

SUPREME COURT OF NOVA SCOTIA

Citation: *Doug Boehner Trucking & Excavating Ltd. v. United Gulf Developments Ltd.*, 2013 NSSC 114

Date: 20130322

Docket: Hfx No. 192468

Registry: Halifax

Between:

Doug Boehner Trucking & Excavating Limited,
a body corporate

Plaintiff/Defendant by Counterclaim

v.

United Gulf Developments Limited, a body corporate
and Greater Homes Inc., a body corporate

Defendants/Plaintiffs by Counterclaim

v.

W. Eric Whebby Limited

Third Party by Counterclaim

v.

Garden Crest Developments Limited

Fourth Party by Counterclaim

Judge: The Honourable Justice M. Heather Robertson

Heard: March 4, 2013, in Halifax, Nova Scotia

Decision: March 22, 2013 (**COSTS**)

Counsel: Sara Scott and Taayo Simmonds, Articled Clerk, for
Defendants/Plaintiffs by Counterclaim
George W. MacDonald, Q.C., and Michael Blades , for Third Party
by Counterclaim
David G. Coles, Q.C., and Geoff Franklin, Articled Clerk, for Fourth
Party by Counterclaim

Robertson, J.:

[1] Counsel have made submissions as to the award of costs in this protracted litigation that commenced on January 15, 2003. My written decision following a retrial of the proceeding was issued January 7, 2013.

The Litigation

[2] The proceeding was originally commenced by the plaintiff Doug Boehner Trucking & Excavating Limited (“Boehner”), upon the perfection of a mechanics lien on January 15, 2003.

[3] United Gulf Developments Limited and Greater Homes Inc. (“United Gulf”) filed a defence counterclaim on February 5, 2003.

[4] On December 16, 2003, United Gulf added W. Eric Whebby Limited (“Whebby”) as a third party to their counterclaim.

[5] On January 16, 2004, Whebby filed a defence and fourth party claim against Garden Crest Developments Limited (“Garden Crest”).

[6] A trial of the matter was held before Justice Charles Haliburton, March 6-9, 2005. Through mechanical failure of the court’s recording system, there was no record of this trial.

[7] On appeal the Nova Scotia Court of Appeal (2007 NSCA 92) referenced the “bizarre set of circumstances” of the failed recording system that in significant part resulted in the Court’s order for a new trial. Without a transcript the Court of Appeal could not substitute its’ own findings for those of Justice Haliburton. The Court of Appeal provisionally fixed costs at \$6,000.

Mediation Re Costs of First Trial:

[8] The parties following the first trial agreed to a mediation with the Province of Nova Scotia, to resolve the issue of the costs of the first trial and the appeal. The parties agreed to split the costs of the mediation. The parties accepted the recommendations of the mediator and now describe the settlement achieved, more

in the nature of throw away costs. The parties released the Province from any further claims as a result of this system failure. The amounts thus paid to the parties, as revealed in submissions were Garden Crest \$16,942.31, United Gulf \$10,000 and Whebby, in the words of their counsel George MacDonald, “somewhere in between.”

Prejudgment Interest

[9] United also addressed prejudgment interest from November 13, 2003, reciting the *Judicature Act*, R.S.N.S., 1989, c. 240, s.41. Essentially the rate to apply rests in the discretion of the Trial Judge. *Rule 70.07* provides for a rate of 5% on liquidated damages, absent any agreement between the parties. United seeks 4% from November 13, 2003, a date chosen to reflect the actual payment of the cost incurred from remediation of the contaminated soils.

[10] United submits that as per the affidavit of Kevin Nelson of United Gulf borrowing rates for the period 2003-2011 range between a low of 2.25% and a high of 9.25%, hence the submission of an average rate of 4% "to be given to all parties."

