SUPREME COURT OF NOVA SCOTIA

Citation: Ackermann v. Kings Mutual Insurance Company, 2012 NSSC 3

Date: (20120103)
Docket: Tru. No. 230417
Registry: Truro

Between:

Adrian Ackermann and Kelly Ackermann

Plaintiffs

v.

The Kings Mutual Insurance Company

Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	November 25, 2011, in Halifax, Nova Scotia
Counsel:	Robert Pineo, for the plaintiffs James Chipman, Q.C. and Kate Marshall, for the defendant

Introduction

[1] This is a determination of costs. The matter was heard by a judge and jury in Truro in June 2009. The jury awarded damages of $320,000, including $55,000 in punitive damages. The defendant's appeal of the award of punitive damages was dismissed by the Nova Scotia Court of Appeal. The costs relating to the appeal are not before me.

Solicitor-client Costs

[2] The plaintiffs seek costs on a solicitor-client basis. They allege that the defendant acted in a callous and arbitrary manner throughout the investigation, and that if the matter had been properly investigated, it is likely that litigation or trial would have been avoided. They further allege that the conduct of the defendant was reprehensible and that it amounted to an abuse of process. The plaintiffs rely on the factors that the jury considered in awarding punitive damages as the basis for seeking solicitor-client costs. They submit that, despite finding that Mr. Ackermann was honest, cooperative and forthright during the investigation, the defendant disregarded his evidence of the pre-and post-hurricane Juan condition of the barn, as well as the timing and extent of the damage. Three witnesses observed the barn both before and

after the hurricane, and provided their observations to the defendant. However, the defendant failed to supply them to its adjuster.

[3] The defendant's inspector, Mr. Forsythe, had inspected the barn several months after the hurricane, producing a report that showed substantial damage to the barn when compared to the report that he produced several months before the hurricane. The post-hurricane report was withheld from both the adjuster and the defendant's expert, and from the plaintiffs until it was specifically requested as an undertaking at discovery. The plaintiffs also claim that the defendant arbitrarily dismissed the claim, as demonstrated by the attitude and gratuitous comments made about the plaintiff's expert and legal counsel by the adjuster and by the expert on behalf of the defendant.

[4] The defendant says there is no basis to award solicitor-client costs, and that to do so would be to levy a punitive award twice for the same conduct. The defendant takes the position that there was no arbitrary conduct on its part, and that with all of the information available it is likely that it would still have litigated the matter, given the expert evidence it offered at trial through Mr. Archie Frost.

[5] Rule 77.01(1)(b) of the Civil Procedure Rules permits the court to award costs on a solicitor-client basis in exceptional circumstances. It is well-established that solicitor-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young* v. *Young*, [1993] 4 S.C.R. 3, at para. 251. The defendant (citing Orkin's Law of Costs at §219) submits that an award of punitive damages, by itself, does not demand an award of solicitor-client costs. Orkin offers the view that "the two issues are legally distinct or, putting it another way, the issue of indemnifying a plaintiff for legal costs is sufficiently distinct from punishing a defendant for misconduct that an award of punitive damages should not automatically preclude the awarding of solicitor-and-client costs." I note Orkin's further comment, in the same sentence, that "[a]s has been said in this context, the awarding of costs is a discretionary matter which by definition is not governed by a set of rigid rules." Consequently, depending on the circumstances, courts have not hesitated to award solicitor-client costs in addition to exemplary, aggravated, or punitive damages. Conversely, to deny the plaintiff punitive damages does not, in itself, justify the denial of solicitor-client costs: the issues are distinct.

