SUPREME COURT OF NOVA SCOTIA

Citation: *Spring Water Ice Inc. v. 3862143 Canada Inc.*, 2023 NSSC 162

Date: 20230523
Docket: Hfx No. 486186
Registry: Halifax

Between:

Spring Water Ice Inc., formerly 3321244 Nova Scotia Limited, a body corporate

Applicant

and

3862143 Canada Inc., formerly Spring Water Inc., a body corporate, and Gary MacKenzie

Respondents

DECISION ON PREJUDGMENT INTEREST AND COSTS

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 1, 2023, in Halifax, Nova Scotia
Written Submissions:	January 12 and 16, 2023
Counsel:	Christopher Madill, for the Applicant Tim Hill, K.C., for the Respondents

By the Court:

Introduction

[1] The Applicant company (NewCo) claimed it was misled or defrauded by the Respondents, a company and its principal, Gary MacKenzie (collectively, "SWI"), from whom it bought an ice business under an asset purchase agreement ("the Agreement"). NewCo subsequently claimed that SWI failed to disclose certain information required by the Agreement. NewCo claimed resulting damages of $975,000, being the difference between what it paid for the business and what it claimed it would have offered had it been aware of ongoing contractual commitments that SWI allegedly failed to disclose. This Court dismissed these claims in a decision reported at 2022 NSSC 356.

[2] The Court did, however, allow NewCo's claims in respect of volume rebates dating from prior to the sale that NewCo paid in the amount of $223,954.85, as well as amounts received by SWI after the sale ($94,300.59). These amounts were due as adjustments under the Agreement.

[3] At issue is what prejudgment interest attaches to those amounts. In particular, whether contractual interest or interest pursuant to the *Judicature Act*, R.S., N.S. c. 240, and Civil Procedure *Rule* 70.07 applies.

[4] NewCo had retained a holdback of $300,000 in the event of post-closing adjustments. The Agreement provided, at s. 2.4(c), that NewCo would deposit the holdback in the bank and that it:

> shall be held by the Purchaser's solicitors in trust, as security for:
>
> (i) any post-closing adjustments or reimbursements to the Purchase Price in accordance with the terms of this Agreement;
>
> (ii) the indemnity by the Vendor for breach of representations, warranties and covenants; and
>
> (iii) any other amounts owing by the Vendor to the Purchaser...
>
> The Holdback shall be invested by the Purchaser's solicitors with a Canadian Schedule I chartered bank with interest to accrue to the credit of the recipients of the Holdback on a proportional basis on expiry of the Holdback period. The Holdback, or the balance thereof after application of the foregoing shall be released and paid to the Vendor 90 days after the Closing Date. Any Holdback amount in dispute will be withheld, with interest continuing to accrue, until the dispute is resolved to the mutual satisfaction of the Vendor and the Purchasers.
>
> [Emphasis added]

[5] SWI took the position that the post-closing amounts it received would be advanced to NewCo when NewCo released the holdback. NewCo argues that SWI advanced a claim for the holdback "which was not successful, given the Court's directions that...$318,255.54 be credited to the Applicant against the holdback."

[6] This Court in fact held that "[i]n all of the circumstances, including the initiation of litigation against it, I find that [SWI] did not breach the relevant provisions of the APA by not to date reconciling the amounts it owed NewCo with the holdback sum of $300,000.00." This Court likewise rejected NewCo's claim that SWI was unjustly enriched, "because the APA provided for a process for deducting amounts owed by SWI from the holdback. This needs to be done." (para. 260). Finally, this Court held that SWI was "entitled to the return of the holdback funds, once the amounts owed to NewCo are deducted from those funds, i.e., $94,300.59, and $223,954.85." (para. 261).

[7] The Court's conclusion on the merits is summarized as follows:

> 281 Each of the NewCo's claims is dismissed with costs to the Respondents, except as follows.
>
> 282 NewCo is entitled to the sums of $94,300.59 and $223,954.85, which shall be deducted from the holdback amount of $300,000. If interest is applicable to those amounts, I leave it to counsel to agree to the applicable rate or brief the Court.

[8] This resulted in a total award of $318,255.44 to NewCo, prior to interest and disbursements. The Court awarded costs of the proceeding to SWI.

[9] The parties have been unable to agree on the quantum of either prejudgment interests or costs, including whether SWI is entitled to costs on a solicitor and client basis, because of its unsuccessful allegations of fraud against Gary MacKenzie.

Prejudgment Interest

Contractual Interest

[10] The *Judicature Act*, R.S.N.S. 1989, c. 240, is the starting point in any consideration of prejudgment interest. Sections 41(i) and (k) state:

> (i) 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 the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal;
>
> ....
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> > (i) interest is payable as of right by virtue of an agreement or otherwise by law,...

