

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Saccary v. THI Construction and Pettipas*, 2024 NSSC 259

**Date:** 20240926  
**Docket:** 499114  
**Registry:** Halifax

**Between:**

Donald Saccary and Theresa Saccary

*Plaintiffs*

v.

THI Construction Limited and Terry Pettipas

*Defendants*

<b>COSTS DECISION</b>
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**Judge:** The Honourable Justice Mona L. Lynch

**Heard:** March 4, 5, 6, 7, 11, 12, 13, 14, 28, 2024, in Halifax, Nova Scotia

**Final Written:** September 6, 2024

**Costs Submissions:** July 30, 2024 – Plaintiffs  
August 14, 2024 – Defendants

**Counsel:** Ronan Holland, for the Plaintiffs  
Noel Fellows, for the Defendants

**By the Court:**

[1] This is the costs decision after a trial in relation to the construction of the Saccarys' house by the Defendant THI Construction. After a nine day trial, THI Construction was ordered to pay damages to the Saccarys in the amount of \$95,608 plus HST and prejudgment interest. Terry Pettipas was found not to be personally liable for damages as the contract was with THI and not him personally. The corporate veil was not pierced. General damages were sought but not awarded.

**Issue:**

**What is the appropriate costs award in the circumstances of this case?**

**Position of the Parties:**

[2] The Saccarys submit they were almost entirely successful and that the award of damages should be between \$52,125 and \$58,407 plus disbursements of \$15,365.30. The Saccarys seek costs based on Tariff A, Scale 3 based on the complexity of the trial. The Saccarys also seek an increase of 50% in the costs based on a formal offer to settle for the amount of \$80,000 made under *Civil Procedure Rule* 10.05 prior to the finish date. The Saccarys ask that the days of trial be found to be 9.

[3] THI submits that the Saccarys were not successful in their claim to find Terry Pettipas personally liable nor were they successful in their claim for general damages. In their view, the costs should not be increased because of the formal offer to settle as the formal offer to settle was to both defendants and the Saccarys were not successful in their claim against Terry Pettipas. Therefore, the increase under *Rule* 10 does not apply. THI also submits that the trial was not complicated and the basic Scale, Scale 2 should be used. They disagree with some disbursements and with some of the Saccarys' calculations. In their view the costs should be \$29,250 plus any disbursements allowed. They ask that the days of trial be counted as 8.5.

[4] THI also submits that prejudgment interest should not be included in determining the amount involved under Tariff A.

**Analysis:**

[5] *Civil Procedure Rule 77.02* provides a general discretion to make an order that will do justice between the parties. Both parties agree that the costs are under Tariff A but disagree on the Scale. Costs are generally awarded to the successful party and here there is no doubt that the Saccarys were successful in all but two of their claims. *Rule 77.06(1)* requires that costs be fixed in accordance with the tariffs, unless a judge orders otherwise.

[6] First I must determine the amount involved. I agree that prejudgment interest is not included in the calculation of the amount involved (*Brocke Estate v. Crowell*, 2014 NSSC 269 para.88). The Tariffs require that I look at the amount involved, the complexity of the proceeding and the importance of the issues. The amount involved is approximately \$110,000 which would mean a Scale 2 (Basic) amount of \$12,250. I do not agree that the trial was of the level of complexity or that it involved issues that are of importance other than to the parties to put it in Scale 3. While THI asks that the days be counted as 8.5 what they count as a ½ day went into the afternoon. Therefore I find that it is proper to count the trial as 9 days and so \$18,000 should be added for a total of \$30,250.

[7] I must also consider the formal offer to settle to the Defendants prior to the finish date. *Rule 10.05* sets out the requirements for a formal offer to settle in order for a party to take advantage of the costs provisions in *Rule 10.09*. Both parties delivered offers to settle to the other side prior to the finish date. The Saccarys' offer was for \$80,000 plus costs in the amount of \$20,000 or an amount determined by a judge at the Defendants' option. Terry Pettipas and THI offered to pay \$10,000 inclusive of damages, interests, costs and disbursements. The award of damages after trial was more than \$80,000.

[8] Terry Pettipas and THI submit that the formal offer to settle by the Saccarys does not comply of the requirements of *Rule 10.09* because it would not have given Terry Pettipas a better result than he would have received by accepting the offer as the claim against him was dismissed. I find that this would be a valid consideration if I was making a costs award in relation to Terry Pettipas but I am making a costs award in relation to THI and clearly the formal offer to settle was more favourable to THI than the judgment at trial.

[9] Terry Pettipas and THI were represented jointly by one lawyer and there is nothing to point to any increased costs to defend Terry Pettipas. There was very little time spent in argument or evidence in relation to the claim against Terry Pettipas

personally. Terry Pettipas is not seeking nor am I awarding him costs. Also, there was not much time spent on the general damages claim.

[10] When I consider the formal offer to settle in relation to THI, all of the requirements in *Rule* 10.09 (1) have been met. The Saccarys' offer was made at least one week before the trial and the offer was not withdrawn or accepted. The focus under *Rule* 10.09(1)(c) is not on the Plaintiff and whether the Saccarys received a better award at trial. THI received a judgment which provided a result that is no better than THI would have received by accepting the offer to settle (*Garner v. Bank of Nova Scotia*, 2016 NSSC 105 para. 64). Therefore the Saccarys obtained a "favourable judgment" under *Rule* 10.09(1).

[11] As stated in *Belmont Financial Services Incorporated v. Watters*, 2023 NSSC 19, the whole thrust of *Rule* 10.09 and the other rules which deal with settlement is to encourage timely resolution of disputes to avoid spending large sums of money and using court time (para.10).

[12] While the increased award of damages under *Rule* 10.09 is discretionary, I see no reason to depart from them. I will increase the amount based on the tariffs by 50% to \$45,375.

[13] The Saccarys claim disbursements in the amount of \$15,365.30. THI objects to costs for a witness who did not testify and the cost of photocopies at \$.30 a page. I will reduce the amount claimed by the witness fee and subpoena of \$450. I will also reduce the photocopying cost by half from \$666.60 to \$333.30 The Saccarys are awarded disbursements in the amount of \$14,582.

**Conclusion:**

[14] The Saccarys are awarded costs in the amount of \$45,375 plus disbursements of \$14,582 for a total of \$59,957.

Lynch, J.