2010 S. CK. Number: 304120

SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Brown v. Newton, 2010 NSSM 33

BETWEEN:

THOMAS K. BROWN

Claimant

- and -

WALTER O. NEWTON, Q.C.

Defendant

SUPPLEMENTARY DECISION AND ORDER
(Interest and Costs)

Dates of Written Submissions:	On behalf of the Claimant:	April 13th, 2010
	On behalf of the Defendant:	April 19th, 2010
Before:	Gavin Giles, Q.C., Chief Adjudicator	
Counsel:	For the Claimant: Rubin Dexter	
	For the Defendant: W. Harry Thurlow	
Date of Supplementary Decision:	April 21st, 2010	

Gavin Giles, Q.C., Chief Adjudicator

INTRODUCTION:

[1] This matter was heard before the Small Claims Court of Nova Scotia in a "special sitting", held at the offices of McInnes Cooper, Barristers and Solicitors, in Halifax, on Friday, March 19th.

[2] On April 8th, 2010, I rendered a written decision (*Brown v. Newton*, 2010 NSSM 28). At paragraph 280, I indicated that I would "hear counsel separately as to interest and costs, if either or both are sought".

[3] By way of a written submission dated April 13th, 2010, Mr. Dexter, on behalf of the Claimant, sought both interest and costs. By way of a response written submission, dated April 19th, 2010, Mr. Thurlow argued for some limits on any award of interest. Mr. Thurlow did not address the question of costs.

BACKGROUND:

[4] My earlier decision is still fresh enough that it does not require much in the way of summary here.

[5] The Defendant is a lawyer. The Claimant was his client. The Claimant engaged the Defendant to provide him with legal advice and legal services regarding a dispute over his late father's Estate proceeding before the Supreme Court of Nova Scotia.

[6] The Defendant represented to the Claimant that he (the Defendant) had negotiated a settlement of the Claimant's outstanding dispute. The Claimant's late father's Estate disagreed. The Defendant advised the Claimant to proceed to an Application (now a Motion) before the Supreme Court of Nova Scotia seeking the enforcement of the settlement said to have been negotiated.

[7] The Claimant followed the Defendant's advice and proceeded with the recommended Application. The Application was dismissed. The Supreme Court of Nova Scotia held that the Claimant had not come close to satisfying the onus on him that a settlement of the

dispute with his late father's Estate had been concluded.

[8] Relative to the Application, the Claimant paid fees, disbursements and related taxes to the Defendant totalling $4,959.84. That payment took place on October 4th, 2004.

[9] Additionally, the Claimant was required to pay party/party costs to his late father's Estate. These costs were in the lump sum, all-inclusive, of $1,250.00. These costs were paid by the Claimant on November 2nd, 2004.

[10] The Claimant commenced the within Claim against the Defendant seeking the recovery of the above-noted expenditures. I found in favour of the Claimant. I ordered that the Defendant pay the Claimant the sum of $6,199.84. I indicated that I would hear counsel separately as to interest and costs. Their submissions have now been received and considered.

***COSTS*:**

[11] Mr. Dexter, on behalf of the Claimant, seeks costs of $174.13. That is the amount of the filing fee paid by the Claimant to the Court when his Claim against the Defendant was commenced. Mr. Thurlow, on behalf of the Defendant, has taken no position with respect to those costs. They seem reasonable. They are therefore "allowed".

***INTEREST*:**

[12] The *Small Claims Court Act* addresses costs but not interest (see: s. 29(1) (b)). That said, Section 9(a) of the *Act* makes a tangential reference to interest as follows:

> A person may make a claim under this Act:
>
> (a) Seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest; [underlining mine].

[13] The standard interpretation which has been given to the above-noted provision is that the Court's monetary jurisdictional limit does not include whatever interest might accrue to a

pending claim. The inferences to be drawn, therefore, are that a successful party's entitlement to interest was within the mind of the Legislature when the Small Claims Court was established and that interest is in addition to the Small Claims Court's monetary jurisdiction.

[14] Sections 41(i) and 41(k) of the *Judicature Act* are also instructive. Those sections provide that:

> [I]n 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 at 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;
>
> …
>
> [T]he Court in its discretion may decline to report interest under clause (i) or may reduce the rate of interest for the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.

[15] Mr. Dexter has submitted on behalf of the Claimant that he is entitled to pre-judgment interest from November 2nd, 2004, until the date herein. Mr. Thurlow has disagreed. He has submitted on behalf of the Defendant that the Claimant's entitlement to pre-judgment interest should be limited to a 1-year period.

[16] According to Mr. Thurlow:

> As a court of commercial efficiency, the Small Claims Court can encourage people to bring matters forward for speedy resolution by limiting the duration provided for pre-judgment interest where there is no good reason for the delay. On the same note, a plaintiff should not be rewarded for long periods of inactivity. Accordingly, the defendant submits that one year would be an appropriate period of time to apply pre-judgment interest in this case.

[17] I agree generally with Mr. Thurlow's comments but disagree with his submission that the Claimant's entitlement to pre-judgment interest ought to be limited to a one year period. I refer in that regard to the decision of the Supreme Court of Nova Scotia (per: McDougall, J.) in *Force Construction Limited v. Nova Scotia (Attorney General)*, 2009 NSSC 10.

[18] One of the issues addressed by McDougall, J. in *Force Construction* was the plaintiff's delay in commencing its action — three years after the cause of action arose — and the plaintiff's additional delay in prosecuting its claim because of the illness of one of its expert witnesses. With respect to the latter delay, McDougall, J. held that it could not fairly be attributed to the plaintiff. With respect to the former delay, McDougall, J. held that it did not constitute undue delay to commence an action having a 6-year limitation period three years after the cause of action arose.