[11] In *Wilson v. K.W. Robb & Associates Ltd.*, 1998 NSCA 117 (C.A.) ("*Wilson*"), Hallett, J.A., speaking for the Court of Appeal stated that:

> [a]s a general rule, if the parties to the action have expressly agreed to a contractual rate of interest that would be payable on an outstanding account, or if the Court considers it an appropriate case in which to imply a term that interest be paid at a particular rate, the court should not exercise its discretion under s. 41(k)(i) as the creditor would be entitled to interest on a contractual basis. [para. 46]
>
> [Emphasis added]

[12] Dealing with similar language in the Saskatchewan *Pre-judgment Interest Act*, the Saskatchewan Court of Court of Queen's Bench in *Niebergal v. QHR Technologies Inc.*, 2020 SKQB 327, referred to *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 (SCC):

428 *Bank of America Canada* is, indeed, the principal authority relevant to the question of what rate of pre-judgment and post-judgment interest should be ordered on an award of damages for breach of contract. The specific issue in that case was whether simple interest or compound interest should be awarded. More particularly, should the court award interest at the statutory rate, or at a rate derived from the underlying contractual arrangements? In the result, the Supreme Court affirmed the trial decision to award pre-judgment and post-judgment interest at the contractual rate, stating that it was appropriate for the contractual rate to govern in the absence of special circumstances. In doing so, Major J. gave effect to the following general principles relating to the primacy of contractual commitments:

> 46 … Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.
>
> [Emphasis added in *Niebergal*]
>
> ...
>
> 49 With respect to the failure to repay the loan in this appeal when due, it cannot be said that the cost of such delay was not in the contemplation of both parties at the time they made the contract, particularly as both parties were in the business of lending. A loan agreement with a specified interest rate is an agreement between parties on the cost of borrowing money over a period of time. Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender.
>
> [Emphasis added]

429 Justice Major did not expand on what was meant by the caveats "over-riding policy concerns" or "exceptional circumstances" placed by the court on the principle that the contractual interest rate should prevail over the statutorily prescribed one. Lower courts were left to take up that challenge and some Canadian courts did so. In *Citi Cards v Ross,* 2014 ONSC 114, for example, the court offered this explanation at para. 27:

> 27 Exceptional circumstances that would cause a court to decline to apply a contractual interest rate must be more than just financial hardship for the borrower: vague or unclear terms, overriding policy concerns such as a criminal interest rate, unconscionable conduct on the part of the lender, or commercially unsophisticated parties.

The Position of SWI

[13] SWI submits that there are no exceptional circumstances that support a departure from the general rule that the parties' agreement on interest should be the basis for the court's order. According to SWI, the interest that has accumulated on the first $300,000 of the amount it owes under the court's judgment – that is, the amount of the holdback – should be credited to NewCo. As to the remaining $18,255.44 of the judgment, SWI submits that interest should be calculated based on the average interest rate actually received by the Applicant on the holdback deposit.

The Position of NewCo

[14] NewCo says prejudgment interest should not follow the Agreement. It says that the Agreement did not specify a rate of interest, and did not limit recovery of interest to amounts generated while the funds were held in trust. It claims simple interest at five percent pursuant to the *Judicature Act*.

Analysis and Findings

[15] In the view of this Court, based on the authorities, the Court's discretion under s. 41(k)(i) of the *Judicature Act* should not be exercised where the parties have not

specified a contractual interest rate. This is made clear, in *Wilson*, where the Nova Scotia Court of Appeal set the general rule of allowing the contractual rate where parties "have expressly agreed to a contractual rate of interest that would be payable on an outstanding account" (para. 46). Thus, in *Wilson*, the alleged contractual rate in dispute appeared on the claimant's invoices as follows: "Terms 2% per month or 24% per annum interest charged on all overdue accounts" (para. 58).

[16] In *Niebergal* the promissory notes in dispute included an interest rate structure with specified rates (para. 420). In *Bank of America Canada* the rate was specified as "the appellant's prime lending rate plus one percent compounded monthly" (paras. 57-58), which was ascertainable on its face by reference to the appellant's prime rate.

[17] By contrast, the Agreement in this case provides no basis on its face to ascertain the rate. Interest is only ascertainable after the fact. <u>There is no contractual rate to apply.</u>

[18] Further, NewCo argues that the amounts ordered are liquidated claims, so that prejudgment interest should be governed by Civil Procedure *Rule* 70.07, which states:

Prejudgment interest on liquidated claims

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.

[19] The definition of a liquidated claim was considered in *Pick O'Sea Fisheries Ltd. v. National Utility Service (Canada) Ltd.*, 1995 NSCA 208, where the Court of Appeal said:

> 36 "Liquidated demand" is not defined in the Rules.
>
> 37 The present English Rule, with respect to entering judgment in default of defence (Order 19, Rule 2), is similar to our Rule in that it refers to the case where the plaintiff's claim "is for a liquidated demand only". The words liquidated demand, as they are used in that English Rule, are defined in *Precedents of Pleadings*, Bullen & Leake, 12th edition, 1975 at p. 153 as follows:
>
> > "A liquidated demand is a debt or other liquidated sum. It must be a specific sum of money due and payable, and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic. Otherwise even though it be specified, or quantified, or named as a definite figure that requires investigation beyond mere calculation, it is not a "liquidated demand" but constitutes "damages"."
> >
> > [Emphasis added]
>
> 38 Similarly, these words are defined in *The Supreme Court Practice*, 1988, Volume 1, p. 35 as follows:
>
> > "A liquidated demand is in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages'."
>
> 39 In *Principles of Pleadings and Practice*, Odgers (*supra*) at p. 46 the author says the following:
>
> > "When the amount to which the plaintiff is entitled can be ascertained by calculation, or fixed by any scale of charges or other positive data, it is said to be "liquidated" or made clear . . . . <u>But when the amount to be recovered depends upon the circumstances of the case and is fixed by opinion or by</u>

> assessment or by what might be judged reasonable, the claim is generally unliquidated . . . . But if the claim is in its nature a claim for damages at large, it is not in law treated as a "liquidated demand" even if the plaintiff puts a figure on the damages which he is claiming."
>
> [Emphasis added]

[20] Flinn, J.A., for the Court of Appeal in *Pick O'Sea Fisheries*, went on to cite with approval a line of Newfoundland authorities interpreting a Newfoundland civil procedure rule that was "for all intents and purpose, identical" to the Nova Scotia rule (para. 43). Flinn, J.A., stated:

