SUPREME COURT OF NOVA SCOTIA

Citation: *Grafton Connor Property Inc. v. Murphy*, 2015 NSSC 368

Date: 20151218
Docket: Hfx No. 293148
Registry: Halifax

Between:

Grafton Connor Property Incorporated, a body corporate,
c.o.b. Grafton-Connor Group and Beauforth Investments Incorporated,
a body corporate, c.o.b. North End Beverage Room

Plaintiffs

v.

Sean Murphy, in his quality as Attorney in Fact in Canada for
Lloyd's of London Underwriters and
Marsh Canada Limited, a body corporate

Defendants

DECISION ON COSTS

Revised Decision:	The original text of the decision has been corrected according to the attached erratum dated January 14, 2016.
Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	October 19, 2015, in Halifax, Nova Scotia
Written Decision:	December 8, 2015
Counsel:	John P. Merrick, Q.C., for the plaintiffs Michael S. Ryan, Q.C., for the defendant, Sean Murphy Christopher C. Robinson, Q.C., Kevin Gibson and Ian Dunbar for the Defendant, Marsh Canada Limited

By the Court:

[1] On March 7, 2007, the North End Pub, owned and operated by the Grafton Connor Group of Companies ("Grafton Connor"), was destroyed by fire. The Pub was insured by Lloyd's of London Underwriters ("Underwriters") under an insurance policy that had been placed through Marsh Canada Limited ("Marsh"). Following a denial of coverage on the basis of material misrepresentation, Grafton Connor filed an action against Underwriters and Marsh for coverage pursuant to the terms of the policy.

[2] Following a 15-day trial, I issued a written decision on June 30, 2015, apportioning liability equally between *Grafton Connor and Marsh* (2015 NSSC 195). I reserved the issues of pre-judgment interest and costs and invited counsel to submit their respective positions.

GRAFTON CONNOR PRE-JUDGMENT INTEREST CLAIM

[3] In the trial decision, Grafton Connor was awarded the following damages:

Replacement cost of Pub:	$2,174,514.02
Replacement cost of contents:	$411,357.61
Business Interruption:	$154,997.53
Increased cost of construction:	$405,981.77
Increased cost of contents:	$ 15,364.81
Lost past income:	$637,000.00
Total:	$3,799,215.74

[4] This figure was reduced by 50% for contributory negligence, resulting in an award of $1,899,607.87. Grafton Connor seeks pre-judgment interest on that amount at the rate of 5%, calculated from 30 days after the filing of the Proof of Loss until September 2015. This yields an award of pre-judgment interest of $775,673.22.

[5] Grafton Connor describes its claim as primarily a claim for "liquidated damages" and suggests it is appropriate to award interest for the entire claim at the rate of 5% prescribed in *Civil Procedure Rule* 70.07.

[6] Marsh argues that the amount of $775,673.22 sought by Grafton Connor is significantly inflated. According to Marsh, the rate of 5% prescribed for liquidated damages claims is inappropriate because Grafton Connor's claim is for damages in negligence, not for liquidated damages. Marsh says the amount of pre-judgment interest claimed is further inflated as a result of Grafton Connor's failure to distinguish between the individual awards comprising the total judgment. Grafton Connor has calculated interest on all of the awards made from July 5, 2007, notwithstanding the fact that awards for increased cost of construction, increased cost of contents, and lost past income were quantified by the court as of June 2014. Marsh maintains that if interest was payable on these awards, it would not begin to accrue on July 5, 2007, as suggested by the plaintiff.

[7] In addition, Marsh says Grafton Connor is not entitled to pre-judgment interest on the award for the replacement cost of the Pub ($2,174,154.02), because the court has already compensated for inflation by means of a separate award for the increased cost of construction ($450,980.77). In other words, the court has decided that the sum of $2,580,495.70 (less 50% for contributory negligence) would place Grafton Connor in the same position in June 2014 as it would have occupied had the award been made when the proof of loss was submitted. The same holds true with respect to the claim for the replacement cost of the contents where the court awarded $15,364.81 to reflect the increase in the replacement cost of the contents as of June 2014. Marsh argues that calculating pre-judgment interest on these awards would constitute impermissible double recovery.

[8] Marsh accepts that the amount for business interruption and loss of income should be treated differently, because they have not been adjusted for inflation. Nonetheless, Marsh maintains that interest cannot be calculated on those amounts globally from July 2007, as the plaintiff suggests. Rather, interest should be calculated from the year that the amounts in question would have been earned. Marsh relies on *All-Up Consulting Enterprises Inc v. Dalrymple*, 2013 NSSC 46, [2013] N.S.J. No 80 for the view that pre-judgment interest should be limited to 4% per annum on these awards.

[9] Section 41(i) of the *Judicature Act*, R.S.N.S. 1989, c. 240, is the source of the Court's jurisdiction to award pre-judgment interest:

> 41(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…

[10] In addition, the court can decline to award prejudgment interest or reduce the rate of interest in certain circumstances. The following appears in s. 41(k) of the *Act*:

> 41(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 ifthe interest is payable as of right by virtue of an agreement or otherwise by law, the claimant has not during the whole of the pre-judgment period been deprived of the use of the money now being awarded, or the claimant has been responsible for under delay in the litigation.

[11] The leading decision in Nova Scotia on pre-judgment interest is *Bush v Air Canada*, [1992] N.S.J. No. 17. In that decision Chipman J.A. noted that the trial judge is given a broad discretion in fixing the interest rate. He described the purpose of pre-judgment interest at paras. 43 and 56:

> 43 The purpose of prejudgment interest is to attempt to place the plaintiff in the same position he or she would have been in had the award been paid on the day the cause of action arose.…
>
> …
>
> 56… the purpose of prejudgment interest is to compensate the plaintiff for being without the money represented by the award of damages. It is not designed to penalize the defendant or to deprive the defendant of an undue windfall in being able to enjoy the money during the intervening period.