[19] Though the limitation periods applicable in the Supreme Court of Nova Scotia are the same as those which are applicable in the Small Claims Court of Nova Scotia, I find myself in general agreement with Mr. Thurlow's submission on the timeframes within which Small Claims Court claims should ideally be commenced. There are many reasons for the more timely prosecution of Claims in the Small Claims Court than Actions in the Supreme Court. One of those reasons is established pursuant to the provisions of Section 2 of the *Small Claims Court Act*: the timely, inexpensive and informal pursuit of civil justice within the Small Claims Court's limited jurisdiction.

[20] Of influence on McDougall, J. in *Force Construction* was the decision of the Nova Scotia Court of Appeal (per: Chipman, Oland and Fichaud, JJ. A.) in *Couse v. Goodyear Canada Inc.,* 2005 NSCA 46. At issue there was a trial judge's reduction in the period through which pre-judgment interest would be paid from approximately six years to only four years.

[21] Though the trial judge purported to rely on the provisions of Section 41(k) of the *Judicature Act* in exercising the discretion necessary to reduce the period for which pre-judgment interest would be ordered, there was no indication of how that discretion was being exercised. In short, there was no indication that there had been any undue delay in the prosecution of the plaintiff's case nor was there any indication of either an agreement with respect to pre-judgment interest or the plaintiff's deprivation of the sums which the pre-judgment interest would otherwise represent.

[22] Implicit in the reasoning in *Couse* is that there has to be some reason to depart from the normal award of pre-judgment interest, that is to say for the period from which the cause of action arose until the Court's order determining the cause of action has been filed.

[23] According to Mr. Thurlow's written-submission, the basis in the instant case for a reduction of the period for which pre-judgment interest can be ordered is that it took the Claimant some 3½ years to commence his Claim against the Defendant. Thereafter, the Claimant's Claim languished in the Small Claims Court with an initial hearing, a successful appeal, a remission back to the Small Claims Court for a re-hearing, a re-hearing and, finally, a brief period of reservation to permit written submissions and a written decision.

[24] Addressed above is the application of limitation periods against the backdrop of the provisions of Section 2 of the *Small Claims Court Act*. In short, with all things being equal, it should have been possible for the Claimant to have prosecuted his claim against the Defendant in the Small Claims Court — including his appeal — within a maximum period of three years, including a sufficient period for consideration and reflection on whether or not the claim would in fact be made.

[25] In such circumstances, I am going to decline Mr. Dexter's invitation on behalf of the Claimant to award pre-judgment interest from November 2nd, 2004, to the date herein. Instead, I will award pre-judgment interest from November 2, 2004, through to and including November 2, 2007.

[26] In arriving at that conclusion, I have not failed to consider the Claimant's complaint to the Nova Scotia Barristers' Society regarding the Defendant's delivery of his legal services. Instead, I have concluded that there was nothing to bar the Claimant from proceeding with his two possible remedies against the Defendant at the same period of time. That is particularly so given that the Nova Scotia Barristers' Society had no jurisdiction to order the repayment of the Claimant's fees paid to the Defendant nor the reimbursement by the Defendant of the costs award levied against the Claimant.

INTEREST RATE:

[27] I have considered carefully Mr. Thurlow's submissions regarding the appropriate rate at which the Claimant's entitlement to pre-judgment interest should be paid. Relying on Practice Memorandum #7 of the "old" *Civil Procedure Rules*, Mr. Thurlow has submitted the applicable interest rate herein should be limited to 2.87% annually; that being the average interest rate paid by the Bank of Canada on 1-year treasury bills from November 1st, 2004, through to and including April 1st, 2010.

[28] With obvious respect, even Practice Memorandum #7 is not so limited. It instead refers to evidence being generally necessary to establish an applicable average interest rate for any period in question through such means as the averaging of one (1) and two (2) year interest rates on term deposits and treasury bills. It also refers in paragraph 3 to making an award of pre-judgment interest, where no evidence is presented, with a view to doing reasonable justice to the parties.

[29] Also with obvious respect, the interest paid by the Bank of Canada on 1-year treasury bills is not the same as the consumer interest which would have to be paid by a person in the position of the Claimant borrowing money from a commercial lender for the relevant period of time. Rather, the latter rate would be at least somewhat higher. In fact, given the Claimant's evidence at the initial hearing of his limited means, it might well have been that he was a poor credit risk and would have had to pay an even higher commercial interest rate.

[30] Without traipsing too far into the field of speculation, I cannot conclude, given all of the above, that the 4% annually proposed by Mr. Dexter in his submission on behalf of the Claimant is incorrect. It is in fact doubtful that the Claimant, between November 2nd, 2004, and November 2nd, 2007, could have borrowed the amount of money in issue on the short-term basis involved for an interest rate as low as 4%.

[31] On the strength of all of the above, the Defendant will pay to the Claimant costs in the sum of $174.13. The Defendant will also pay to the Claimant simple pre-judgment interest calculated on the total of $6,199.84 at the rate of 4% annually for a total of three years, or $743.98.

[32] There will be no additional costs arising out of the submissions on interest and costs themselves.

ORDER:

[33] Between interest and costs, the Defendant shall pay to the Claimant the sum of $918.11.

DATED at Halifax, Nova Scotia, this 21st, day of April, 2010.

Gavin Giles, Q.C., Chief Adjudicator,
Small Claims Court of Nova Scotia

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