

IN THE SUPREME COURT OF NOVA SCOTIA  
**Citation:** White v. E.B.F. Manufacturing Limited, 2005NSSC68

**Date:** 20050331  
**Docket:** SH 163572  
**Registry:** Halifax

**Between:**

Eric White

Plaintiff/Defendant  
by Counterclaim

v.

E.B.F. Manufacturing Limited

Defendant/Plaintiff  
by Counterclaim

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** March 1, 2005, in Halifax, Nova Scotia

**Counsel:** Colin D. Piercey for the plaintiff/defendant by  
Counterclaim  
Michael J. Wood, Q.C., for the defendant/plaintiff by  
counterclaim

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**DECISION ON COSTS and INTEREST**

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**By the Court:**

[1] On the 7<sup>th</sup> day of December, 2004 an order was granted which reflected a decision delivered by me on the 10<sup>th</sup> day of September, 2004. The decision followed a trial held before me over an eight day period beginning on October 6, 2003 and ending on October 21, 2003.

- [2] Counsel for the parties had difficulty agreeing on the content of the Order but eventually an Order was issued leaving interest on royalties to be agreed upon by the parties, failing which the matter could be brought back for the court to decide. [See paragraph 8 of the Order].
- [3] Since the parties could not agree on costs the Order allowed counsel to make further submissions on this issue [see paragraph 13 of the Order].
- [4] Both issues came before me on March 1, 2005.

**ISSUE # 1:** What is the appropriate amount of prejudgment interest payable to the plaintiff on unpaid royalties?

- [5] I would like to first deal with the issue of interest payable on royalties found to be owed to the plaintiff by the defendant.
- [6] Paragraph 41 of my decision provided for the payment of interest. It states:
- [41] .... White is also entitled to interest on all unpaid royalties at a rate equal to the average interest that EBFML would have had to pay on any monies borrowed from its bank during the period from its inception in September, 1997 up to the present day. Interest is not to be compounded.

[7] Counsel for the defendant quite correctly pointed out that if a court exercises its discretion to award prejudgment interest then the rate should be based on a reasonable rate of return on the investment of the money awarded rather than a rate charged on borrowed funds.

[8] As support for this position counsel referred to the case of **K.W. Robb & Associates Ltd.** v. **Wilson** (1998), 169 N.S.R. (2d) 201 (NSCA). The Honourable Justice Doane Hallett stated at page 211, paragraph 44 the following:

[44] 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 the time and most importantly whether the rates should be the rate a party would have to pay to borrow money for the relevant period for 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 prejudgement 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 prejudgment interest was to be calculated might be an appropriate rate.

- [9] My initial decision regarding interest on unpaid royalties failed to comply with Practice Memorandum No. 7. Based on the Nova Scotia Court of Appeal decision in **Lunenburg v. Public Service Commission of Bridgewater** (1983), 59 N.S.R. (2d) 23, the court is entitled to change its decision at any time prior to the Order being entered. As previously indicated, although an Order had already been issued it left open for agreement by the parties the rate of interest on unpaid royalties, failing which it would be open to either party to bring the matter back to the court for a resolution. As such, I amend my decision to order interest not at the average rate paid by the defendant on borrowed funds but rather on the basis of a reasonable rate of return on the investment of the money had the plaintiff received it when it was due to him. The average rate based on the investment approach as calculated by the defendant's counsel using information obtained on the Bank of Canada's

website for one year treasury bills as well as two year benchmark bonds is 4.21%. The rate paid on Federal Government treasury bills and bonds are very secure and, hence, the rate of return is normally slightly below the average for similar types of investments. I will therefore set the interest rate to be paid at 5% which is to be applied on the monthly amounts found owing to the plaintiff for unpaid royalties. Interest is not to be compounded.

**ISSUE # 2:** What, if any, costs should be awarded and to whom?

[10] My decision left it to the parties to agree on costs failing which they were to file written submissions. I have had the benefit of both written and oral submissions of counsel for which I am most appreciative.

[11] The plaintiff was not successful in establishing repudiation of the license agreement with the defendant. He was, however, successful in obtaining judgment against the defendant for all unpaid royalties owing to him since the defendant company began operations in September, 1997. The plaintiff was also successful in a number of other aspects of his claim.

[12] In addition, the defendant initially filed a counterclaim which was only discontinued a few months prior to the commencement of trial. The plaintiff was forced to defend himself against this counterclaim thus incurring additional

costs, albeit not as much as he would have had to incur should this aspect of the matter have proceeded to trial. But nonetheless expense was incurred and is a factor to be considered in awarding costs unless there was an agreement to have the counterclaim withdrawn without costs to either party. That was not the case in this proceeding.

[13] Costs normally follow the event and are determined in accordance with *Civil Procedure Rule 63*. It is clear that the court has the ultimate discretion to award costs, however, the successful litigant would normally expect to receive some compensation for the expense incurred in advancing a claim or defending against a claim brought against him or her or it, as the case may be.

[14] In this particular case, although the plaintiff was not successful in its claim for repudiation, he was certainly successful both in terms of his claim for the payment of royalties and in defending against the counterclaim of the defendant. The plaintiff was clearly the successful party. As such I exercise my discretion in awarding costs to the plaintiff.

[15] Until the party appointed to calculate royalties completes her work it is impossible to determine the amount involved. This, in effect, limits use of the Tariffs as a guide for determining costs.

[16] It is therefore an appropriate case for ordering lump sum costs under *Civil Procedure Rule* 63.02. I must also take into consideration *Civil Procedure Rule* 40.03 as it pertains to the discontinued counterclaim, while not losing sight of the defendant's success in arguing against repudiation.

[17] This was a lengthy and complex case. It took approximately eight days of trial. There were also numerous pre-trial applications. Normally I would be inclined to order costs in the range of \$35,000.00 to \$40,000.00; however, taking into consideration the limited success of the defendant regarding the issue of repudiation I am prepared to reduce the amount to be paid by the defendant to the plaintiff to \$25,000.00 along with disbursements to be taxed. The defendant will have 60 days in which to pay this amount once disbursements have been determined.

J.