[6] In *Goncalves* v. *Martins*, 2002 BCSC 878, 2002 CarswellBC 1384, affirmed at 2003 BCCA 288, the plaintiff, who was suffering from reduced mental capacity and had difficulty fully comprehending financial matters, was induced to transfer $23,941 to the defendants, and, at the defendant's suggestion, gave a mortgage of $31,200 to the bank. Of this amount, the defendants appropriated $13,000, and caused her to lose $6819 in mortgage expenses. In addition to awarding punitive damages of $3000 against the defendants, Clancy J. awarded special costs and followed *Smart* v. *McCall Pontiac Buick Ltd.*, 1999 CarswellBC 2057, [1999] B.C.J. No. 2111 (B.C.S.C.), where groundless allegations of dishonesty were made against the plaintiff. Clancy J. continued, at paras. 55-58:

> 55 In *Fullerton* v. *Matsqui* (District) (1992), 12 C.P.C. (3d) 319 (B.C. C.A.) the Court held at para. 23:
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> > Special costs, or solicitor-and-client costs are therefore awarded when a court seeks to dissociate itself from some misconduct. Because the court is expressing its disapproval, the award must go beyond indemnity and enters the realm of punishment.
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> 56 In *Garcia* v. *Crestbrook Forest Industries Ltd.* (1994), 45 B.C.A.C. 222 (B.C. C.A.)the Court held at para. 17:
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> > . . . the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, [1993] B.C.J. No. 2909, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

> 57 The conduct of the defendants in dishonestly obtaining funds from Ms. Goncalves and in fabricating evidence at trial is clearly outrageous and reprehensible. It is conduct deserving of punishment and behaviour from which the court must disassociate itself.
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> 58 I have earlier awarded punitive damages as a form of punishment but that does not preclude an award of special costs. The conduct of the defendants amply justifies such an award. To the extent possible, Ms. Goncalves should recover costs which approach her reasonable costs of bringing the action. There will be an award of special costs against the defendants as to both the claim and the counterclaim.

[7] In *Harnden* v. *Kosir* (1995), 44 C.P.C. (3d) 34 (Ont. C.J. (Gen. Div.)), Ferguson J. awarded solicitor-client costs after finding that the defendant, or someone on his behalf, had deliberately set fire to the plaintiff's house, and the defendant had lied to hide that conduct in an attempt to avoid liability for it. (This decision was reversed on appeal, without reference to the following comments on the law of costs: 1997 CarswellOnt 1043 (Ont. C.A.), leave to appeal refused, 107 O.A.C. 399 (note)(S.C.C.)). Ferguson J. stated, at paras. 13-16:

> 13 Counsel for the defendant cited cases where the court declined to award solicitor and client costs on the ground that the plaintiff had already been awarded punitive damages. 539618 Ontario Ltd. V. Stathopoulos (1989), 17 A.C.W.S. 93d) 159 (Ont. H.C.J.); Verleg v. Angeloni (1993), 20 C.PC. (3d) 132 (B.C.S.C.) I make three observations.
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> 14 First, the awarding of costs is a discretionary matter and therefore by definition is not governed by a set of rigid rules. I must exercise my own discretion.
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> 15 Second, all cases are different.
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> 16 Third, I awarded punitive damages in this case to punish the defendant for his conduct before the trial. I did not then take into account the costs of the proceeding. It seems to me that the issue of indemnifying the plaintiffs for their legal costs is sufficiently distinct from punishing the defendant for his conduct outside the

> proceeding that the award of punitive damages should not automatically preclude the awarding of solicitor and client costs. After committing the misconduct which was the ground for the punitive costs, the defendant had the opportunity to admit liability and agree to settle the plaintiffs' claim. He did not do so. He denied liability and lied in this proceeding in an effort to avoid liability thereby causing the plaintiffs further expense to recover their loss. In these circumstances I think it is just to award solicitor and client costs in addition to punitive damages. Similarly, I find that the award of aggravated damages is not a bar because it was made for the purpose of compensating for mental distress and humiliation and not to pay for the legal costs.

[8] Having considered the foregoing law and argument, I have decided that this is not an appropriate case to award solicitor-client costs. It does not follow automatically from the fact that punitive damages are awarded that there should be an award of solicitor-client costs. The conduct referred to in the decisions cited above included perjury and gross misconduct towards the opposite party. It was necessary in those cases to send a message that the Court could not be associated with such callous behaviour. That type of egregious and misleading conduct is not evident here.