[12] The Court of Appeal considered the various authorities and adopted the position that the rate of pre-judgment interest must be reduced where inflation has been built into the damage award:

> 61 A double recovery should be avoided in the exercise of a trial judge's discretion under s. 41(i) and (k) of the *Judicature Act*, *supra*. The conclusion must be that to the extent that inflation was taken into account for the period between the accrual of the cause of action and the trial, the judge should then adjust the interest rate so that it is not taken into account for a second time. This exercise should be carried out in fixing the rate and requires an examination of the award to determine whether inflation from the date the cause of action arose has been taken into account. Judges should take particular care in cases where a long period

> of time has elapsed between the time the cause of action arose and the assessment of damages. It is in these cases where one can more often say with confidence that the award has grown by inflation from what it would have been at the time from which interest starts to run. In many cases, a judge may not be able to say with any degree of certainty that an inflation factor has been built into the award. In these cases when the second step is taken, a commercial rate of interest would generally be appropriate. Where, however, a judge is satisfied that inflation has been built in, a rate such as the discount rate of 2 1/2% per annum is appropriate. If the trial judge does not do this, a double recovery results to the plaintiff. An injustice is therefore done which requires interference by an appeal court with such an exercise of discretion.

[13] See also *Flynn v. Halifax (Regional Municipality*), 2006 NSSC 106, [2006] N.S.J. No. 262, paras. 40-42; *Mielke v Harbour Ridge Apartment Suites Ltd.*, 2011 NSSC 313, [2011] N.S.J. No. 441, paras. 90-101.

[14] Marsh is correct that the court has already accounted for inflation with respect to the replacement cost of the Pub and its contents. It is incorrect, however, in asserting that Grafton Connor is entitled to no interest at all on these awards. The Court of Appeal in *Bush* did not find that where inflation had been built into an award the Court should exercise its discretion to decline to award interest, but held instead that the rate of 2.5% - the discount rate prescribed by former Civil Procedure Rule 31.10 (2) (current Rule 70.06) - is appropriate.

[15] In my view, the total award for replacement costs of the pub of $2,580,495.70, less 50% for contributory negligence, and the replacement cost of the contents of $426,722.42, less 50% contributory negligence, should attract a rate of interest of 2.5% *per annum*.

[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 Ltd v. National Utility Services (Canada) Limited*, [1995] N.S.J. No. 481, 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. 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 liquidated damages. Those awards that have not been adjusted for inflation therefore attract the prejudgment interest rate of 5%.

[18] Pursuant to the reasoning above, I award interest on the value of the Pub of $2,174,514.02, the increased cost of construction of $405,981.77, the replacement cost of contents of $411,357.61, and the increased costs of contents of $15,364.81 at 2 ½% per annum, less 50% for contributory negligence. The interest award on the Pub and contents is $75,118.45 per annum for a period of eight years (June 2007 to June 30, 2015) which equals $600,947.60, less 50%, for an amount of $300,473.80.

[19] With reference to pre-judgment interest on the amount awarded for business interruption and loss of income, although Marsh suggests a rate of 4%, I have concluded that it is more appropriate to award a rate of 5% per annum. As Marsh suggests, I will calculate interest on these amounts from the date they would have been earned. After reducing the total of $132,749.04 by 50% for contributory negligence, the interest award amounts to $66,374.56.

[20] The total award for prejudgment interest, after taking into account the 50% for contributory negligence, is $3,66,848.36 ($300,473.80 and $66,374.56). This results in a total of $366,848.36.

COSTS AWARD

[21] The amount awarded to the plaintiff was $3,799,921.74 less 50% for contributory negligence. However, Grafton Connor's total claim against Underwriters, or alternatively against Marsh, as set out in its post-trial submissions, was $7,145,291.16, plus aggravated damages, punitive damages, pre-judgment interest, costs and disbursements.

[22] Underwriters seeks party and party costs under Tariff A using an amount involved of $7,057,180. Underwriters arrived at this amount by using the provisional damage awards set out in the trial decision. Underwriters made a formal offer to settle of $500,000 on June 10, 2014, seven days before the start of trial. Since Grafton Connor recovered nothing against Underwriters, Underwriters says the basic tariff amount should be increased by 25% (Scale 3). Alternatively, Underwriters submit that Scale 3 is appropriate given the complexity of the issues, the amount put in issue and the importance of the litigation to all of the parties.

[23] Grafton Connor agrees with Underwriters that Scale 3 of Tariff A is appropriate but says that the amount involved should be $1,899,607.87, the amount actually awarded to the plaintiff. Grafton Connor takes the position that Marsh should be denied costs against it, and that any costs awarded to Underwriters against Grafton Connor should be paid by Marsh pursuant to a *Sanderson* or *Bullock* order.

[24] Like the other two parties, Marsh agrees that Scale 3 is appropriate but says that the court should exercise its discretion and use two different "amounts involved". It says Grafton Connor's award should be calculated based on 50% of an amount involved of $3,799,215.74 while Marsh should be awarded costs against Grafton Connor based on 50% of an amount involved of $7,145,291.60, the amount claimed by Grafton Connor in its post-trial submissions. Marsh says that using a single amount would result in the costs awarded to Grafton Connor and Marsh simply being set off against one another. This result would fail to account for the success of Marsh in reducing the quantum of the claim made against it by Grafton Connor, including the dismissal of the claims for aggravated and punitive damages.

[25] To support its position that Marsh be denied cost against it, Grafton Connor relies primarily on *Flatley v. Denike*, [1997] B.C.J. No. 429, a decision of the British Columbia Court of Appeal, which suggests that costs are only be awarded to a party who recovers damages or loss.

[26] On this issue, I agree with Marsh that it is entitled to costs against Grafton Connor. There is no reason to depart from the law in Nova Scotia as set out in *Sydney Cooperative Society Limited v. Coopers & Lybrand*, 2006 NSSC 276, [2006] N.S.J. No. 382, at paras 17 and 18:

> 17 The defendant argues that *Flatley* should be distinguished on the basis of the language of the statutes involved. *The British Columbia Negligence Act* provided that a person who has sustained "damage or loss" shall be entitled to recover for that damage or loss from "each other person who is liable to make good the damage or loss" (s. 2(c)). The liability for costs of the parties to an action "shall be in the same proportion as their respective liability to make good the damage or loss" (s. 3). As the British Columbia Courts have interpreted these provisions, a defendant who has not sustained damage or loss may not collect damages, even if liability is divided. This statutory language bears little resemblance to the *Nova Scotia Contributory Negligence Act*. Further, the defendant notes, *Mader* was decided after *Flatley* (though in the same year) and does not refer to the British Columbia decision.
>
> 18 I am satisfied that the law in Nova Scotia is as set out in *Mader*. As a general rule, each party is entitled to their costs according to the division of liability.

