

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Industrial Alliance Insurance and Financial Services Inc. v. Brine*,  
2016 NSCA 3

**Date:** 20160202

**Docket:** CA 431538

**Registry:** Halifax

**Between:**

Industrial Alliance Insurance and Financial Services Inc.

Appellant

Respondent by Cross-Appeal

v.

Bruce Brine

Respondent

Appellant by Cross-Appeal

**Judges:** Fichaud, Oland and Scanlan, JJ.A.

**Heard:** Submissions by Written Briefs, in Halifax, Nova Scotia

**Held:** *Supplementary decision* on trial costs and calculation of interest.

**Counsel:** Michelle C. Awad, Q.C., and Danielle Kershaw for the appellant, respondent by cross-appeal  
Barry Mason, Q.C., and Glenn Jones for the respondent, appellant by cross-appeal

**Decision:**

[1] On November 17, 2015, this Court rendered a decision in this appeal (2015 NSCA 104). At ¶ 242 this Court invited the parties to make submissions on the issues of pre-judgment interest and costs at trial as the trial judge is no longer available to resolve any dispute on trial costs. Since that time the appellant, National Life Assurance Company of Canada, now Industrial Alliance Insurance and Financial Services Inc. (“National”) has also asked this Court to calculate the amounts due to National as a result of payments it made to Mr. Brine pursuant to the order in the original trial decision. This calculation requires a calculation of interest owing to the parties at relevant dates.

[2] First, I will deal with the issue of costs at trial as it is necessary that this Court first establish the net amounts due by the respective parties before interest amounts can be calculated.

**Costs at trial**

[3] The original trial decision directed that National pay Mr. Brine for:

breach of contract	\$62,036.81
mental distress	\$30,000.00
aggravated damages	\$150,000.00
punitive damages	\$500,000.00
Total:	\$742,036.81
Less a credit on the counterclaim of:	\$210,000.00
Net owing to Mr. Brine	\$532,036.81

In addition, the trial judge’s Order directed that National pay Mr. Brine pre-judgment interest of \$53,177.66 and trial costs of \$106,962.21. The total damages, pre-judgment interest and costs was \$692,177.68.

[4] On appeal, Mr. Brine was awarded: \$62,036.81 for breach of contract, \$90,000 for mental distress caused by breach of contract, including the breaches of the contractual duty of good faith, and \$60,000.00 for punitive damages. The total to Mr. Brine on appeal was \$212,036.81. The award to National in relation to the counterclaim remained unchanged at \$210,000.00. The result was a net entitlement to Mr. Brine of **\$2,036.81**.

[5] Mr. Brine has argued that there should be no adjustment to the costs and pre-judgment interest amounts negotiated after the original trial, suggesting that the post-trial agreement related to pre-judgment interest and costs was binding and settled that issue once and for all. I see nothing in the materials submitted to this Court that convinces me the parties had intended to bind themselves to the amounts agreed in terms of pre-judgment interest and trial costs no matter what the outcome of the appeal. On October 28, 2014, Justice Fichaud, in Chambers issued an order, to which the parties' counsel had signed their consent. Regarding interim payments pending appeal, the order states that:

the parties agreement to [...] payments reflected in this Order is without prejudice to any arguments which either party might make in relation to the Appeal and Cross-Appeal of Justice Bourgeois' August 18, 2014 Order and is without prejudice to any requirement for repayment which may result from the final determination of the within Appeal and Cross-Appeal.

[6] I am satisfied that costs at trial should be calculated based on the results. On appeal there was a substantial adjustment to the amounts recovered by the respective parties. National suggests that Mr. Brine should be entitled to costs in the total amount of \$17,000.00 based on Tariff A under the Nova Scotia *Civil Procedure Rules*. This would include \$2,000 per day for each day of trial. Although the \$17,000.00 amount National proposes references Tariff A, it does not include a 25% premium that the parties negotiated after the original trial decision was rendered. National submits that premium is no longer warranted in view of the result on appeal.

[7] Although I agree that the \$17,000.00 plus disbursements of \$12,977.21 would normally be the costs awarded through a straight application of Tariff A, I am not satisfied that is appropriate in this case.