> 44 In *Saunders et al v. Lewis* (1990), 40 C.P.C. (2d) 40 Cameron J. (as she then was) considered the Newfoundland Rule 16.01(2)(a) and the meaning of the words "liquidated demand" in the context of whether or not a particular judgment had been properly entered for a liquidated demand. She said at p. 44:
>
> > "The claim by the plaintiffs is for compensation for breach of contract. The ease with which damages may be quantified does not change the characterization of the claim from a claim for unliquidated damages to a liquidated demand.
> >
> > It is the contract itself which must be looked at to determine how the claim is to be characterized. Generally speaking, in order that a demand may be 'liquidated' one party must obligate himself to pay the other a specific sum of money either absolutely or upon the happening of a specified contingency."
> >
> > [Emphasis added]
>
> 45 In the case of *Soreltex International Inc. v. Custom Carpet Sales Ltd.* (1993), 24 C.P.C. (3d) 315, the Court of Appeal of Newfoundland also dealt with this issue. In a statement of claim, the plaintiff alleged that the defendant had sold and delivered to it carpeting that was defective. It claimed $15,000 for the defective carpeting in stock; $3,000 for the cost of replacing the defective carpeting already sold; and an indemnity for further replacement costs. On default of defence, judgment was entered for all claims. On an application to set the judgment aside, a Chambers judge allowed the judgment for $15,000 to stand, as a judgment for a liquidated demand, but struck out the remainder of the judgment.
>
> 46 Goodridge C.J.N., after referring to *Saunders* (*supra*), said at p. 317:
>
> > "Suffice it to say that a liquidated claim is generally a claim for an amount agreed to be paid by a defendant to a plaintiff, such as the price of goods

> sold and delivered, the amount due under a promissory note or the amount agreed to be paid as liquidated damages while an unliquidated claim is generally a claim for damages arising out of a tort or breach of contract. …
>
> The claim of Custom Carpet does not involve any liquidated amount. It is essentially a claim for damages for breach of contract. Default judgment could only have been entered for damages to be assessed. The default judgment for a liquidated sum should not have been entered."

[21] The Court of Appeal in *Pick O'Sea Fisheries* went on to examine the contract to decide whether an $8000 "service fee" constituted a liquidated claim. Flinn, J.A. concluded that "it cannot be said that, at the time the action was commenced by the respondent against the appellant, the $8,000 service fee was a specific sum due and payable by the appellant to the respondent" (paras. 47-51).

[22] Neither party in the within case reviewed the modern Nova Scotia caselaw interpreting the phrase "liquidated damages."

[23] In *All-Up Consulting Enterprises Inc. v. Dalrymple*, 2013 NSSC 46, the plaintiffs' helicopter was damaged by one defendant, whose insurer – also a defendant – represented that it would remediate the situation quickly due to the urgency for the plaintiffs' business, then failed to do so. As a result of the defendant insurer's inaction, the plaintiffs' helicopter crop-spraying business failed. The plaintiff was awarded damages in negligence. LeBlanc, J. held that the plaintiff's business losses were not a liquidated claim, and awarded prejudgment interest at

four percent (paras. 260-263). The business losses in question had been the subject of expert evidence and extensive judicial assessment (summarized at para. 245).

[24] In *Murphy v. Burke*, 2014 NSSC 359, the question was whether an insurer's subrogated claim for an amount paid to an insured was a liquidated demand within the meaning of *Rule* 8.06, so that it would not need reference to a judge for assessment on a motion for default judgment. The requirement was for "pleaded facts that, taken as admitted, clearly show that the amount is due, such as a liquidated demand pleaded in sufficient detail." The motion encompassed three separate proceedings:

> 2 Each action values a subrogated claim brought in the name of the plaintiff by the plaintiff's insurer, following payment by the insurer to its insured for damages sustained in a collision. Each pleads facts establishing the defendant's negligence as cause of the damages. Each pleads the insured's subrogation rights under the *Insurance Act*.
>
> 3 In *Murphy v. Burke*, the statement of claim says that the insurer "has paid the claim of its insured" and seeks judgment against the defendant for "Special damages in the amount of $5,170.53 representing the property damages caused to the Plaintiffs' motor vehicle together with towing costs and the costs of a rental vehicle". In *Crouse v. Sparks*, the insurer "paid the claim of its insured" and seeks judgment for "special damages in the amount of 19,649 Dollars and 85 Cents". No details or particulars of the special damages are given. In *Oldford v. Rector*, the insurer "paid the claim of its insured" and seeks judgment for "special damages in the amount of $4,811.93". Again, no details are given.

[25] Moir, J. said:

> 6 Judge O'Hearn considered the Rule 12.01 meanings of "liquidated" and "unliquidated" in *Bennett v. Savory* (1976), 22 N.S.R. (2d) 333 (Co. Ct.). The authorities referred to at para. 6 make it clear that a debt or a contract for a fixed