The Applicable Tariff

[9] I am of the view that the 1989 tariff applies in this proceeding, because the Originating Notice (Action) and Statement of Claim were issued on September 9, 2004. The 2004 Tariff became effective September 21, 2004, and was published in the Royal Gazette on September 29, 2004. I am satisfied from the relevant decisions,

including *Bevis* v. *CTV Inc.* and 2004 NSSC 209, *Little (Litigation Guardian of)* v. *Chignecto School Board*, 2004 NSSC 265, and *Miller* v. *Royal Bank of Canada* 2008 NSSC 139 that the effective date of the 2004 Tariff was September 21, 2004 for any and all proceedings commenced on and after that date. I repeat the following comments from *Miller* v. *Royal Bank, supra*:

> [8] The jurisprudence supports the conclusion that the tariff in effect when the proceeding was initiated is the one properly to be applied. The plaintiff can therefore rely on the tariff in force when the proceeding is commenced. Any other approach, in my view, would create uncertainty on the issue of costs.
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> [9] The *Costs and Fees Act* provides that "[p]arty and party costs in respect of the services mentioned in the regulations, or in respect of other related services or any combination of services, shall be determined by the Costs and Fees Committee": s. 2(3). The Committee includes the Chief Justice of Nova Scotia and the Chief Justice of the Supreme Court (or their nominees) and three barristers appointed by the Barristers' Society: s. 2(4). Party-and-party costs approved by the Committee pursuant to s. 2(3) "are subject to the approval of the Attorney General and shall come into force and be effective upon publication in the Royal Gazette or at such other time subsequent to publication as the Costs and Fees Committee may determine": s. 2(5). The present tariffs were published in the *Royal Gazette*, Part I, vol. 213, No. 39 (September 29, 2004) at p. 2072. The Minister of Justice and Attorney General directed that the tariff "determined by the Costs and fees Committee to be used in determining Party and Party Costs, be established and approved" pursuant to s. 2(5) of the *Costs and Fees Act*. The order was dated September 21, 2004. As noted, the new tariffs became effective upon publication. There was no indication that they were intended to take effect at any other time.

[10] I am mindful that B. MacDonald J. took a different view in *Conrad* v. *Bremmer*, 2006 NSSC 99, holding that costs were a procedural matter and therefore the new tariff had retroactive or retrospective effect. With respect, I follow the view derived

from *Bevis* and other cases, leading to the conclusion that the 1989 Tariff applies in this case.

Party-and-Party Costs

[11] Having determined that the 1989 Tariff is applicable, it is necessary to assess the amount of party and party costs the plaintiffs would receive from its application.

[12] The trial was conducted over a period of eight days. Based on an amount involved of $320,000, and utilizing Scale 3 (basic), the plaintiff would be entitled to an award of $13,975, and an additional $2000 for each day of trial. The total of these two amounts ($13,975 and $16,000) is $29,975.

[13] The immediate issue that arises is whether an award of costs of $29,975 in relation to the total amount recovered of $320,000 constitutes a sufficient recovery of party-and-party costs, or whether the court should exercise its discretion and increase the amount in order to provide a substantial indemnification of the plaintiff's actual cost of litigation. Such an increase may be achieved by two methods: Rule 77.07 provides that the judge may order an increase or decrease in costs which would be

added to the tariff costs, and Rule 77.08 provides that the judge may award lump sum costs instead of tariff costs.

[14] As to increasing costs as an additional amount to the taxed costs, in *Williamson* v. *Williams* (1998), 223 N.S.R. (2d) 78, 1998 CarswellNS 465, the Court of Appeal increased the costs award to between 66% and 75% of the plaintiff's counsel's legal account. Freeman J.A. said, for the court:

