie* entitlement to interest at 24% per annum. I draw this inference based on his comments that he would have awarded interest in the range of 10-12% per annum; the interest award resulted in a patent injustice to the appellant.

I would allow the appeal on grounds 2 and 3 and will exercise the power conferred on this Court to do what the trial judge ought to have done in exercising the power conferred on the Court by s. 41(i) and (k) of the **Judicature Act**. In order to do this, it is necessary to set out what the trial judge actually held with respect to the respondent's claim. I have already set out the trial judge's decision in which he reduced the respondent's claim from $11,145.00 to $10,645.00. After determining the amount owing for the work, the trial judge directed his attention to the respondent's interest claim. The trial judge immediately rejected the respondent's claim for compound interest. It is apparently from the transcript that the interest claim as allowed by the trial judge was not based on the sum of $10,645.00 found to be owing but on $12,440.20, which included interest, apparently at 24%, from the date of the respective invoices that were outstanding from the time the work commenced until September 1st, 1988. I have previously set out the method of calculation of interest and the amount for which judgment should be given as described to the Court by counsel for the respondent.

The order taken out on November 28th, 1997, contained the following relevant paragraph:

> **IT IS ORDERED** that the Defendant, Mr. Charles F. Wilson, pay to the Plaintiff, the sum of $34,832.50, plus costs in the amount of $3,750.00 pursuant to Tariff A, Scale 3, plus disbursements in the amount of $900 to be taxed, for a total of $39,482.50 payable to the Plaintiff.

The trial judge apparently concluded that the respondent was entitled to interest at 24% on each invoice from the date it was rendered; he accepted counsel's calculation of the interest due up to September 1st, 1988. Such a basis for calculating an interest award would be consistent with his acceptance that the respondent had a contractual entitlement to interest at 24% per annum on overdue accounts. However, as I have concluded that his award must be set aside, I will calculate interest on the basis of the amount of the respondent's claim as allowed by the trial judge ($10,645.00). Technically speaking, under s. 41(i) of the **Judicature Act**, the respondent would be entitled to an award of interest from the date the cause of action arose for each unpaid invoice. To make that calculation is far too complicated; I will use a starting date of September 1st, 1988.

The interest issue ought to be decided by the application of s. 41(i) and (k) to the facts. The relevant facts are as follows: the cause of action arose in 1988; the action was commenced in 1994 within the six year period dictated by the **Limitation of Actions Act**; the trial was held in November 1997, about 3 years after the action was commenced. Counsel for the appellant concedes that a period of three years

between the commencement of an action and it being tried is not unreasonable. I tend to agree but one must always consider the nature of the action in question and all the circumstances. In this proceeding a total of nine years had passed before the action was tried.

The object of s. 41(i) of the **Judicature Act** is to require the court to award interest so as to compensate a plaintiff for the fact that the plaintiff has been deprived of the money eventually awarded from the time the claim arose until the date of judgment after trial or subsequent to appeal. Without this legislation defendants were often able to delay paying debts or damage claims with impunity. Under s. 41(i) the Court has a very broad discretion as to the rate of interest. As a general rule, courts assess what would have been the range of interest rates that could have been earned on the money had it been paid before the date of judgment. In this case, the trial judge considered the range to be between 10 and 12% for the period 1988 to 1997.

It is arguable that a delay in commencing an action for debt until just prior to the expiration of the limitation period is not an undue delay for which a plaintiff ought to be responsible. The argument has some attraction. However, the court ought to consider the facts and circumstances of each case. In this case the final account to the appellant was rendered in September, 1988. The appellant had made it clear to the respondent in May of 1988 that he was not satisfied with the respondent's work. The last payment on account was in February of 1988. By

September, 1988 the respondent was issuing statements of account for the balance claiming interest at 24% per annum. The accounts were not being paid. It must have been obvious to the respondent that the account was not going to be paid yet the respondent waited almost six years to commence an action. Maybe the principal of the respondent company was comforted in thinking he was earning compound interest at 24%.

There will be circumstances in cases that would warrant a delay of six years in commencing an action but, in my opinion, this is not one of them. I would not infer from the evidence nor from the scope of the claim put forward that the respondent delayed the commencement of the action out of a sense of compassion for the appellant. I find that there was an undue delay in commencement of this action. I am satisfied the respondent is responsible for this undue delay in the litigation.

The action ought to have been tried within four years of 1988. Pursuant to s. 41(k)(iii) I would reduce the period for which interest is awarded to four years. There is no evidence that the respondent was paying interest charges to a credit grantor by reason of the failure of the appellant to have paid the account in 1988. Counsel did not provide evidence respecting rates of interest as required by Practice Memorandum No. 7. The average return on term deposits for a one year period for the period September 1988 to September 1992 was in the range of 9 to 10%. In my opinion 10% would be a fit rate at which to award interest pursuant to s. 41(i) of the

Judicature Act. I would award this interest on the sum of $10,645.00. being the amount of the debt found due. Pursuant to s. 41(k)(iii) I have reduced the period for which it is awarded to four years being a reasonable time in which to have had this matter litigated. Therefore, interest in the amount of $4,258.00 shall be included in the judgment for a total judgment of $14,903.00.

Costs

The order for judgment issued by the trial judge was for the sum of $34,832.50 plus costs in the amount of $3,750.00 (Tariff A, Scale 3) and disbursements of $900.00 for a total judgment of $39,482.50. The award of costs was made on the basis of the respondent being substantially successful at trial and on the amount of the award.

The award has been reduced from approximately $35,000.00 to just under $15,000.00. While I am of the opinion the respondent is still entitled to the costs of the trial as the trial time was, in the main, taken up with evidence that related to the performance of the services by the respondent which were challenged by the appellant, I would reduce the costs award at trial to reflect the amount of the claim I have allowed. Applying Tariff A, Scale 3 the costs award at trial should be reduced to $2,250.00 plus disbursements of $900.00.

As to costs on the appeal, the appellant has been substantially successful

and he should have costs of $1,000.00 plus disbursements.

Conclusion

I would set aside the order of the trial judge and would make the following order:

IT IS HEREBY ORDERED

(i) that the appeal is allowed and the Order of the trial judge dated November 28th, 1997, is set aside;

(ii) that the appellant, Charles F. Wilson, pay to the respondent, K.W. Robb & Associates Limited the sum of $14,903.00 plus costs in the amount of $2,250.00 plus disbursements at trial of $900.00 for a total of $18,053.00 which shall bear interest at the rate of 5% per annum from December 1st, 1997 to the date of payment;

(iii) that the respondent, K.W.Robb & Associates Limited pay to the appellant, Charles F. Wilson, costs of the appeal in the amount of $1,000.00 plus disbursements to be taxed;

(iv) the appellant may set off the amount of the award of costs as provided for in sub paragraph (iii) against the amounts owing by the appellant to the respondent in sub paragraph (ii).

IT IS FURTHER ORDERED that the if appellant has paid anything on the Order for Judgment of November 28, 1997, that he be given credit for such payment in calculating any amount to be paid under the terms of this

Order.

Hallett, J.A.

Concurred in:

Hart, J.A.

Pugsley, J.A.

C.A. No. 143981

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

CHARLES F. WILSON

Appellant

- and -

K.W. ROBB & ASSOCIATES LIMITED, a body corporate

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.