Citation: *Trans North Turbo Air Ltd. et al.* v.
North 60 Petro Ltd. et al., 2003 YKSC 26

Date: 20030605
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

S.C. No. 00-A0174

BETWEEN:

TRANS NORTH TURBO AIR LIMITED

PLAINTIFF

and

NORTH 60 PETRO LTD., PATRICK O'HAGAN and BRIAN LARKIN

DEFENDANTS

S.C. No. 00-A0226

AND BETWEEN:

ROBERT BRIAN CAMERON

PLAINTIFF

and

NORTH 60 PETRO LTD., PATRICK O'HAGAN and BRIAN LARKIN

DEFENDANTS

S.C. No. 00-A0211

AND BETWEEN:

ALMON LANDAIR LTD.

PLAINTIFF

and

NORTH 60 PETRO LTD., PATRICK O'HAGAN and BRIAN LARKIN

DEFENDANTS

S.C. No. 00-A0212

AND BETWEEN:

SUMMIT AIR CHARTERS LTD.

PLAINTIFF

and

NORTH 60 PETRO LTD., PATRICK O'HAGAN and BRIAN LARKIN

DEFENDANTS

Appearances:

R. Patrick Saul and Darryl G. Pankratz	For Trans North Turbo Air Limited and Robert Brian Cameron
Peter Chomicki, Q.C.	For Almon Landair Ltd. and Summit Air Charters Ltd.
Rick B. Davison, Q.C. and Bruce Churchill-Smith	For the Defendants

Before: Mr. Justice R.S. Veale

REASONS FOR DECISION ON PRE-JUDGMENT INTEREST AND COSTS

[1] On March 27, 2003, I issued Reasons for Judgment, 2003 YKSC 18, in this case. I awarded the plaintiffs a monetary judgment and costs on Scale 5 against the defendants. I invited the parties to address any costs issues, as costs were not addressed at trial. I also invited counsel to speak to the issue of pre-judgment interest.

[2] The following issues have been raised for consideration:

1. What damages should be special damages, thereby requiring the calculation of pre-judgment interest at the end of each six-month period?

2. Should the pre-judgment interest rate be reduced from 7.5 percent to the average rate of 5.21 percent?
3. Should Trans North Turbo Air Ltd. be granted special costs or increased costs?
4. Should the plaintiffs receive double costs pursuant to Rule 37(23)?

ISSUE 1: WHAT DAMAGES SHOULD BE SPECIAL DAMAGES, THEREBY REQUIRING THE CALCULATION OF PRE-JUDGMENT INTEREST AT THE END OF EACH SIX-MONTH PERIOD?

[3] This case involves liability for the fire loss of Hangar C on January 18, 1999, at Whitehorse, Yukon. I concluded that the defendants were the cause of the fire that destroyed Hangar C. The employees of North 60 negligently used an oxyacetylene torch in the removal of a North 60 sign from the roof of Hangar C. The damages awarded to Trans North Turbo Air Ltd. (TNTA) are as follows:

a)	Helicopters	$4,037,116
b)	Fixed-Wing Aircraft	$ 506,231
c)	Equipment and Tools	$ 414,872
d)	Hangar Supplies	$ 15,909
e)	Office Contents	$ 82,158
f)	Office Supplies	$ 5,760
g)	Vehicles	$ 56,064
h)	Third-Party Losses	$ 206,011
i)	Fire Investigation Costs	$ 38,079
j)	Extra Fire-Related Costs	$ 222,700
k)	Loss of Hangar C	$2,788,100

l)	Hangar C Parts and Accessories	$1,959,100
m)	Business Interruption Loss 1999 and 2000	$1,147,884
n)	Loss due to Increased Insurance Premiums	$ 735,800

[4] The damages awarded to Summit Air Charters Ltd. (Summit) were $1,102,000, representing the loss of aircraft, parts and inventory and loss of revenue. I have been unable to determine the breakdown into each category, as these damages were agreed upon and only the total damage number was presented.

[5] The damages to Almon Landair Ltd. (Almon) were $675,000 U.S.

[6] The damages to Robert Cameron were $58,500, representing the loss of a Fleet Canuck aircraft. I am advised that a further Beaver aircraft belonged to Robert Cameron. The damages for that loss, in the amount of $420,585, were listed under TNTA, as the aircraft was under lease to TNTA.