> 24 The present tariffs were adopted in 1989 to replace the antiquated Costs and Fees Act then in effect. In *Landymore* v. *Hardy* (1992), 112 N.S.R. (2d) 410 (N.S. T.D.) Saunders J. stated:
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> > The underlying principle by which costs ought to be measured was expressed by the Statutory Costs and Fees Committee in these words:
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> > > ... the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity.
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> 25 In my view a reasonable interpretation of this language suggests that a "substantial contribution" not amounting to a complete indemnity must initially have been intended to mean more than fifty and less than one hundred per cent of a lawyer's reasonable bill for the services involved. A range for party and party costs between two-thirds and three-quarters of solicitor and client costs, objectively determined, might have seemed reasonable. There has been considerable slippage since 1989 because of escalating legal fees, and costs awards representing a much lower proportion of legal fees actually paid appear to have become standard and accepted practice in cases not involving misconduct or other special circumstances.
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> 26 The appellant's counsel claimed to have booked time equivalent to $80,000 in fees to Dr. Williamson through to the end of the first trial. There was no evidence that a contingency fee agreement was in place, although Dr. Williamson's counsel suggests there was an informal arrangement of some nature, nor was there evidence of an actual account for legal fees. Dr. Williamson is nevertheless liable to pay them. By an objective standard no reasonable person informed as to the current level of

> legal fees based on time charges would anticipate that Dr. Williamson, as a successful litigant, could expect to be billed far below the range of the $80,000 mentioned by counsel in total for all stages of proceedings. Even if evidence of the exact legal fees Dr. Williamson is to be charged were before us, this would not be determinative. An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary.

He continued, at para 32:

> 32 In my view the following factors make the award of party and party costs calculated from the tariffs so inadequate as to be manifestly unjust and call for an award of a lump sum in addition:
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> > (1) The appellant has had to go through a five-day trial, an appeal as to liability, a trial on the assessment of damages ordered by this court, and the present appeal, (as well as the respondents' application for leave to the Supreme Court of Canada.) The tariffs would have yielded similar costs if the present results had been achieved at the initial trial (even if it had been a one or two day trial) and appeal.
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> > (2) The appellant's claim results from a deliberate breach of the fiduciary duty owed to him by the respondents. The appropriate remedy should reflect the principle of restitution.
> >
> > (3) There is a public interest in protecting investor confidence in financial institutions. (See Hodgkinson v. Simms) It is not to the long term benefit of the securities industry if it is seen to be operating outside the law because significant legal expenses cannot be recovered and wronged individuals cannot afford to take erring brokers to court.

[15] I also note the following comments of Moir J. in *Founders Square Ltd.* v. *Nova Scotia (Attorney General)* (2000), 186 N.S.R. (2d) 189, 2000 CarswellNS 199 (S.C.), affirmed at 2001 NSCA 49:

> 6 In setting a lump sum, it would be appropriate to take into account the amount of fees to be billed to the successful party, but such could not be deternative [determinative]. "An exercise of judicial discretion to assess objectively what was a reasonable amount would still be necessary." (Williamson, para. 26) Mr. Pugsley points out that a purpose of the tariff system is to avoid an award that reflects the

> particularities of the arrangement between the successful party and counsel, and of counsel's price and efficiency. I agree that this is one of the benefits of following the Tariff, and the Tariff should not be departed from lightly, but departure is required when it is manifest that the Tariff will not serve the underlying principle. Further, it is not appropriate to exercise the discretion merely by ascertaining actual costs and applying a percentage. As was said by Freeman, J.A., the discretion necessitates an objective assessment of a reasonable amount.

[16] I am of the view that the amount which the plaintiffs are entitled to recover by applying the 1989 Tariff is manifestly unreasonable and, in my opinion, would lead to an injustice. As Moir J. stated in *Founders Square*, it is not appropriate in the exercise of discretion merely to ascertain the actual award or by applying a percentage. He also stated that the discretion that should be exercised necessitates an objective assessment of a reasonable amount.