[11] Whebby requests that the Court adopt an average interest rate of 2.15% which reflects the cost of borrowing as reflected in treasury bond yields. This information is outlined in the affidavit of Michael Blades, associate counsel to George MacDonald. This rate also reflects the old rules Practice Memorandum 7, as applied in *Awan v. Cumberland Health Authority and the Attorney General of Nova Scotia*, 2009 NSSC 295. In that case the Court applied 1972 *Civil Procedure Rules* and s. 41(1) of the *Judicature Act*. As the *Civil Procedure Rules* of 1972 do not deal with prejudgment interest on unliquidated claims, the Court relied on Practice Memorandum 7 of the rules which provided.

1. Judicature Act

Section 41 of the *Judicature Act*, R.S.N.S. 1985, c. 240, as amended, provides that in any proceeding for the recovery of any debt or damages the court shall include in the sum for which judgment is to be given, interest thereon at such rate as it thinks fit for a certain period. There are other provisions in the section with respect to the rate of interest and related matters.

2. Evidence to Calculate Rate of Interest

(a) Counsel shall strive to agree upon a rate prior to the conclusion of the trial, which rate the court may, but is not bound to accept.

(b) In the event counsel cannot agree upon a rate prior to the conclusion of the trial, counsel should place before the court evidence upon which the court may arrive at a rate of interest which is proper. Such evidence shall include the prevailing rates of interest for the relevant period of time, which, it is suggested, be in the form of a table prepared and introduced into evidence showing the average rates of interest for one (1) year or two (2) year term deposits or treasury bills. The table shall show the various rates existing during the relevant period and the calculation of the average rate.

The Amount Involved

[12] In the course of submissions counsel agree that the cost of remediation cannot be strictly characterized as liquidated damages, but through the receipt of evidence in the trial was made certain in the amount of \$525,797 reduced to \$487,295.53, after considering Boehner's role in increasing the costs of reclamation.

[13] I agree that the "sum involved" should be the amount of the Court's award against Whebby, the sum of \$487,295.53.

The Issues

[14] The issue for me to decide are as follows:

- (a) What is the amount of prejudgment interest that should be applied?
- (b) What is the amount of costs to be awarded following the 2012 trial?
- (c) What is the amount of costs to be awarded following the 2006 trial?
- (d) What are the costs to be awarded following the appeal?
- (e) What is the appropriate amount for disbursements?

[15] Fortunately, counsel agree that they have achieved agreement on the issue of disbursements.

Rule 77

[16] The award of costs is at the discretion of the Trial Judge, a discretion that should be exercised to achieve a fair and just result between the parties.

[17] *Rules 77.03(3) and 77.06(1) of the Civil Procedure Rules* provided:

Liability for costs

77.03 (3) Costs of a proceeding follow the result, unless a judge orders or a *Rule* provides otherwise.

...

Assessment of costs under tariff at end of proceeding

77.06 (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Cost and Fees Act*, a copy of which is reproduced at the end of this *Rule 77*.

[18] In the determination of the “amount involved”, the tariff distinguishes between costs where claims are allowed and when they are dismissed. The provisions state:

In these Tariffs unless prescribed, the “amount involved” shall be

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount allowed;
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues;

[19] The amount I have determined is \$487,295.53.

Trial Costs

[20] United submits that while consideration should be given to the settlement amount provided by the Province, the settlement should not prevent the successful parties from receiving a costs award from the 2006 trial. They also urge an averaging of the old and new tariff for that trial in the sum of \$30,781.94 ($\$18,993.87 + \$42,750.00 / 2$).

[21] United Gulf seeks an award of costs following the 2012 trial of \$48,750 ($\$34,750 + \$14,000$) for a seven-day trial based on Tariff A Scale 2 (Basic).

[22] Garden Crest seeks an award of costs following the 2012 trial of \$49,750 plus \$14,000 for seven days of trial for a total award of \$63,750. Although they base the amount involved on \$525,797, the total reclamation costs and not the amount allowed of \$487,295.53.

[23] Garden Crest seeks an award of costs following the 2006 trial under Tariff A Scale 2 (Basic) of $\$49,750 + \$8,000$ for four days of trial for a total of \$57,750. They acknowledge however, if Justice Haliburton's suggestion of a blended tariff were adopted "splitting the difference", Garden Crest would be seeking \$38,564.

