

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Sysco Canada Inc. v. Joe's Warehouse Ltd., 2011 NSSC 378

**Date:** 20111018

**Docket:** Hfx. No. 326282

**Registry:** Halifax

**Between:**

Sysco Canada Inc.

Plaintiff

v.

Joe's Warehouse Limited

Defendant

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**DECISION ON COSTS**

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**Judge:** The Honourable Justice Suzanne M. Hood

**Heard:** Via written submissions:  
by the *Defendant* on August 23, 2011  
by the *Plaintiff* on September 15, 2011

**Written Decision:** October 18, 2011

**Counsel:** Tim Hill and Diana Reivaj for the Plaintiff  
Ralph Ripley for the Defendant

**By the Court:**

[1] The defendant was wholly successful at trial and is entitled to its costs. In addition, it made an offer of settlement which was rejected.

[2] The defendant submits the “amount involved” is the claim of \$78,985.21 plus pre-judgment interest. The plaintiff refers to *Hines v. Englund* (1993), 124 N.S.R. (2d) 156 (N.S.S.C.) as authority for the proposition that, in most cases, pre-judgment interest should not be included in the amount involved.

[3] Stewart, J. said in para. 25:

25 A determination of the ‘amount involved’ for purposes of applying a scale of costs was recently considered by Gruchy, J. in *Skeffington v. McDonough and Vanenburg* (1992), 114 n.S.R. (2d) 181 (TD), where at p. 182, he rejected the inclusion of pre-judgment interest for the following reasons:

The total interest award is the product of the quantum of damages, interest rate and time. The sum of that award increases as time is expended to final judgment. The imposition of costs on a figure including interest therefore would have an exponential effect on the overall award.

That is not to say that such an award might not be appropriate in some cases. A trial judge must examine and be mindful of the totality of the award. The judgment reflects variables including such factors as interest rate and time.

[4] I am not satisfied that this is an appropriate case in which to include pre-judgment interest in the “amount involved.”

[5] Accordingly, the “amount involved” is \$78,985.21. based upon Tariff A that results in a costs award of \$7,313.00 (Scale 1), \$9,750.00 (Scale 2) or \$12,188.00 (Scale 3). Scale 2 is the basic scale.

[6] The plaintiff submits that something less than Scale 2 costs yet something more than Scale 1 costs should be awarded. Plaintiff’s counsel says this is because of: narrowing of the issues by counsel; brief witness examinations; no experts; not calling several witnesses; presentation of a joint exhibit book. He submits this was a simple trial.

[7] The defendant’s counsel, on the other hand, submits Scale 2 should be used.

[8] I conclude, for the reasons put forward by plaintiff’s counsel, that an amount half-way between Scales 1 and 2 is the appropriate amount. That amount is \$8531.50.

[9] To the above amount, the tariffs provide for an additional amount of \$2,000.00 for each day of trial. This was a one day trial.

[10] The defendant made an offer to settle, pursuant to *Rule 4.08*, of \$1.00 all-inclusive. The defendant therefore refers to *Rule 10.09* which provides:

**10.09 - Costs if formal offer not accepted**

(1) A party obtains a “favourable judgment” when each of the following have occurred:

(a) the party delivers a formal offer to settle an action, or a counterclaim, crossclaim, or third party claim, at least one week before a trial;

(b) the offer is not withdrawn or accepted;

(c) a judgment is given providing the other party with a result no better than that party would have received by accepting the offer.

(2) A judge may award costs to a party who starts or who successfully defends a proceeding and obtains a favourable judgment, in an amount based on the tariffs increased by one of the following percentages:

(a) one hundred percent, if the offer is made less than twenty-five days after pleadings close;

[11] In this case, the offer to settle was made less than twenty-five days after pleadings closed. The defendant therefore says the costs award should be increased by one hundred percent.

[12] The plaintiff refers to *Rule 10.03* which provides:

**10.03 - Settlement offers and costs**

A judge who determines costs may take into consideration a written offer of settlement made formally under this Rule or otherwise, unless the offer was made at a settlement conference or under an agreement that the offer would not be admissible in relation to costs.

[13] I may consider the offer of settlement in determining an appropriate costs award. Similar wording is contained in *Rule 10.08(2)*: “A judge may award costs ... .”

[14] The plaintiff submits it was not unreasonable at such an early stage to reject an offer of \$1.00 which it says was “basically a call to forego the opportunity for the Plaintiff to have their matter heard before the court in exchange for no monetary benefit ...”

[15] Although it turns out that the defendant's offer was, in essence, the result at trial, I conclude it was not unreasonable for the plaintiff not to accept it at that time. After discoveries were held, it may have been reasonable for the plaintiff to have reconsidered its rejection of the offer.

[16] In my view, the award of costs should be increased by seventy-five percent. Accordingly, the costs I award are \$18,430.13.

[17] To that amount is to be added the defendant's disbursements as evidenced by its counsel's affidavit. The plaintiff took no issue with respect to the amount. Disbursements are awarded in the amount of \$2,072.47.

Hood, J.