[27] Marsh is to be awarded 50% of its costs and disbursements from Grafton Connor and Marsh should be liable for 50% of the costs and disbursements incurred by Grafton Connor.

[28] I am mindful that Grafton Connor argues that if the court reduces Grafton Connor's own costs by 50% due to the finding of contributory negligence, and awards Marsh 50% of its costs, Grafton Connor will walk away empty-handed despite having been 50% successful. In other words, Marsh's success would be recognized twice -- once in a reduction of Grafton Connor's costs, and again in an award of 50% of Marsh's costs. While this reasoning is persuasive, the same argument could be made in any case where liability is divided.

[29] As to the appropriate "amount involved" upon which costs should be based, the Tariffs provide as follows:

> In these Tariffs unless otherwise 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;
>
> (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
>
> (i) the amount of damages provisionally assessed by the court, if any,

(ii) the amount claimed, if any,
(iii) the complexity of the proceeding, and
(iv) the importance of the issues;

[30] Underwriters submits that since the claims made against it by Grafton Connor were dismissed, subsection (b) applies, and I should use an "amount involved" of $7,057,180. This figure represents the damages I would have awarded against Underwriters if Grafton Connor had been successful in its claim for the value of the policy *and* the claim for consequential damages – a claim which I held was too remote.

[31] For its part, Marsh submits that neither subsection of the Tariffs specifically contemplates the present scenario where liability is equally divided between the plaintiff and the defendant, and where the defendant successfully defended a consequential damages claim of over three million dollars. It says that the "amount involved" for Grafton Connor should be determined with regard to the amount awarded ($3,799,215.74), while the "amount involved" for Marsh should be determined with regard to the amount claimed by Grafton Connor in its post-trial submissions ($7,145,291.60).

[32] As support for its position that this court should use two different amounts involved, Marsh relies on *Shelburne Marine Ltd v. MacKinnon & Olding Ltd*. (1997), 163 N.S.R. (2d) 257, [1997] N.S.J. No. 463 (S.C.). In that case, the plaintiff claimed damages in the amount of $263,930, and liability was apportioned 60% to the plaintiff and 40% to the defendant. Saunders J., as he then was, fixed the amounts involved for the plaintiff at $90,000 and $35,000 for the defendant. However there was no indication as to how Saunders J arrived at different amounts involved, and the decision has not been judicially considered. Interestingly, in *Armstrong v. Baker*, [1992] N.S.J. No. 628 (S.C.), an earlier decision of Saunders J., he rejected the argument by a defendant that different amounts involved should be applied to the parties.

[33] While not relied on by Marsh, I am mindful that in *Boutilier v. Pearcey*, 2011 NSSC 307, [2011] N.S.J. No. 420, MacAdam J. used two different amounts involved when fixing lump sum costs where the amount awarded to the plaintiff was far less than the amount claimed. In that case, the plaintiff was rear-ended by the defendants and sought damages in excess of one million dollars. A jury awarded damages of $142,952.00. The parties agreed that the 1989 Tariff applied to the proceeding. Recognizing the inadequacy of the 1989 Tariff in providing a

substantial contribution to the parties' costs, MacAdam J. elected to award a lump sum. One of the factors he considered in determining an appropriate lump was the "amount involved":

> **23** The "amount involved" is one factor relevant in assessing lump sum costs. Pursuant to Tariff A of the 1989 Tariff, the amount involved, "where the main issue is a monetary claim which is allowed in whole or in part", shall be determined having regard to:
>
> (i) the amount allowed,
> (ii) the complexity of the proceeding, and
> (iii) the importance of the issues;
>
> **24** When there was a monetary award, a practice developed of using the amount awarded as the amount involved: *Williamson v. Williamson*, [1998] N.S.J. No. 498, at para. 22. In *Curwin v. Sobeys Group Inc.*, 2007 NSSC 164, for example, McDougall J. held that the amount involved would be the amount awarded by the jury.
>
> **25** Although in *Marshall (Litigation Guardian of) v. Annapolis County District School Board*, 2010 NSSC 179, Pickup J. set the "amount involved" as the amount claimed by the plaintiff, in *Nassim v. Perth Insurance Co.*,2009 NSSC 417, Coughlan J., although clearly taking into account the amount claimed in determining the amount involved, did not equate the two. Smith A.C.J. followed a similar approach in *Farrell v. Casavant*, 2010 NSSC 46, where the plaintiffs, in their pre-trial brief, advanced claims ranging from $88,127.48 to $135,127.48. At trial the claim was dismissed, but the Associate Chief Justice provisionally assessed damages at $10,879.48. She awarded the defendant additional costs to take into account both the amount claimed as well as the failure of the plaintiff to accept two offers to settle. An important consideration in adding an additional $5,000.00 to the calculated costs was the failure to accept the offers to settle. She did not follow the formulas set out in Rule 10.09(2), "as that Rule was not in effect when either of the Offers were made." In the present case, only an offer to settle for $300,000.00, made in March 2010, was made after the 2009 Rules became effective.
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> **26** "Risk" differs from the perspective of a plaintiff and a defendant. The plaintiff's risk is that they would not have received what was eventually decided they were owed. For the purpose of assessing the amount involved for a plaintiff, reference is had to what the adjudicator, whether it be a judge or a jury, awarded. From the perspective of the defendant, the risk is what the plaintiff claimed in the litigation. There are, of course, in many cases though not this one, non-monetary claims advanced by parties.
>
> **27** If it were necessary to set an amount involved, I would fix the amount involved for the plaintiff at the amount awarded, together with an adjustment for pre-judgment interest. In respect to the defendants, the amount involved would be $1,000,000.00.