[24] Both United and Garden Crest seek fixed costs for \$6,000 for the appeal.

[25] Whebby submits that the 1989 tariff which was in effect at the time the litigation was commenced should apply, in the calculation of all cost awards.

[26] Further they submit that in all the circumstance the parties should absorb their own costs with respect to the first trial, in light of the settlement achieved by the parties with the Province of Nova Scotia, regarding the failed recording system, which effectively disposed of the issue of costs for that trial.

[27] Whebby relies on *Marshall (Litigation Guardian of) v. Annapolis County District School Board*, 2010 NSSC 179:

[10] The tariff of costs and fees that formed a schedule to the *Costs and Fees Act*, R.S.N.S. 1989 c. 104, when the action was commenced, was repealed by the

Financial Measures (2004) Act, S.N.S. 2004, c. 3, s. 15. The tariff was subsequently incorporated into *Regulations under the Costs and Fees Act*.

[11] The defendants submit and, the plaintiff concurs, that the court should apply the tariff that applied when the action was commenced.

[12] In *Bevis v. CTV Inc.*, 2004 NSSC 209, Moir J., in speaking of the 2004 tariff, held that the revised tariff cannot apply to an action commenced prior to the effective date of that revised tariff. At para. 7 he stated:

... The new Tariff of Costs and Fees was certified by the Costs and Fees Committee on 1 September 2004 and was approved by the Minister of Justice on 21 September 2004 and was published on 29 September 2004. Under s. 2(5) of the *Costs and Fees Act*, RSNS 1989, c. 104, the new Tariff comes into force "upon publication in the Royal Gazette or at such other time subsequent to publication as the Costs and Fees Committee may determine". The committee recommended that the new tariffs should "have no retroactive effect" and should "apply to proceedings commenced after they came into effect" except that the new Chambers Tariff "could be adopted as practice immediately". Consequently, this action would fall under the old Tariff system.

[13] I am satisfied that, as this action was commenced prior to the adoption of the 2004 tariff, the 1989 Tariff A would apply.

[28] I have also considered the case law relied on by Garden Crest, *Grass (Litigation guardian of) v. Women's College Hospital*, [2004] O.J. 1519; "costs of a first trial generally followed costs of the second trial"; *Spoor v. Nicholls*, [2002] B.C.J. 319; *Conrad v. Bremner* 2006 NSSC 99. I have also reviewed the case relied on by United Gulf, *Landymore v. Hardy*, 112 N.S.R. (2d) 410, 1992 CarswellNS 90, 10 C.P.C. (3d) 311, 307 A.P.R. 410, [1992] N.S.J. No. 79 (N.S. T.D. Feb 06, 1992) "costs are intended to reward success."

[29] The award of costs in this circumstance requires that I recognize the successful litigants, yet not overly penalize the defendant Whebby, who clearly was not responsible for the recording malfunction of trial #1. Further, I will attempt to achieve a fair result, recognizing that all the parties agreed to a settlement with the Province of Nova Scotia, designed in part to defray costs of the first trial.

[30] Accordingly, as the litigation commenced in January 2003, I will apply the tariff that applied when the action commenced so that the 1989 Tariff A Basic Scale will apply, for both trial #1 and trial #2 on the amount involved of \$487,295.53 in favour of Garden Crest and United Gulf.

[31] Following that determination of the use of the 1989 Tariff, I will also apply an average interest rate of 2.15% reflecting treasury bond yields, under the old rules Practise Memorandum 7. Therefore United Gulf is awarded prejudgment interest on the amount of the award \$487,295.53 from November 13, 2003 to January 7, 2013 at the rate of 2.15%.

[32] Both Garden Crest and United Gulf shall have their appeal costs in the amount of \$6,000.

[33] Counsel have agreed to prepare an order which reflects the negotiated disbursements, to be awarded to Garden Crest and United Gulf. I will allow counsel to review and confirm the calculation of the trial costs for the 2006 and 2012 trials on the basis I have set out above, that will be payable by Whebby to Garden Crest and United Gulf.

Justice M. Heather Robertson