> sum is a liquidated demand. The concept extends to contracts in which the price or remuneration is not fixed, but is determinable by current prices in a trade or a recognized scale of charges. Damages ascertained by opinion are unliquidated. Merely stating a fixed sum in the writ does not assist.
>
> 7 The plaintiff in *Bennett v. Savory* pleaded that the defendant converted her automobile and that it was worth $800. Judge O'Hearn decided that the claim for judgment for $800 was an unliquidated demand. Damages had to be assessed.
>
> ...
>
> 9 The various plaintiffs refer to definitions of "liquidated demand" in *Pick O'Sea* and submit that because the insurer paid a specific sum to the plaintiff the subrogated claim is liquidated. I respectfully disagree. The pleadings do not show what is owing between the plaintiff and the defendant, only what the plaintiff's insurer was prepared to offer and the insured was prepared to accept. The value of the claim against the defendant may be limited to the subrogated amount, but the pleadings do not clearly show that that is the amount due by the defendant.
>
> 10 Under the 2008 Rules, a liquidated demand is merely an example of the kind of claim that can be quantified on default without resort to an assessment. The principle is in the broader words, "pleaded facts that, taken as admitted, clearly show that the amount is due".
>
> [Emphasis added]

[26] In the cases before Justice Moir, which involved claims for losses arising from car accidents, Moir, J. held that "[m]erely pleading a specific amount does not assist" (para. 11). He went on to consider the meaning of the phrase "liquidated demand pleaded in sufficient detail" under *Rule* 8.06(b):

> 12 What unliquidated claims are covered by the new words? I think that the value of the converted automobile in *Bennett v. Savory* would qualify today. On the other hand, compensation for pain, suffering, and loss of amenities is highly circumstantial, as is loss of profits on injury to a business, and damage to reputation. These are claims the qualification of which requires inquiry into varied circumstances. The value of these claims is too uncertain for any pleadings to "clearly show that the amount is due".
>
> 13 However, there are some unliquidated claims that can be pleaded in such a way as to "clearly show that the amount is due". Loss of past wages over a defined period, cost of care over a defined period, out-of-pocket expenses, definite losses for breach of contract, and cost of repairs are a few that come to mind.

> 14 The prothonotary should ask herself: Do these pleadings so clearly provide all the information on the quantification of the claim that I can see the amount claimed is due by the defendant to the plaintiff, or is it necessary to inquire further into the circumstances?
>
> 15 It would have been clearer in *Murphy v. Burke* if the pleadings had broken down the sums for repair, towing, and rent, but the total is pleaded and is to be taken as admitted. We have no idea from the pleadings in *Crouse v. Sparks* and *Oldford v. Rector* how the claimed amounts are quantified or whether they contain uncertain amounts, such as compensation for personal injury.
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> 16 In my opinion, the pleadings in *Murphy v. Burke* meet Rule 8.06(b), but the pleadings in the other two actions do not.
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> [Emphasis added]

[27] In *Grafton Connor Property Inc. (c.o.b. Grafton-Connor Group) v. Lloyd's of London Underwriters (Attorney)*, 2015 NSSC 368, the plaintiffs were awarded damages against their insurer and the broker who placed the insurance after a denial of coverage when their pub burned down. On the question of whether the damages were liquidated damages, LeBlanc, J. said:

> 16 As to the awards for business interruption and loss of income, I agree with Marsh that the interest must be calculated from the year that these amounts would have been earned. As to whether these two awards constitute "liquidated damages" or not, the loss of income clearly does not constitute a liquidated damages. The question is more complicated with respect to the business interruption. In *Pick O'Sea Fisheries* ... the Court of Appeal described "liquidated damages" as "a pre-estimate of damages, agreed-upon and advanced by the parties to a contract, as to what damages will be paid in the event of a breach of that contract": para. 34.
>
> 17 I am not convinced that Marsh is correct in its assertion that because the claim constitutes a claim in negligence, rather than contract, the awards made against it cannot constitute liquidated damages. <u>The amounts due under the policy and set out in the Proof of Loss, when claimed against Underwriters, are clearly liquidated damages. They were agreed upon by the parties and do not depend on the circumstances of the case. While the claim against Marsh was in negligence, the effect of that negligence was the loss of the value of the contract and damages were calculated with reference to the contract. For this reason, I am of the view that any awards made that were calculated with reference to the insurance policy constitute</u>

> liquidated damages. Those awards that have not been adjusted for inflation therefore attract the prejudgment interest rate of 5%.
>
> [Emphasis added]

[28] In *J.W. Bird and Co. v. Allcrete Restoration Ltd.*, 2019 NSSC 311, the plaintiff obtained default judgment on several credit accounts for construction materials. Brothers, J. dismissed a motion to set aside the default judgment. On the question of whether the amounts sought were liquidated demands, Brothers, J. said:

> 44 Wheaton argues that the prothonotary was not permitted to assess the amount of the default judgment because these were not proper liquidated demands. This action was commenced as a Notice of Action for Debt and contained in the Statement of Claim is a claim for a principal amount owed.
>
> 45 The claim against Wheaton is a liquidated demand. The invoices issued by J.W. Bird are detailed, both in the formal legal demand provided to Wheaton on January 25, 2019, as well as in the Notice of Action for Debt and Statement of Claim. In the claim, specific sums of money charged for goods sold and delivered by J.W. Bird are set forth and readily ascertainable.
>
> …
>
> 47 The claims against Wheaton are for precise sums claimed in the nature of debt, due, and payable by virtue of a contract. These sums relate to goods that were supplied and delivered by J.W. Bird. There has been no contest to the fact that J.W. Bird delivered the goods and there has been no contest to the sums charged for those goods.
>
> 48 Wheaton relies on *Shintom Co. v. M.T.C. Electronic Technologies Co.*, 1994 CarswellBC 1276 (S.C.) to argue the amounts owing are not liquidated demands. Shintom, supra, is distinguishable. That claim included claims in excess of damages, including injunctions, accountings, and appointment of receivers. Furthermore, *Shintom, supra*, involved goods not actually delivered. There is no such suggestion in this case. Consequently, there is no fairly arguable defence based on this argument.

