**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Christopher v. United Gulf Developments Ltd., 2009 NSSC 92

**Date:** 20090320
**Docket:** Hfx.No. 296534
**Registry:** Halifax

**Between:**

Terry Christopher and Elizabeth Christopher

Plaintiffs/Defendants
By Counterclaim

- and -

United Gulf Developments Limited, a body corporate
with an office in Halifax, Province of Nova Scotia

Defendant/Plaintiff
By Counterclaim

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DECISION ON COSTS

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| **Judge:** | The Honourable Justice Kevin Coady |
| **Heard:** | January 16, 2009, in Halifax, Nova Scotia |
| **Written Submissions:** | February 24 & 25, 2009 |
| **Decision:** | March 20, 2009 |
| **Counsel:** | John Keith, for the plaintiffs<br>David Farrar, QC, for the defendants |

**By the Court**:

[1] The decision on the merits was issued on February 12, 2009. The Christophers were completely successful on the action. United Gulf's counterclaim failed in its entirety. The parties have provided written submissions on the issues of pre-judgment interest and costs.

**PRE-JUDGMENT INTEREST:**

[2] United Gulf accepts that the Christophers are entitled to pre-judgment interest on $150,000 and that the period for calculation of same is from August 10, 2008 to February 12, 2009.

[3] The Christophers argue that the 2009 *Civil Procedure Rules* apply and that *Rule* 70.07 is determinative of this issue. *Civil Procedure Rule* 70.07 states as follows:

> "The rate and calculation to be used for prejudgment interest on a liquidated claim is five percent a year calculated simply, unless a party satisfies a judge that the rate or calculation should be otherwise."

[4] The Christophers submit that the burden is on United Gulf to establish that this rate should not apply. The Christophers seek $3,821.25 in pre-judgment interest for the 186 day period.

[5] United Gulf submits that pre-judgment interest in this matter should be calculated pursuant to the direction provided by Practice Memorandum 7 of the *1972 Rules*. This memorandum was summarized by Hallet J.A. in *Robb (K.W.) & Associates v. Wilson* (1998), 169 N.S.R. (2d) 201 as follows:

> Under s.41(i) [of the Judicature Act] 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 prejudgment 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.

[6] Obviously the first issue to be resolved is which approach is to be utilized.

[7] The "new" *Rule* 92 addresses the transition from the *1972 Rules* to the *2009 Rules*. *Rule* 92.02(1) states that "these *Rules* apply to all steps taken after January

1, 2009 in an action started before January 1, 2009 unless this *Rule* 92 provides or a judge orders otherwise." *Rule* 92.04 states that "each of the following steps that is outstanding in an action on January 1, 2009 must be completed under the *Nova Scotia Civil Procedure Rules (1972)* unless the parties agree or a judge orders otherwise: (b) an Interlocutory Application."

[8] This action was commenced on May 27, 2008 and the application for summary judgment filed on September 26, 2008. Arguments were heard on January 16, 2009 and a decision rendered on February 12, 2009. I take the view that the issue of prejudgment interest is part of the summary judgment application, and, as such, is governed by the practice associated with the *1972 Rules*.

[9] Practice Memorandum 7 provides that prejudgment interest is to be determined according to the average rates on one or two year term deposit treasury bills for the relevant period. United Gulf has provided table evidence as required by paragraph 2(b) of the Practice Memorandum. That evidence indicates that the average daily rate on one year term deposit treasury bills between August 10, 2008 and February 12, 2009 was 1.76 percent. I have no evidence on 2 year term

deposits. I accept this evidence and I award the Christophers $1,245.95 in prejudgment interest.

**COSTS:**

[10] This application was heard in chambers on January 16, 2009. It was originally scheduled to be heard on January 6, 2009. This court adjourned the application as a result of the Christophers providing the court and United Gulf with lengthy written submissions on the morning of January 6. I attach no fault to United Gulf for this adjournment. Mr. Keith defended the late filing by asserting that Mr. Farrar was late in delivering his submissions and that the holidays impeded Mr. Keith from responding sooner. I take the view that the adjournment factor should be a wash as between the parties and that costs should be based on a one-half day application.

[11] The Christophers are clearly entitled to a costs award as they were entirely successful on the action and the counterclaim. They argue that Tariff "C" applies (Interlocutory proceedings) and that $1,500.00 is appropriate. They further argue

that because this application disposed of all issues, they are entitled to a multiplier of three for a total award of $6,000.00.

[12] United Gulf argues that the appropriate range of costs under Tariff "C" is $750.00 to $1,000.00 and that the proper multiplier is two. This approach would result in a total costs award of between $1,500.00 and $2,000.00.

[13] The court reserves a general discretion to fix costs. The tariff serves as a guide.

[14] In Orkin's The Law of Costs (2nd ed) the exercise of this discretion is discussed at page 2-11:

> The discretion is a judicial one to be exercised according to the circumstances of each particular case and based upon material before the court. The discretion is that of the trial judge and its exercise is not to be referred or delegated; nor can it be fettered by any consent of the parties, even though great weight should be given to such consent.
>
> The principles that should be observed in exercising discretion as to costs have been defined as follows:
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> > First, the principle of indemnity is a paramount consideration. Secondly, the courts must approach the matter on the basis that

> encourages settlement of all actions from the outset. Thirdly, the court must discourage actions and defences which are frivolous. Fourthly, the court must discourage unnecessary steps in the litigation.

> The view has been expressed that costs should not be imposed as a matter of arbitrary or capricious practice by courts, but there should be a consistency of pattern.

[15] I am awarding the Christophers $1,000.00 in Tariff C basic costs for the application.

[16] The Tariff sets out three factors to consider when assessing an appropriate multiplier:

- The complexity of the matter
- The importance of the matter to the parties
- The amount of effort involved in preparing for and conducting the application

[17] I do not find that this was a particularly complex application. The principles of summary judgment are well established. The analysis involved straight forward contractual concepts of breach and repudiation. Any complexity resulted from a lack of focus in expanding the principles at play.

[18] I accept that the $150,000.00 was important to the Christophers and that the delay in resolving this dispute was disruptive to their lives. However, on the other hand, I am at a loss why they would invest their life savings in this manner.

[19] I do not conclude that this application required significantly greater effort than most summary judgment applications.

[20] I am exercising my discretion and setting the multiplier factor at three for a total costs award of $3,000.00 plus prejudgment interest in the amount of $1,245.95.

J.