[34] While MacAdam J. interpreted the Tariffs as allowing for consideration of the amount claimed in cases where the plaintiff was partially successful, there is authority to the contrary. In *Willis v. Bernard L Mailman Projects Ltd*, 2008 NSSC 94, [2008] N.S.J. No. 114, the plaintiff claimed damages in the amount of $700,000 against the defendant. The amount awarded at trial was $272,000. The defendant argued that the "amount involved" in assessing costs should be the amount claimed, not the amount awarded. Justice Hood concluded that this approach was inconsistent with the language of the Tariffs:

> **66** It is up to the court to determine the amount involved. The tariffs deal with the issue for the guidance of the court. The tariffs provide:
>
> > In these Tariffs, 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;
>
> **67** In this case, the plaintiff's claim was allowed in part. The complexity of the proceeding has been dealt with above under the determination of which scale to use. The trial did not raise unusual issues which, in my view, is the intent of the phrase "importance of the issues."
>
> **68** Because the plaintiff was partially successful, I do not agree that the amount claimed should be the amount involved in this case. In my view, it is a factor where the claim is dismissed. The tariffs say:
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> > (b) where the main issue is monetary claim which is dismissed, an amount determined having regard to
> >
> > > (i) the amount of damages provisionally assessed by the court, if any,
> > >
> > > (ii) the amount claimed, if any,
> > >
> > > (iii) the complexity of the proceeding, and
> > >
> > > (iv) the importance of the issues;

> **69** Although the plaintiff's exaggerated claim was not accepted, she had some success at trial in that she was awarded a sum of $132,053.29 in addition to the $140,000.00 already paid. I have concluded above that she is also entitled to interest plus costs and disbursements although her costs will be reduced by fifty percent. [*Emphasis added*]

[35] Although Underwriters succeeded in defending Grafton Connor's claims against it, I do not believe that the use of the amount provisionally awarded as the "amount involved" is appropriate in the circumstances of this case. The Tariffs provide that in cases "where the main issue is a monetary claim which is allowed in whole or in part", the "amount involved" is to be determined with regard to the amount awarded, the complexity of the proceedings, and the importance of the issues. In cases "where the main issue is a monetary claim which is dismissed", the court may consider the amount of damages provisionally assessed and the amount claimed, presumably because there is no other way to determine an amount where the claim has been denied.

[36] In this case, Grafton Connor sued both defendants for the value of the insurance policy, and for consequential damages arising from the delay in Grafton Connor obtaining the insurance proceeds. The claims were made in the alternative, with no possibility of liability on the part of both defendants. I ultimately apportioned liability equally between Grafton Connor and Marsh for the value of the policy, and dismissed the consequential damages claim. Had I concluded that the policy was valid or that Underwriters had been negligent in assessing the risk, damages would have been assessed at $3,799,215.74, the same amount for which I apportioned liability equally between Marsh and Grafton Connor. My conclusion that the consequential damages claim was too remote applied to both defendants. In these circumstances, where the exposure to both defendants is identical, it makes sense to determine a single "amount involved", having regard to the factors applicable to cases where the main issue is a monetary claim which is allowed in whole or in part.

[37] As for Marsh's submission that I should use different amounts involved for the plaintiff and the defendants in order to account for the success of the defendants in defending the consequential damages claim, I prefer to recognize this success, or what MacAdam J. described as the difference in risk between the parties, by other means. I accept that the awards of costs to both Underwriters and Marsh should reflect their success in defending the significant consequential damages claim advanced by Grafton Connor. A great deal of work was expended to defend the claim for consequential damages that was added to the pleadings six

years after the action was initially filed. This amendment nearly doubled the defendants' exposure, adding over $3,000,000 to the claim. Expert reports and additional witnesses were necessary to respond to the new claim. The direct and cross-examination of existing witnesses like Gary Hurst and Steve McMullin were longer and more complex than would otherwise have been necessary.

[38] In my view, an exercise of the court's discretion under *Civil Procedure Rule* 77.07 to increase the tariff amount is an appropriate means by which to recognize the success of Marsh and Underwriters in defending the consequential damages claim. Rule 77.07 provides, in part:

> Increasing or decreasing tariff amount
>
> 77.07 (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
>
> (a) the amount claimed in relation to the amount recovered...

AWARD OF COSTS AND PREJUDGMENT INTEREST TO UNDERWRITERS

[39] Accordingly, I believe the appropriate "amount involved" to be used under the Tariff is $3,799,215.74, but I will exercise my authority under Rule 77.07 to add a significant sum to the awards in favour of Underwriters and Marsh due to the substantial difference between the amount claimed and the amount recovered. Although Underwriters and Marsh each made a formal offer to settle of $500,000 to Grafton Connor, these offers were made a week before trial and do not warrant the 25% increase to the basic tariff amount suggested by Underwriters. That said, I accept that Scale 3 of Tariff A is appropriate given the complexity of the issues and the importance of the litigation to all of the parties.

[40] Therefore, starting with Underwriters, the costs calculation would proceed as follows:

$3,799,215.74 x6 .5% (basic scale)	$246,949.02
(+25%) for Scale 3	$61,737.26

15 x $2000 for 15 days of trial	$30,000.00
Total	$338,686.28

[41] To the award of $338,686.28 I add the amount of $60,000 pursuant to *Rule* 77.07, for a total of $398,686.28.

[42] In addition, Underwriters seeks disbursements in the amount of $158,008.07, inclusive of GST/HST and VAT, where applicable. No objection has been raised as to the reasonableness of this amount, and I allow the disbursements claim in its entirety.

[43] Finally, Underwriters seeks interest, costs and disbursements on its counterclaim of $95,000.00, an amount it paid for the cleanup of the North End Pub site. The cost of the cleanup would ordinarily have been paid by Underwriters if the insurance policy had been found to be valid.

[44] Underwriters submits that it paid the $95,000 on October 31, 2012 and accordingly is entitled to pre-judgement interest for 32 months from November 1, 2012, to June 30, 2015, of $12,667,00. My view is that such an amount is reasonable and I award this amount to Underwriters.

[45] As to the costs on the counterclaim, Underwriters claims that Tariff A, Scale 3, applies, resulting in a claim for costs of $12,250.00 and an additional 25%, equalling $3,062.50. I have no evidence to support a finding that the counterclaim raised a complex issue or resolved an important issue between the parties. I therefore award costs on the counter-claim by applying Tariff A, Scale 2 which results in a total of $12,250.00. Disbursements on the counterclaim have been included in the above award and no separate award for disbursements will be made.

[46] In sum, Underwriters is entitled to costs in the amount of $410,936.28 ($398,686.28 + $12,250), disbursements in the amount of $158,008.07, and pre-judgment interest on the counterclaim in the amount of $12,667.00.

[47] Underwriters' counsel has advised the court that the total amount of billed fees to Underwriters by Cox & Palmer, Stikeman Elliott, a Toronto law firm, and Michael Ryan Legal Services Ltd was $837,794.50, inclusive of GST/HST and VAT, where applicable. No objection was taken by either counsel and there was no

request for taxation from any party. The amount awarded represents a substantial contribution to Underwriter's legal costs.