[29] NewCo submits that the claims for the two amounts ordered against SWI were debts payable by virtue of the contract, not damages requiring assessment. As the Newfoundland Supreme Court said in *Saunders* [(1990), 40 C.P.C.(2d) 40] – in a

passage cited by the Nova Scotia Court of Appeal – "[i]t is the contract itself which must be looked at to determine how the claim is to be characterized" (*Pick O'Sea Fisheries* at para. 44). According to NewCo, the amounts in question fall within the holdback provision in the Agreement (s. 2.4(c)), specifically, "(i) any post-closing adjustments or reimbursements to the Purchase Price in accordance with the terms of this Agreement" and "(iii) any other amounts owing by the Vendor to the Purchaser...". Accordingly, NewCo submits that interest on the relevant amounts should be calculated in accordance with *Rule* 70.07, at five percent simple interest.

[30] This Court agrees. While the Agreement did not state specific amounts, it anticipated specific categories of adjustments post-closing. The parties agreed that any amounts received that constituted "post-closing adjustments or reimbursements", or "amounts owing by the Vendor to the Purchaser" would be payable. These amounts do not require court assessment, but can be calculated based on the contract and the pleadings, without "inquiry into varied circumstances" (to quote Moir, J. in *Murphy*).

[31] Interest at the rate of five percent on the sum of $318,255.44 amounts to $48,024.40. In order to avoid a double recovery, $15,586.39 in interest earned while the holdback remained in the Applicant's solicitors' trust account must be deducted from the calculated interest at five percent of $48,024.40.

[32] Accordingly, the Applicant is entitled to judgment in the amount of $350,693.45, inclusive of simple interest at five percent ($318,255.44 plus $48,024.10 minus $15,586.39, equals $350,693.15).

Costs

[33] SWI says solicitor-client costs are merited in this case, on the basis of the Court's findings on NewCo's claims of fraud. SWI cites various passages from the decision, including the following:

> 1 This case is about whether the Applicant was misled or defrauded by the Respondents in the context of the purchase of the assets of an ice plant, and if so, what damages, if any, the Applicant has suffered.
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> ...
>
> 213 Justice Saunders ... noted in [*Grant v. March* (1995), 138 N.S.R. (2d) 385 (S.C.)] at para. 22 that, "Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation".
>
> 214 The Court finds that Gary MacKenzie made no false representation in relation to the existence of "contracts" with respect to SWI's vendors in the APA. His evidence was that the deal was an asset purchase, and that the contracts SWI had with its vendors were not assignable to NewCo. There is nothing fraudulent which arises from that interpretation of the APA.
>
> 215 Nor did Gary MacKenzie fraudulently inflate SWI's EBITDA. If he had wanted to do so, he could have attempted to hide from NewCo the fact that SWI had a bumper sales year in 2017 due to a hurricane in Puerto Rico which resulted in an increase in ice sales in SWI's fiscal 2018. As Gary MacKenzie stated in an email to Scott Carroll (answering questions posed by Kevin Fraser about Gary MacKenzie's EBITDA calculation), "I did not use the Oct/17 - Feb/18 figures because we had a large one-time sale in that period, and it was not as a result representative of that period in a year. If I had used 2017/2018 it would have shown a significantly larger EBITDA. It did not seem fair to use 2017/2018 in any estimated calculation". This is hardly the approach a man bent on deception would employ.

> ...
>
> 235 Gary MacKenzie never altered his EBITDA calculations throughout the negotiation of the sale. NewCo did not amend its pleadings to delete reference to the claim that Gary MacKenzie had artificially inflated EBITDA, even after discoveries when it became clear that he had not done so. That is a matter for costs at the end of the day.
>
> ...
>
> 268 NewCo submits that to be placed in the financial position it would have been in but for the misrepresentations, damages should be based on the difference between the price it paid and the price it would have paid had it known the actual circumstances. NewCo says it expected to acquire the business "without any, or minimal, ongoing rebate liabilities to its customers". According to NewCo, the evidence indicates (1) that it would have offered less had it been aware of the need to pay the rebates on an ongoing basis and (2) that the value of the business in September 2018 was $5.52 million, not the $6.5 million it paid, a difference of $980,000.00. NewCo says this is the measure of its damages.
>
> 269 NewCo's counsel provides an alternative "indirect" assessment of damages based on the value as represented by the Respondents. The cost of "making good" that representation, NewCo submits, is adding $150,000.00 to the annual measure of value arising from the representations ($1 million) and applying the 6.5 multiplier. This gives a figure of $1.15 million multiplied by 6.5 ($7.475 million). The difference between this figure and the $6.5 million actually paid is $975,000.00, virtually identical to the $980,000.00 resulting from the direct calculation.
>
> [Emphasis added]

[34] While agreeing that the bulk of its claims were dismissed, NewCo argues that this was a case of "divided success" calling for an apportionment of costs. If the award in NewCo's favour – cumulatively, $318,255.44 – is treated as the amount involved for calculating NewCo's own costs entitlement, the result under Tariff A, Scale 2, would be $34,750. NewCo says SWI's costs should be assessed under Tariff A. This requires consideration of the amount of damages provisionally assessed ($96,395); the amount claimed ($975,000); the complexity of the proceeding (not

complex, NewCo submits, given the three-day duration and the lack of expert evidence); and the importance of the issues (in particular, NewCo's unsuccessful allegation of fraudulent misrepresentation).