[17] The trial took place over a period of eight days. The plaintiffs called six witnesses, including an expert witness, and the defendant called four witnesses, including an expert witness. Although I agree with the defendant's position that the trial was not overly complicated, I am still of the opinion that a costs award of $29,975 would be insufficient. Counsel for the plaintiffs documented legal accounts totalling $181,441. The accounts provide a breakdown of the work performed, the time spent for each individual item of work performed and the hourly rate charged by each member of the counsel's law firm. Although the defendant did not object or raise

any issue with reference to the amount of the legal account, that is not conclusive. Whatever arrangements the plaintiffs and their counsel agreed to is not binding on me. Nonetheless, I am of the view that an appropriate amount of party and party costs would be Tariff costs of $29,975, and an additional $25,000, for a total of $54,975. The combined amount represents 30% of the total fees charged to the plaintiffs.

Disbursements

[18] The parties have agreed to the amount of disbursements of $11,915. This amount does not include expert fees and disbursements, which will be dealt with separately.

Expert Fees and Disbursements

[19] The plaintiffs retained the services of David Browning, of D. A. Browning and Associates Inc., who provided an expert report and attended and testified on discovery and trial on behalf of the plaintiffs. Mr. Browning's report and testimony provided evidence as to the condition of the barn and the likely cause of the failure. In addition, he provided assistance regarding the future rebuilding of the barn (the barn has been

rebuilt.) Mr. Browning retained outside surveyors to carry out the survey of the physical changes. However, the material supplied does not specify the hours, the rate for hour or the specific type of work carried out by the surveyors. The amount of $51,532 is the amount claimed by the plaintiffs. I am informed by counsel that this amount does not include the cost of professional engineering fees associated with the rebuilding of the barn.

[20] Rule 77.10(1) provides that an award of party and party costs *"includes necessary and reasonable* disbursements pertaining to the subject of the award." [Emphasis added] As to the claim of the disbursement for the plaintiff's expert, I was not provided with any details of his work. In other words, I have no idea how much time Mr. Browning spent conducting his investigation, preparing the report, preparing for and attending at discovery and preparing for and attending the trial. I do not know how much time Mr. Browning or his staff spent on the file and what is the hourly rate charged. Nor am I aware of the nature of the services Browning paid the surveyor for the survey of the old barn.

[21] At the costs hearing, counsel on for the plaintiffs suggested that I settle on an amount in the area of 80% to 90% of the $51,532.50 claimed. Counsel for the

defendant, by contrast, suggests an amount in the area of $10-$15,000. If I acted in accordance with the suggestions of either the plaintiffs or the defendant, I would be acting in an arbitrary manner and most likely doing a disservice to both parties. Such an approach would be contrary to the one favoured by the Court of Appeal in *Claussen Walters & Associates Ltd*. v. *Murphy*, 2002 NSCA 20, where the trial judge had awarded $16,500 as a disbursement for the real estate appraiser who testified as an expert. Setting aside this award and referring the issue to the taxing master, Saunders J.A., for the court stated, at paras. 12 to 18:

> [12] A finding of relevance, however, did not end the matter. Before obliging the unsuccessful appellants to pay a significant disbursement of almost $16,500, the trial judge was required to consider whether the amount charged was just and reasonable. The proper approach was described by Chief Justice Cowan in J.D. Irving Ltd. v. Desourdy Construction Ltd. (1973) 5 N.S.R. (2d) 350 at p. 362:
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> > In my opinion, Civil Procdeure Rule 63.37, Clause (5) is to the same effect as the old Order LXVIII, r. 23 (vii) and the taxing master is to allow any just and reasonable charges and expenses as appear to him to have been properly incurred in procuring evidence and the attendance of witnesses. Charges by experts and others who are called as witnesses or attend as witnesses are to be allowed, but the amount allowed is to be fixed by the taxing master, having regard to the test of what is just and reasonable in the circumstances.
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> [13] This case was cited by the trial judge and so it cannot be said that any wrong principles of law were applied. However, and with respect, I find that he erred in his disposition. There was simply no evidence before him upon which to conclude that the disbursements incurred by Mr. Walters in engaging Mr. Hardy were "just and reasonable". The onus was on the respondent to justify this charge against the appellants. He did not.
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> [14] Three invoices make up the bill. The first, dated October 18, 1999, was for $9,244.10. The second, dated February 22, 2000 was for $2,483.54. The third, dated February 15, 2001, was for $4,743.75. No particulars of any of the "services rendered"