AWARD OF COSTS TO MARSH

[48] Marsh's costs are be calculated as follows:

$3,799,215.74 x6 .5% (Basic scale)	$246,949.02
(+25%) for Scale 3	$61,737.26
15 x $2000 for 15 days of trial	$30,000.00
Total	$338,686.28

[49] To that I would add $60,000 pursuant to *Rule* 77.07 for a total of $398,686.28. This amount represents a substantial contribution to Marsh's legal costs, as I am advised by Mr. Robinson that Marsh's legal account as of December 31, 2014, was $862,364.25. However, the adjusted amount is $199,343.14, allowing for the 50% adjustment for contributory negligence.

[50] Marsh also claims that their total disbursements of $104,702.26. Grafton Connor did not raise any objection as to the amount of these disbursements and I find them to be reasonable in the circumstances. As a result, I award this amount less 50% for contributory negligence which results in award of $52,351.13 for Marsh's disbursements.

AWARD OF COSTS TO GRAFTON CONNOR

[51] Costs to Grafton Connor from Marsh will be calculated as follows:

$3,799,215.74 x 6 .5% (Basic Scale)	$246,949.02
(25%) for Scale 3	$61,737.26
15 x $2000 for 15 days of trial	$30,000.00
Total	$338,686.28

[52] Due to the fact that Grafton Connor only recovered 50% of the amount awarded because of contributory negligence, the total amount of costs awarded to

Grafton Connor is $169,343.14. I am unable to agree with Grafton Connor's contention that their costs award should be the same as what I have awarded to Marsh. Grafton Connor chose to add a consequential damages claim Marsh successfully defended and, in my view, Grafton Connor cannot escape the consequences of that decision entirely.

[53] As to Grafton Connor's claim for disbursements of $189,957.12, Marsh takes issue with several of items set out in Grafton Connor's submission.

[54] Marsh argues that I should not award the total amount of Mr. Jennings's account of $77,863.24 because this figure is 2.5 times greater than the amount paid by Marsh to its expert, Brian Keough, to do the same work. Mr. Keough billed $29,325.

[55] Grafton Connor suggests that Mr. Jennings's account is reasonable because the plaintiff's consultant has to build a case. In other words, the plaintiff's expert always has the labouring oar in litigation. While there may be cases where the plaintiff's expert must do more work than the defendant's expert, I do not believe that this is such a case. It must be remembered that Mr. Jennings reviewed less material than Mr. Keough and his report was far less helpful to the court. Therefore, I would reduce the award in respect of this disbursement from $77,863.24 to $50,000.

[56] In the case of Frank Szirt, Mr. Szirt was called as an expert and provided a report with respect to the standard of care of an underwriter and insurance broker. He also testified as to the process employed by Underwriters in voiding an insurance policy. The bulk of Mr. Szirt's evidence, which pertained to the conduct of Underwriters, was ultimately not accepted. The portion of the report pertaining to Marsh's conduct was ultimately given little or no weight because Mr. Szirt mistakenly believed that Marsh was in possession of the TRS report for the North End Pub in 2003 and that Marsh had failed to provide it to Underwriters.

[57] I believe however, that Mr. Szirt's opinion on the standard of care with respect to insurance brokers in general was of some value and was not completely wasteful. For this reason, rather than denying this disbursement entirely, I am reducing the amount of his account by $20,000.

[58] Grafton Connor claims payment of a disbursement for "Exp Services". There are no particulars provided by Grafton Connor as to this amount. This amount is excluded.

[59] Secondly, Grafton Connor claims $1064.00 for disbursements associated with the retention of a law firm to represent Mr. Merrick when he was cross-examined on his affidavit filed in relation to the motion to amend the plaintiff's pleadings. Marsh claims that this disbursement should be denied because Civil Procedure Rule 23.09(7) provides that a party submitting an affidavit bears any costs associated with cross-examination. This amount is excluded.

[60] Thirdly, Marsh objects to the approval of a disbursement for QuickLaw online research, which is not itemized, but rather included in a larger disbursement of $10,445.29. No additional information was provided by Grafton Connor either by memorandum or at the costs hearing. I have decided to reduce the amount by $300.00. The revised amount for this item is $10,145.29.

[61] Fourthly, Grafton Connor has claimed travel expenses of $698.88. I have no details of what this travel relates to and accordingly travel expenses generally are not recoverable. I accordingly exclude this amount from any award of disbursement to Grafton Connor.

[62] As a result of these reductions, the total amount awarded for disbursements to Grafton Connor is the amount claimed less the adjustments for the Jennings and Zsirt accounts and the additional adjustments for "Exp Services", the account for legal services, Quick Law and the travel expenses, less 50% on account of contributory negligence.

RETURN OF PREMIUMS COSTS AND PRE-JUDGMENT INTEREST

[63] Having found at trial that Underwriters was entitled to void the insurance policy on the grounds of material misrepresentation, I ordered that Underwriters return the total premiums paid by Grafton Connor for the period of July 1, 2003, to July 1, 2007. Grafton Connor quantifies the total amount of the premiums as $13,390.60, which it claims in full against Underwriters. Underwriters says that

the amount of premium to be returned should be net of the brokerage/commission at 20% paid by Grafton Connor to Marsh.

[64] At trial, I heard evidence from Mr. Harrison as to the procedure to be followed in the return of premiums when an insurance policy is voided. He explained that in the London market, return of the premium was contingent upon the receipt by Underwriters of an endorsement from the insurance broker. However, I held that under Canadian law, the insurer is ultimately responsible for the return of the premiums.

[65] I find the total premium amount of $13,390.60 is to be paid by Underwriters to Grafton Connor. Underwriters is free to seek reimbursement from Marsh for the twenty percent commission that Marsh deducted from the premiums paid by Grafton Connor.

[66] I agree that interest at the rate of five percent annually shall cover the period from July 1, 2005, to June 30, 2015. Grafton Connor is entitled to interest of $6,695.30.

[67] I am mindful that well before the trial, Underwriters offered to set off the amount of the insurance premiums against the amount of the counterclaim. It was Underwriter's responsibility to see to it that the insurance premiums were returned to Grafton Connor promptly rather than awaiting the results of the litigation. The principle that insurers should attend to the return of premiums promptly rather than dealing with it as an afterthought is important.

[68] As to Grafton Connor's claim for costs on this aspect of the claim, I award Grafton Connor costs of $4,000.00 under Tariff A, Scale 2.