[8] A substantial portion of the recovery by Mr. Brine resulted from what the trial judge found to be breaches of the insurer's duty of good faith, warranting the award of punitive damages. This was based on various actions of National representatives as they dealt with Mr. Brine over the years. I am satisfied this aspect of Mr. Brine's claim warrants increased costs through the application of something other than Tariff A. It would be difficult, if not impossible, to separate the actual costs incurred to prove that aspect of the claim. I am satisfied this is a case that warrants an exercise of the Court's discretion through the application of Rule 77.08. Costs should be awarded as a lump sum. I would order costs at trial in the amount of \$40,000, plus trial disbursements in the amount of \$12,977.21. This

amount of \$52,977.21 replaces the trial costs ordered by the trial judge of \$106,962.21.

### Calculation of Interest

[9] The order issued by Fichaud, J.A. in Chambers on October 28, 2014, partially stayed the trial judge's order. After the partial stay, National made payments to Mr. Brine that represented the un-stayed portion of the trial judgment. The total of those payments exceeds the net recovery to which Mr. Brine is entitled after the decision of this Court. The overpayments must be repaid by Mr. Brine, with interest. The parties had agreed on an interest rate of 3% in their earlier negotiations related to pre-trial and post-trial interest. I am satisfied that it is an appropriate rate of interest.

[10] As I have noted, there were various amounts due or paid at different dates. The result is that at some points interest was due to Mr. Brine and at other times interest was due to National. I start by noting that, after adjustments on appeal, including the costs, I have determined above, Mr. Brine was owed \$64,991.69:

Net damages	\$2,036.81
Net PJI	\$9,977.67*
Disbursements	\$12,977.21
Trial Costs	\$40,000.00
Total:	\$64,991.69

(\*National suggested by memo to this court dated December 1, 2015 that the appropriate pre-judgment interest calculation was as follows. Mr. Brine was owed interest in the amount of \$72,977.67 less National's pre-judgment interest of \$63,000 resulting in net pre-judgment interest in the amount of **\$9,977.67** PJI due to Mr. Brine. Mr. Brine has not challenged that calculation, only arguing that there should be no change because the negotiations on costs and interest are binding even after appeal. I have already indicated that I reject that argument. This means the net pre-judgment interest of \$9,977.67 replaces the amount ordered by the trial judge of \$53,177.66.)

[11] To the \$64,991.69 owed to Mr. Brine I add interest from the date of the original trial decision at 3% per annum. With a per diem is \$5.34 the amount owed is then:

Interest August 8, 2014 to October 28, 2014	\$432.54
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Sub-Total: \$65,424.23

On October 28, 2014 National paid Mr. Brine over \$133,000. A month later, and during each of the following 11 months but not at precise monthly intervals, it paid him \$7,000. The calculations below show that, in total, National overpaid Mr. Brine \$152,552.98:

October 28, 2014 payment	\$133,977.21
Sub-total	(\$68,552.98) Overpayment
November 28, 2014 payment	\$7,000.00
Sub-total	(\$75,552.98)
Add 11 additional monthly payments of \$7,000.00 per month	\$77,000.00
Sub-total	(\$152,552.98) Overpayment

[12] I calculate interest on the original \$68,552.98 overpayment from October 28, 2014 to January 28, 2016 in the amount of **\$2,574.96**. For ease of calculation, for the remainder of the interest calculations I have used a payment date of the 28<sup>th</sup> of each month, recognizing that there was some slight variation on the payment dates. The interest on the monthly payments of \$7,000.00 starting on November 28, 2014, I calculated using a per diem of approximately \$17.50 per month for each \$7,000 from the date of each \$7,000 payment. The total amount of interest related to the various \$7,000 payments is **\$1,785.00**.

[13] The total interest outstanding to January 28, 2016 is \$4,359.96. I add this to the overpayment of principal (\$152,552.98). The total amount due from Mr. Brine to National is \$156,912.94 as of January 28, 2016.

[14] As noted in the decision and order of November 17, 2015, Mr. Brine is also to pay costs related to this appeal in the amount of \$10,000 inclusive of disbursements.

Scanlan, J.A.

Concurring:

Fichaud, J.A.

Oland, J.A.