[35] NewCo, while taking the position that solicitor-client costs are not warranted, does not argue that costs should be assessed on the provisional damages of $96,395. Agreeing that this would not provide a sufficient contribution to SWI's costs, NewCo proposes that the court use an amount involved "at the mid-point between the amount claimed and the provisional assessment, or $500,000", resulting in costs under Tariff A, Scale 2, of $34,750. In the result NewCo proposes that the Court order party-and-party costs and disbursements to SWI in the amount of $40,000.

[36] By this Court's estimation, however, the mid-way point between $96,395 and $975,000 is in the vicinity of $535,000.[1] Using this as SWI's amount involved results in costs on Tariff A, Scale 2, in the amount of $49,750.

[37] There is precedent for awarding solicitor-client costs on the basis of unfounded allegations of fraud, deceit and dishonesty. In *Smith's Field Manor Development Ltd. v. Campbell*, 2002 NSCA 104, the trial judge had ordered

[1] The difference between $975,000 and $96,000 (rounded down for simplicity) is $879,000. Half of that number is $440,000 (rounded up for simplicity). Adding that number to $96,000 gives a mid-point of $536,000; subtracting it from $975,000 gives $535,000.

solicitor-client costs “because of the appellants' dogged but unfounded allegations of fraud and dishonesty” against the respondent (para. 75). Hood, J. had referred to the following passage from *Orkin on Costs*:

> 75 …
>
> The exercise of discretion must be based on relevant factors, for example, the conduct of the litigation, and not on otherwise unrelated conduct. Orders of this kind have been made where a litigant's conduct has been particularly blameworthy, for example, where there were allegations of criminality, arson; fraud or impropriety either unproven or abandoned at trial; particularly when the allegations are made against professional persons carrying out their professional duties; ... Solicitor-and-client costs were awarded where a party brought wanton and scandalous charges; or allegations of perjury; ... or dishonesty; ... or deceit, conspiracy and breach of fiduciary duty; ...

[38] Freeman, J.A., for the court, reviewed Hood, J.’s reasons for ordering solicitor-client costs, including an extensive and unsuccessful litigation history driven by the appellants, amounting to something close to a “vendetta” against the respondent (paras. 76-77, 79), with the appellant Lienaux not acting “not acting as a lawyer” but as the “driving force behind the litigation” (para. 80). In the earlier stages of the litigation, Hood, J. had said, “there were no allegations of fraud, perjury or other dishonesty. As each avenue he pursued closed, he found another; hence the myriad amendments to the pleadings” (para. 78). As such, there was no basis to “interfere with the exercise of Justice Hood's discretion in awarding solicitor-and-client costs” (para. 81).

[39] Similarly, in *Wambolt v. Armstrong*, 2013 NSSC 81, the respondents sought solicitor-client costs on an application where the original notice of application, supported by the applicant's affidavit, advanced "claims that each respondent made fraudulent misrepresentations concerning the profitability of Douglas, Armstrong & Spillett Inc., the value of the business, and the addition of other businesses" (para. 3). The applicant "disavowed the allegations of fraud at discoveries held in October of 2011, but they were not formally withdrawn until a couple weeks before the application was heard last March [2012]" (para. 5). Moir, J. declined to order solicitor-client costs given the withdrawal of the allegations, but did order increased party-and-party costs:

> 8 ... A party who alleges fraud without evidence to support it commits a serious breach and exposes himself to full indemnity, even if he eventually sees his error and withdraws the allegation.
>
> 9 I overlooked the withdrawal when I wrote the main decision and, in very brief reasons, decided to dismiss causes that had already been withdrawn... While it does not preclude solicitor and client costs, withdrawal is relevant to whether the discretion should be exercised because counsel could stop preparing the defence of those causes once they were withdrawn and because any damage to reputation could be protected by public withdrawal.
>
> 10 The respondents also rely on *Goulin v. Goulin*, [1995] O.J. No. 3115 and *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, [1998] O.J. No. 4221 which held that deterrence is a reason to award solicitor and client costs even if an allegation of fraud is later withdrawn. I am persuaded by those authorities. However, in the present circumstances the subject is better handled by increasing party and party costs.
>
> 11 The reprehensible allegations of fraud are mitigated by the private withdrawal four months after the proceeding was started. Mr. Wambolt was obligated to correct his affidavit and to publicly withdraw the allegations the moment he recognized his default. However, the private withdrawal was enough to stop work on defending

> the fraud accusations. Also, an order dismissing the fraud causes could have been obtained, if the respondents were very concerned that the allegations hurt reputation.
>
> 12 The default is further mitigated by the public withdrawal just before the hearing.
>
> 13 I will increase party and party costs to take account of the withdrawn allegations of fraud. In my view, this is sufficient to compensate the respondents and to deter others who may be quick to plead fraud.
>
> [Emphasis added]

[40] In the *Leigh Instruments* decision cited by Moir, J., the plaintiff bank advanced allegations of fraud and deceit for strategic reasons at trial. These allegations "were pursued unrelentingly through to the conclusion of trial. Indeed, the plaintiff raised a novel allegation of fraud...in its written argument, despite the fact that it had not been pleaded and the defendants had no opportunity to lead evidence to refute it. All of these allegations of fraud and deceit were held to be wholly unsupported by the evidence" (para. 12). The Court concluded:

> 16 In my view, while the comfort letters may be characterized as a gentlemen's agreement, the fact that the defendants did not indemnify the bank for its loss is not sufficient to relieve against the consequences of making widespread allegations of fraud and deceit, based on evidence which lacks credibility, and which allegations are found to be unsubstantiated.
>
> 17 The bank was a sophisticated commercial lender. It chose to take Plessey's word rather than insist upon its bond. The subsequent fraud allegations made against named individuals appear to be one further step in the bank's overall strategy to pressure the defendants to pay on the comfort letters. While the bank may have brought commercial pressure to bear on the defendants in the marketplace, such a strategy is not appropriate in a court of law, particularly if allegations of fraud are involved. Such conduct carries with it the risk of an adverse costs award, should the fraud allegations fail.
>
> 18 All of the circumstances before me bring this case into the "rare" and "exceptional" category, in which an award of costs on a solicitor and client scale is justified. To paraphrase the dicta of Essen J.A. in *Rainbow Industrial Caterers Ltd.*

> *v. Canadian National Railway Co.* (1988), 54 D.L.R. (4th) 43 (B.C.C.A.) Aff'd on other grounds, [1991] 3 S.C.R. 3 at 69, the court should not condone the recent trend in commercial cases of alleging fraud, seemingly without regard for the rule that fraud must be strictly pleaded and strictly proved. While parties are free to conduct litigation in this manner, they must remain mindful of the potential cost consequences.

[41] The solicitor-client costs order thus rested in particular on the plaintiff's use of the allegations as effectively a negotiating tactic, with the implication that the allegations were advanced without any consideration for whether they could be proven. Affirming the costs decision, the Ontario Court of Appeal said, at 178 D.L.R. (4th) 634, [1999] O.J. No. 3290:

> 31 The trial judge referred to the appropriate statutory authorities and instructed himself that an order of costs on a solicitor-and-client level should be made only in "exceptional" and "rare" cases.
>
> 32 In holding that this was a case for costs, the trial judge said:
>
> > In my view, this is one of the "rare" and "exceptional" cases where an award of solicitor and client costs is warranted. The plaintiff advanced numerous allegations of fraud and deceit on the part of the defendants. These allegations included: allegations that Colin Justice intentionally make false and misleading statements to the bank regarding Leigh financial statements; that Justice intentionally misrepresented Leigh's financial condition to the bank; that Plessey, GEC and GEC Siemens plc intentionally misrepresented the affairs of Leigh to the Bank in order to induce the bank to lend money to Leigh; and that the fifth and last comfort letter was delivered to the bank fraudulently, and that this fraud was perpetrated, in part, by Ross Anderson. These allegations were pursued unrelentingly through to the conclusion of trial. Indeed, the plaintiff raised a novel allegation of fraud concerning Mr. Anderson in its written argument, despite the fact that it had not been pleaded and the defendants had no opportunity to lead evidence to refute it. All of these allegations of fraud and deceit were held to be wholly unsupported by the evidence.
>
> 33 The above-quoted observations of the trial judge are fully supported in the record and, in our view, provide ample reason for the costs order made by the trial judge.

[42] Based on these authorities, SWI requests solicitor-client costs in the amount of $64,816.74. SWI provided Affidavit evidence showing that its actual legal fees and disbursements totaled $64,816.74, prior to HST.

[43] NewCo disputes the claim for solicitor-client costs. In essence, NewCo argues that there is no general principle that solicitor-client costs follow from a failure of allegations of fraud or fraudulent misrepresentation. In *Young v. Young*, [1993] 4 S.C.R. 3, McLachlin, J. (as she then was), speaking for the majority on the principles governing costs, said:

> 251 The Court of Appeal's order was based on the following principles, with which I agree. Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. Accordingly, the fact that an application has little merit is no basis for awarding solicitor-client costs...

[44] NewCo also relies on *Gill v. Bassi*, 2016 BCSC 754, where the court considered the circumstances that will justify "special costs" (analogous to solicitor-client costs):

> 10 A failure to prove allegations of fraud will not automatically result in an award of special costs, but may do so when "the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all": *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724, at para. 7.
>
> 11 The circumstances under which special costs may be ordered were summarized in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11:
>
> > 11 ...

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;
>
> (h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (i) where a party pursues claims frivolously or without foundation.

[45] The defendants in *Gill*, who were seeking solicitor-client costs, argued that most of these factors were present. The court, however, made clear that "special costs" would not be ordered simply on the basis that a party's evidence was accepted or rejected:

> 12 The realtor defendants argue that all of these circumstances except (e) apply in this case. However, the argument advanced under each category essentially flows from the fact the court rejected the plaintiffs' evidence, including their evidence to the effect that they did not read the documents they signed, which disclosed the true purchase price of the lots, and either did not receive or did not pay attention to an explanation of those documents from the conveyancing solicitor.
>
> 13 The defendants' argument may be summarized, and perhaps somewhat oversimplified, as: "(1) The plaintiffs' evidence was not believed; (2) if it was not believed it must have been false; (3) if it was false, the plaintiffs must have known it to be false; and (4) if the plaintiffs knew it to be false, they must have been

> recklessly indifferent in pursuing unfounded and unmeritorious claims through trial."
>
> 14 The last three propositions do not necessarily or automatically flow from the first. Special costs are not awarded based on the acceptance or rejection of testimony. "If it were otherwise, instead of being an extraordinary measure, special costs could be imposed whenever credibility was in issue": *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal ref'd 2012 CarswellBC 1815 (S.C.C.).
>
> 15 Even if one assumes the plaintiffs' evidence was dishonest as opposed to merely unreliable--and I made no explicit finding on that point--dishonest testimony alone is not sufficient to warrant an order for special costs. There must be something more egregious in the impugned conduct for it to be considered reprehensible...
>
> 16 There is a difference between a party who deliberately attempts to mislead the court and a party who fails to prove a case on a balance of probabilities because his or her evidence is not accepted...