GRAFTON CONNOR'S REQUEST FOR A *SANDERSON* OR *BULLOCK* ORDER.

[69] Should a *Bullock* or *Sanderson* order be made requiring Marsh to pay the costs of Underwriters?

[70] Grafton Connor says that it is entitled to a *Bullock* or *Sanderson* order against Marsh in relation to the costs payable by Grafton Connor to Underwriters. Grafton Connor says that the following factors militate in favour of an order:

> 1) Grafton Connor had good reason to join Underwriters;
> 2) There is no good reason to deprive Underwriters of its costs; and
> 3) As between co-defendants, Marsh was wholly responsible for the action.

[71] Grafton Connor writes in its brief: "Your Lordship's decision has clearly placed the responsibility as between the two defendants on Marsh. It was also Marsh's decision to counterclaim against Lloyd's in an attempt to shift blame."

[72] Marsh says that no such order should issue in this case. It says that in order for the court to make a *Sanderson* or *Bullock* order, it must be satisfied that some injustice would be produced by following the normal rule that a successful defendant is entitled to its costs against the plaintiff. No such injustice exists here. Marsh says that it did nothing to cause Underwriters to be joined to the action, and when its crossclaim was made, Underwriters was already a party to the action.

[73] According to Marsh, an injustice would result if the court allowed Grafton Connor to avoid responsibility for the costs consequences of its unsuccessful action against Underwriters.

[74] In *Keizer v Portage LaPrairie Mutual Insurance*, 2013 NSSC 321, [2013] N.S.J. No. 521, Wright J. explained the difference between the two orders, and set out the factors to be considered when determining whether an unsuccessful defendant should bear the costs of a successful defendant:

> 24 The lead question for determination between these parties is whether the costs of Portage, as the successful defendant, should be paid by Founders, rather than being borne by the plaintiffs. Both Portage and the plaintiffs advocate an affirmative answer to that question while Founders contends that the plaintiffs should bear the costs of their unsuccessful action as against Portage.

25 There are two variations of such a costs order which find their origins in the English Courts of Chancery. One is known as a *Bullock* order (emanating from **Bullock v. London General Omnibus Company & Others** [1907] 1 K.B. 264 (C.A.) and the other more modern version is known as a *Sanderson* order (emanating from **Sanderson v. Blyth Theatre Company**, [1903] 2 K.B. 533 (C.A.).

26 The difference between these two forms of order was recently reviewed by the Prince Edward Island Court of Appeal in **Griffin v. Summerside (City)**, 2010 PECA 15. After reviewing the history and purpose of such orders from an earlier decision of that court in **Rayner v. Knickle** (1992) 99 Nfld. & P.E.I.R. 35 (at para. 39), Chief Justice Jenkins wrote as follows (at para. 40):

> In **Moore (Litigation Guardian of) v. Wienecke**, 2008 ONCA 162, at para. 37-50, the Ontario Court of Appeal discussed the difference between Bullock and Sanderson orders and the test for determining which order should be made. The difference between the two types of order is that under a Bullock order the unsuccessful defendant reimburses the plaintiff for the successful defendant's costs while under a Sanderson order the unsuccessful defendant pays the successful defendant's costs directly. The usual test for determining whether a Sanderson order is appropriate has two steps:
>
> (1) the threshold question of whether it was reasonable to join the several defendants in one action; and if the threshold question is answered in the affirmative, then (2) whether a Sanderson order would be just and fair in the circumstances. The second step involves an exercise in discretion in which a number of factors may be relevant. These factors, which need not be applied mechanically in every case, include:
>
> > (1) whether the defendants at trial tried to shift responsibility onto each other, as opposed to concentrating on meeting the plaintiff's case;
> > (2) whether the unsuccessful defendant caused the successful defendant to be added as a party;
> > (3) whether, where there are multiple causes of action, they were independent of each other;
> > (4) in some cases, there is reference to ability to pay.

27 The Nova Scotia Court of Appeal, on an earlier occasion, also reviewed the law in situations where an unsuccessful defendant may be ordered to pay the costs of a successful defendant. In **Kelly v. Wawanasa Mutual Insurance Co.**, [1979]

> N.S.J. No. 504, 1979 Carswell NS 143, the Court of appeal (at paras. 49-51) adopted earlier jurisprudence and affirmed that such an order should only be made where:
>
> > (1) The plaintiff had good grounds for joining the successful defendant as a party;
> > (2) There is no good cause for depriving the successful defendant of his costs; and
> > (3) As between the co-defendants, the unsuccessful defendant was wholly responsible for the action.

[75] As Marsh points outs, the general rule in multi-defendant litigation is that the plaintiff is entitled to costs from the unsuccessful defendant, and the successful defendant is entitled to costs from the plaintiff. *Bullock* and *Sanderson* orders are exceptions to this general rule.

[76] The test for determining whether a *Bullock* or *Sanderson* order is appropriate has two steps. The first step consists of the threshold question of whether it was reasonable to join the several defendants in one action. The threshold question is easily met in this case. Indeed, Marsh does not suggest otherwise. Having answered the threshold question in the affirmative, the court must consider a number of factors to determine whether a Bullock or Sanderson order would be just and fair in the circumstances. These factors include:

> (1) whether the defendants at trial tried to shift responsibility onto each other, as opposed to concentrating on meeting the plaintiff's case;
> (2) whether the unsuccessful defendant caused the successful defendant to be added as a party;
> (3) whether, where there are multiple causes of action, they were independent of each other;
> (4) in some cases, there is reference to ability to pay.

[77] As discussed above, our Court of Appeal in *Kelly* has also indicated that a *Sanderson* or *Bullock* order should only be made where there is no good cause for depriving the successful defendant of his costs and, as between the co-defendants, the unsuccessful defendant was wholly responsible for the action. These criteria

are clearly met in this case, so the matter will hinge on how this court balances the four factors set out by the Ontario Court of Appeal in *Moore* and subsequently adopted in *Keizer*.

[78] Of the *Moore* factors, the first and second have been described as "the two most important": *Dynamic Medical Concepts Inc v. DiBenedetto*, [2008] O.J. No. 1452 (Ont. Sup. Ct. J.) at para. 83. The first factor, whether the defendants attempted to shift blame onto one another, has also been called the "foremost consideration" when determining whether a *Sanderson* or *Bullock* order is appropriate: *Moore, supra*, at para. 46; *Persaud v Bratanov*, 2012 ONSC 6870, [2012] O.J. No. 5725 at para. 22. Grafton Connor says that Marsh's crossclaim is evidence that it attempted to shift responsibility onto Underwriters. Marsh says that each defendant was in the first place largely concerned with advancing its own defence, and the vast majority of the evidence at trial was advanced by each individual defendant relative to its own case. It points out that the only point where Marsh's position departed from that of Underwriters was Endorsement 10, and little or no trial time was consumed in the leading of evidence concerned with that particular point.