> are disclosed. The invoice simply records "for services rendered". There is no basis upon which to deduce hourly rates, or the time spent, or the services provided. Thus, with respect, there was no evidence before the trial judge upon which he could have made the determination as to the "justness" or "reasonableness" of the Hardy disbursement.
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> [15] We cannot accept counsel for the appellants' submission that all or a significant proportion of the Hardy invoices ought not to be recoverable because no use was made of the Hardy reports by the trial judge in his ultimate determination. In our view, this is immaterial. The particular "use" to which an expert's report or opinion may be put by a trial judge may never be discerned. The only question is, as we have noted, whether in fact the disbursement is a "just" and "reasonable" charge against the opposing party.
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> [16] We also reject counsel for the appellants' submission that by the time of trial the respondent did not "need" the Hardy report in order to quantify his damages. On the contrary, having regard to the relief sought and the defences raised, we are perfectly satisfied that retaining Mr. Hardy to prepare a report and to testify at the trial was prudent and necessary. Where the trial judge erred was in concluding that the amount of the Hardy disbursement was "just" and "reasonable" when there was no evidence before him on which he could make such a determination.
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> [17] In the result we find that his decision in this respect was so clearly wrong as to amount to a manifest injustice. The decision and order of the trial judge are set aside insofar as it obliged the appellants to pay - without a proper evidentiary foundation justifying the expense - the full amount of the Hardy disbursement.
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> [18] Upon being satisfied, as we are, as to the necessity of engaging Mr. Hardy to advance the respondent's action and claims for relief, the taxing master need not be concerned with the question whether Mr. Hardy's work on behalf of the respondent was required. We are satisfied it was for the reasons already given. We direct that the matter be referred to a taxing matter for the sole purpose of determining whether, upon a proper evidentiary basis, all or a portion of the Hardy disbursement totalling $16,471.39, is a just and reasonable charge against the appellants having regard to all of the circumstances.

[22] I have decided to take the same approach as was suggested by Saunders J.A. by remitting the matter to the Small Claims Court for taxation, for the sole purpose of

determining whether, or what portion of, the Browning disbursement of $51,532.50 is reasonable.

Pre- and Post-Judgment Interest

[23] The parties are near agreement on the amount of pre-judgment interest to be paid. The plaintiffs seek $57,260, while the defendant agrees to an amount of $57,392. I accept the amount suggested by the defendant, and grant pre-judgment interest in the amount of $57,392.

[24] The plaintiffs seek post-judgment interest from the date of the jury award, June 11, 2009, at the rate of five per cent per annum, pursuant to the *Interest on Judgments Act*, R.S.N.S. 1989, c. 233. The Order After Trial With a Jury was issued on September 24, 2009. I would calculate post-judgment interest, if any, from that date. I would not allow any interest on the amount of $265,000 as the payment was made within 10 days of the Order being taken out. The punitive damage award was paid on May 19, 2010, approximately eight months after the Order was issued. I award post-judgment interest in the amount of $1,500. I am unable to agree that the Court should award any post-judgment interest on legal costs for the period before the Order was issued. On

reflection, I will permit interest at five percent on $66,000 for a period of two years, in the amount of $7000.

The Outstanding Claim for Aggravated Damages

[25] The plaintiffs reserve the right to pursue a claim for aggravated damages. This claim arises from losses associated with the Provincial Government Disaster Relief Program. Under this policy, victims of Hurricane Juan were entitled to claim for uninsured losses caused by the storm. Because the plaintiffs were unable to advance a claim until the issues of costs, prejudgment interest, post-judgment interest and disbursements were resolved, that this matter could not be addressed. The plaintiffs say they intend to pursue this claim with diligence. I expect to have communication from the plaintiffs and the defendant on the progress of this claim not later than March 30, 2012.

Conclusion

[26] In summary, I award the following:

(1) $54,975 in party and party costs;

(2) $11,915 for disbursements;

(3) $57,392 for pre-judgment interest; and

(4) $8,500 for post-judgment interest.