[46] This being the latter situation, the court did not order special costs (paras. 16-17).

[47] As NewCo argues, a failure to prove fraud on the evidence will not lead automatically to solicitor-client costs. NewCo submits that the focus in determining whether a claim was made “maliciously or frivolously” is on the knowledge of the parties when the proceeding was commenced, citing *Salman v. Al-Sheikh Ali*, 2011 NSSC 30, where Hood, J. said:

> 17 The Shahins say that the Salmans should not have commenced the action or continued it once they knew what their witnesses said at discovery, that is, having denied any defamatory statements were made. However, the case law referred to above says that the focus is to be on the knowledge base of the parties at the time the action is commenced. In the Amended Reply to Demand for Particulars, the Shahins set out in substantial detail the allegations upon which they relied in their action. There is no evidence to establish that this was reprehensible conduct on the part of the Shahins. I therefore look at the conduct of the parties during the litigation. According to the Statement of Claim and the Amended Reply to Demand for Particulars, the Shahins had a cause of action. It is not apparent that the claim

was made maliciously or frivolously, although it is clear in hindsight that the claim was not made out. However, that is not the test.

[48] Hood, J. relied on the decision of Murphy, J. in *Chisholm v. Nova Scotia (Attorney General)*, 2009 NSSC 29, where he said:

> 11 Although the Defendants achieved complete success, this is not a case where the Plaintiff's conduct was so egregious as to warrant a solicitor-client costs award. Decorum and courtesy prevailed in the courtroom during trial. While it may have been misguided for the Plaintiff to pursue the claim, I am not convinced it was advanced maliciously or recklessly, or that the Plaintiff fully appreciated that the claim was groundless. In reaching this conclusion, I find support in [*Petten v. E.Y.E. Marine Consultants*, [1998] N.J. No. 371 (Nfld. S.C.T.D.).] at paras.87 and 88, where the Newfoundland Supreme Court offered the following guidance when considering whether to award solicitor-client costs:
>
> > 87 The analysis of this issue must be undertaken from the point of view, reasonably assessed, of the party who is potentially subject to the award, and not from the judge's point of view with the benefit of hindsight after having heard the case. To do otherwise would expose potential litigants to a significant risk of costs, dissuade the development of the law by the submission of novel claims and discourage or impede litigants' access to the courts. The deliberate, or even possibly the reckless, pursuit of a claim known or believed to be unfounded will often be good evidence of having taken the action out of malice or for other improper motive and thereby constitute an abuse of process which would fall within the notion of reprehensible, scandalous or outrageous conduct. The importance of examining whether a claim is in fact unfounded is with respect to the inferences which may be drawn concerning the motivation of the claimant. It is for this reason that when examining the question of whether a claim is unfounded the focus must be on the knowledge base of the claimant and his solicitor rather than on the basis of hindsight. The correct approach is exemplified by the following comment of Hardinge, J. in *Shedwill v. Wilson* (1991), 48 C.P.C. (2d) 70 (B.C.S.C.) at p.73:
> >
> > > With the benefit of hindsight I have decided the allegation was unfounded. However, looking at the matter from the point of view of the plaintiffs when they commenced their action and even at trial, I am not prepared to go so far as to say the allegation was obviously unfounded, made recklessly or out of malice.
> >
> > 88 The distinction must be drawn, when viewing cases from the point of view of the claimant, between those which have "little merit" which *Young* tells us does not form a basis for awarding solicitor-client costs, and those

> which have obviously no merit. This distinction explains comments in some of the Newfoundland Court of Appeal cases which assert that solicitor-client costs are appropriate where a party has commenced or defended an action "on an obviously frivolous or groundless basis" and where there is a "deliberate advancing of a frivolous claim" which would normally require, additionally, "fraud or other malicious, wanton or scandalous conduct". The advancing of a weak case or one which becomes clear, only with the benefit of hindsight, that it was groundless, will not be sufficient...
>
> [Emphasis added]

[49] As such, NewCo submits, adverse credibility findings alone will not justify solicitor-client costs. As NewCo describes the findings here, "the Court preferred the evidence of Mr. MacKenzie over that of Mr. Carroll with respect to the representations that were made by Mr. MacKenzie." This was not a case of attempting to mislead the Court, they say, and the allegation of fraud was not "obviously unfounded" until the evidence of the witnesses was heard.

[50] I do not believe NewCo's response to the claim for solicitor-client costs adequately addresses the specifics of this matter. This Court made a finding on the main application that NewCo's pleading that Mr. MacKenzie inflated the EBITDA in order to raise the purchase price was based on no evidence, and further, that it was contrary to the evidence elicited by NewCo on discovery (paras. 234-235). The allegation was never withdrawn. Justice Moir's decision in *Wambolt* indicates that a failure to withdraw such an allegation in these circumstances will presumptively lead to solicitor-client costs. This is not simply a situation where Mr. MacKenzie's

evidence was preferred by the Court, but one where allegations of dishonesty were advanced in the face of contrary knowledge.

Conclusion

[51] SWI is entitled to costs of $49,750 (Tarif A, Scale 2) plus $6,000 ($2,000 per day), which amounts to $55,750. The Court exercises its discretion to increase that amount to total costs of $60,000 as a result of NewCo's baseless allegations of fraud on the part of Gary MacKenzie. This amount is inclusive of disbursements.

[52] All amounts owing under this decision ($350,693.15 and costs of $60,000.00) must be paid within 30 days of this decision.

Smith, J.