[79] When deciding whether or not one defendant tried to shift blame onto the other, the presence or absence of a crossclaim or a specific pleading that the other defendant is responsible for the plaintiff's losses is not determinative. In *Universal Stainless Steel & Alloys Inc v. JP Morgan Chase Bank*, 2009 ONCA 801, [2009] O.J. No. 4831, the Ontario Court of Appeal held that one defendant had attempted to shift blame onto the other notwithstanding the absence of a crossclaim:

> 63 The motions judge ordered the appellant to pay the costs incurred by its co-defendant, Comerica, in the amount of $117,996.21. The appellant submits that the motions judge misapprehended the facts and incorrectly applied the test set out by this court in *Moore v. Wienecke* (2008), 90 O.R. (3d) 463 for determining whether a *Sanderson* order should be made.
>
> 64 *Moore v. Wienecke* established a two-part test. First, the court must ask whether it was reasonable to join the several defendants together in one action. Second, the court, in exercising its discretion, must consider whether a *Sanderson* order is just and fair in the circumstances. In applying this second branch of the test, four factors must be considered: (1) Did the defendants try to shift responsibility on to each other as opposed to concentrating on meeting the

> plaintiff's case?; (2) Did the unsuccessful defendant cause the successful defendant to be added as a party?; (3) Were the two causes of action independent of each other?; and (4) Would the inability of an unsuccessful litigant to pay render the award unfair?
>
> 65 The appellant acknowledges that the first branch of the test has been satisfied as Universal properly included both the appellant and Comerica as defendants. Comerica's position was that it did all that was required of it and that it was the appellant that should be liable.
>
> 66 With respect to the second branch of the test, the appellant argues that it is neither fair nor reasonable to require it to pay Comerica's costs as it made no cross-claim against Comerica. The appellant simply alleged that the documents presented were not compliant and notice to it of the transfer of the letter of credit was required. It maintained the alleged deficiencies and the failure to give notice of the transfer were defences against Universal's claim.
>
> 67 In my view, the absence of a cross-claim and the fact that the appellant did not specifically plead that Comerica was responsible are not determinative. In effect, the appellant's position was that discrepant documents were presented by Comerica, and that neither Comerica nor anyone else gave the notice of the transfer that the appellant alleged was required. The appellant's submissions therefore necessarily implied that Comerica, as the transferring bank, was party to errors that justified its refusal to pay Universal. Comerica took a position directly contrary to the appellant, maintaining that it presented compliant documents to the appellant and notice of the transfer of the letter of credit to Universal did not have to be made. This satisfies the requirement of responsibility shifting.
> *[Emphasis added]*

[80] In my view, it is inappropriate for Marsh to suggest that the defendants in this case did not attempt to shift blame onto one another. The primary position advanced by both Grafton Connor and Marsh was that Grafton Connor's losses were covered under Endorsement 10 of the Underwriters policy. It was only in the event that this shared position proved incorrect that they turned on each other. Furthermore, unlike in *Universal Stainless*, Marsh did file a crossclaim against Underwriters that was not abandoned before trial. While Marsh is correct that there was no evidence led at trial with respect to Endorsement 10, it was not for a lack of trying. Marsh gathered expert evidence on the meaning of Endorsement 10, but that evidence was ultimately deemed inadmissible. The reality is that

Marsh's primary defence to this action was that Underwriters was liable for Grafton Connor's damages pursuant to the language of Endorsement 10. That Marsh's allegation of liability against Underwriters was based in contract and required no evidence at trial is irrelevant. In my view, the first factor, which is the "foremost consideration", has been met in this case.

[81] The second factor is whether the unsuccessful defendant caused the successful defendant to be added as a party. The Ontario Court of Appeal has observed that a *Sanderson* or *Bullock* order is unfair and an error in principle where the unsuccessful defendant has done nothing to cause the joinder of the successful defendant: *Eichmanis v. Wawanesa Mutual Insurance Co* (2007), 287 D.L.R. (4th) 15 (Ont. C.A.), leave to appeal denied [2007] S.C.C.A. No. 178.

[82] In my view, the circumstances of this case are similar to those considered by the Ontario Superior Court of Justice in *Persaud v. Bratanov*, 2012 ONSC 6870, [2012] O.J. No. 5725 at para. 23**::**

> 23 The second factor arising from the case law relates to whether the unsuccessful defendant caused the successful defendant to be added as a party to the litigation. See: *Moore v. Wienecke*, at para. 48. There is no doubt that it was the Persaud plaintiffs who first engaged Ms. Bratanov in this litigation, not Unifund. At the same time, however, it is fair to observe hat this step appears to have been taken by the plaintiffs to avoid any dispute with Unifund over whether they had joined all of the potential liable defendants. It is also fair to note that, if the plaintiffs had not included Ms. Bratanov as a party defendant, Unifund would have caused Ms. Bratanov to be added as a party defendant. Accordingly, in my view, this factor is somewhat neutral in the analysis. The plaintiffs in fact added Ms. Bratanov as a defendant, but Unifund would have added Ms. Bratanov in any event.

[83] The same can be said of the case at bar. Underwriters was added as a defendant by Grafton Connor, but it is patently obvious from the primary defence adopted by Marsh and its crossclaim that it would have added Underwriters to the action if Grafton Connor had not. The involvement of Underwriters was a necessary condition of the primary position advanced by both Grafton Connor and Marsh at trial. In my view, this case does not fall within the category of cases contemplated by the Ontario Court of Appeal in *Eichmanis* where a *Sanderson* order would constitute an error in principle.

[84] The third factor is whether, where there are multiple causes of action, they were independent of each other. It is true that the claim against Underwriters was in contract, and the claim against Marsh was made in contract. Marsh emphasized this fact at the hearing. The following passage from the Ontario Court of Appeal in *Rooney (Litigation guardian of) v. Graham*, 2001 Carswell Ont 887, [2001] O.J. No. 1055 (Ont CA) is instructive on this point:

> 7 A *Bullock* or *Sanderson* order has been said to be inappropriate when an independent cause of action is alleged against each defendant, for example when one is based in contract and the other in tort, or when separate actions have been instituted against each defendant. See *Scarboro Golf & Country Club Ltd. v. City of Scarborough et al.* (No. 2) (1986), 32 D.L.R. (4th) at p. 732 and *Dellelce Construction and Equipment v. Portec Inc.* (1990), 73 O.R. (2d) 396 (Ont. H.C.) at p. 442.
>
> 8 In my view, these authorities do not provide a blanket rule that a *Bullock* or Sanderson order can never be made when the causes of action are independent, or when separate actions are instituted. Although such circumstances may indicate the appropriateness of these orders, and will at times be determinative, each case must be assessed on its own facts. The proper approach to issuing a Bullock or Sanderson order will consider each case in its context. Thus, there may be times where the causes of action are independent or the actions separate, but it is nevertheless fair that the responsible defendant be called upon to pay for the inclusion of others in the trial proceedings.

[85] Marsh argued at the hearing that Grafton Connor could easily have pursued the defendants separately. It said Grafton Connor could simply have accepted that the loss was not covered by the policy and sued Marsh independently. This argument is strained. In order for Grafton Connor to be successful against Marsh, it would have to prove that Marsh's actions had caused it to lose the benefit of coverage under the Underwriters policy. Marsh's primary defence in that situation would be that Grafton Connor's losses were in fact covered pursuant to Endorsement 10 of the policy - the same position it adopted at trial. In my view, Grafton Connor is correct that the claims were completely interwoven, and it would have been unreasonable to pursue two different actions. Accordingly, in my opinion, this factor favours a *Sanderson* or *Bullock* order, or is, at the very least, neutral.

[86] Finally, there is no issue in this case concerning any party's ability to pay.

[87] In light of the above, I am of the view that a *Sanderson* order should be made against Marsh. That said, however, it should not be for the full amount of Underwriters' costs. As Marsh points out, this is not a case like *Keizer* where the unsuccessful defendant was found 100% liable for the plaintiff's damages. Liability was split, and we should therefore start from a position that Marsh should be responsible for 50% of Underwriters' costs. That does not end the analysis, however. If, as I have suggested, the court considers the vast difference between the amount claimed and the amount ultimately awarded when deciding on a costs award for Underwriters, Marsh's liability for Underwriters' costs should be reduced to account for this fact. There is no question that Marsh would have joined Underwriters if Grafton Connor had not, but Grafton Connor should bear sole responsibility for its failed consequential damages claim. Accordingly, I would recommend a *Sanderson* order making Marsh liable for something in the range of 45% of Underwriters' costs.

[88] As a consequence, Marsh is directed to pay 45% of Underwriters' costs and disbursements. These costs include the $12,500 in costs on the $95,000 counterclaim for the amount paid by Underwriters for debris removal. It is appropriate to include these costs because the cost of debris removal was included in the value of the policy, for which Marsh and Grafton Connor were found jointly liable. Accordingly, Marsh is directed to pay $184,921.33 in costs and $71,103.63 in disbursements. Grafton Connor is directed to pay the balance of $226,014.95 in costs and $86,904.44 in disbursements,

UNDERWRITERS COSTS AGAINST MARSH ON THE CROSSCLAIM

[89] I am of the view that costs on the crossclaim should be minimal. No time was spent on the crossclaim at trial, and, as noted in the main decision, the claim made little sense and the chance of success of the claim by Marsh against Underwriters was, in the best sense of the word, highly remote.

[90] I agree with Marsh that the crossclaim was started at a very early stage in was not pursued further. In the pleadings, the following appears:

> These defendants refer to the Statement of Claim herein and the allegations contained therein against the co-defendant, Sean Murphy, in his quality as attorney in fact in Canada for Lloyd's of London Underwriters and cross-claims against the cold-defendant for any amounts found you by this defendant to the plaintiff.

[91] The Marsh position is that the Underwriters simplify the very terse denial. No particulars of the crossclaim were requested to reference in the pleadings. That is where the crossclaim ended.

[92] I agree with the Marsh position that the cross-claim was never argued at trial or in the various submissions that I received.

[93] The Marsh position is a further buttressed by *Civil Procedure Rule* 4.09:

> 4.09 (1) a defendant may cross-claim against another defendant for its claim of either of the following kinds:
> (a) a claim that the other Defendant is liable to the first defendant for all or part of the plaintiffs claim;
> (b) the claim that would be consolidated with the plaintiff's action if the defendant commenced an independent action for the same claim.

[94] In conclusion it is my view that the amount that I should award add to Underwriters in respect of this is $3,500. This represents approximately 40% to 50% of the additional work required in addressing the issue in its pretrial and post-trial briefs.

SUPREME COURT OF NOVA SCOTIA

Citation: *Grafton Connor Property Inc. v. Murphy*, 2015 NSSC 368

Date: 20151208
Docket: Hfx No. 293148
Registry: Halifax

Between:

Grafton Connor Property Incorporated, a body corporate,

c.o.b. Grafton-Connor Group and Beauforth Investments Incorporated,
a body corporate, c.o.b. North End Beverage Room

Plaintiffs

v.

Sean Murphy, in his quality as Attorney in Fact in Canada for
Lloyd's of London Underwriters and
Marsh Canada Limited, a body corporate

Defendants

ERRATUM

Judge: The Honourable Justice Arthur J. LeBlanc

Erratum: January 14, 2016

Counsel: John P. Merrick, Q.C., for the plaintiffs
Michael S. Ryan, Q.C., for the defendant, Sean Murphy
Christopher C. Robinson, Q.C., Kevin Gibson and Ian Dunbar for the Defendant, Marsh Canada Limited

In my decision of December 18, 2015, reported as 2015 NSSC 368

P. 88 is replaced with the following:

[88] As a consequence, Marsh is directed to pay 45% of Underwriters' costs and disbursements. These costs include the $12,500 in costs on the $95,000 counterclaim for the amount paid by Underwriters for debris removal. It is appropriate to include these costs because the cost of debris removal was included in the value of the policy, for which Marsh and Grafton Connor were found jointly liable. Accordingly, Marsh is directed to pay $184,921.33 in costs and $71,103.63 in disbursements. Grafton Connor is directed to pay the balance of $226,014.95 in costs and $86,904.44 in disbursements.