[7] The relevant sections of the *Judicature Act*, R.S.Y 1986, c. 96 are:

s.35 (3)

> (3) Subject to subsection (7), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon at the prime rate existing for the month preceding the month in which the action was commenced calculated from the date the cause of action arose to the date of judgment.
>
> *(Amended by SY 1993, c. 12, s. 2)*
>
> (4) Where the judgment includes an amount for special damages, the interest calculated under subsection (3) shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the date the cause of action arose and at the date of the judgment.
>
> *(Amended by SY 1993, c. 12, s. 3)*
>
> …

> (7) The judge may, where he considers it to be just to do so in all the circumstances, in respect to the whole or any part of the amount for which judgment is given,
>
> (a) disallow interest under this section;
>
> (b) fix a rate of interest higher or lower than the prime rate, or
>
> (c) allow interest under this section for a period other than that provided.

[8] The position of TNTA is that the only special damages are those that were incurred after the date of the fire. The following damages were incurred after the fire and before judgment:

(i) Third-party losses;

(ii) Fire investigation costs;

(iii) Extra fire-related costs; and

(iv) Business interruption loss, including increased insurance premiums.

[9] The rationale of the plaintiffs is that the special damages were not incurred as of the date of the loss and therefore should not be entitled to interest from the date of loss. The plaintiffs say that the remaining damages all occurred at the date of loss and therefore fall within s. 35(3) of the *Judicature Act* and accordingly have pre-judgment interest calculated from the date of the cause of action to the date of judgment.

[10] The position of North 60 is that all of TNTA's damages should be treated as special damages, thereby reducing the pre-judgment interest claimed as it would be calculated at six-month intervals according to s. 35(4). In other words, North 60 accepts the four items that counsel for TNTA calls special damages. North 60 interprets special damages as meaning ascertainable or calculable, which would include most of the

damages from (a) to (n) in paragraph 2 above. Counsel for North 60 makes the further point that many of the aircraft and tools were replaced during the period between the date of loss and trial. That is to say, counsel for North 60 focusses on the fact that TNTA received insurance proceeds and replaced items so that TNTA's loss was curtailed. Counsel for TNTA replies that the insurer is making a subrogated claim and stands in the same position as TNTA and the other plaintiffs as against the defendants, i.e. no payment has been made by the defendants, and therefore pre-judgment interest runs from the date of the cause of action to the date of judgment.

Analysis

[11] The first task is to interpret what is meant by "special damages" in s. 35(4) of the *Judicature Act*, RSY 1986, c. 93. I am of the view that it is not necessarily a question of interpreting "special damage" in the usual context of general damages and special damages that one encounters in tort or personal injury law. I say this because s. 35(3) does not use the words "general damages," but rather states that "a person who is entitled to a judgment for the payment of money" is entitled to an award of interest from the date of loss to the date of trial. The general rule in s. 35(3) is that judgments for the payment of money incur interest from the date of loss to the date of judgment.

[12] Section 35(4), however, refers to "special damages" and requires an interest calculation at the end of six-month periods. It is worth noting that "special damages" has many interpretations, depending upon the context in which it is used. See *Hope Hardware and Building Supply Co. Ltd.* v. *Field Stores* (1978), 90 D.L.R. (3d) 49 (B.C.S.C.) and [1980] B.C.J. No. 234 (B.C.C.A.); *Baart* v. *Kumar*, [1985] B.C.J. No. 2462 (B.C.C.A.); *Darling* v. *Collins* (1958), 25 W.W.R. (N.S.) 522; *Wersch* v. *Wersch*,

[1945] 2 D.L.R. 572; *Paulse* v. *Neville and J.J. Neville & Sons Ltd.*, [1977] 12 Nfld. & P.E.I.R. 223; *Parisian* v. *Canadian Pacific Ltd., et al.* (1983), 25 C.C.L.T. 105; *McLeod* v. *Boultbee & Atkins*, [1931] 4 D.L.R. 912 and *Heltman et ux* v. *Western Canadian Greyhound Lines Ltd. and Ryder* (1966), 57 W.W.R. (N.S.) 449. This is not an exhaustive list, but includes most of the cases referred to in *Baart* v. *Kumar*, *supra*.

[13] A particularly perceptive observation cited with approval by Seaton J. in *Baart* v. *Kramer*, *supra*, was made in *Darling* v. *Collins*, *supra*, at page 524:

> The line between general and special damage is not drawn too definitely and the terms are used somewhat loosely. It is my experience that damages which are definitely ascertained are usually claimed as special damages.

While this case was drawing the line between general damages and special damages, the statement that the terms are used loosely is well put. For example, as pointed out in *Baart* v. *Kumar*, *supra*, the Manitoba Court of Appeal in *Wersch* v. *Wersch*, *supra*, found that lost income prior to trial fell within the term special damage. British Columbia courts have ruled otherwise, while the Newfoundland Court of Appeal has treated lost income as special damages.

[14] In my view, the reference to special damages should be given a contextual interpretation. Special damages are therefore those that arise at different times between the date the cause of action arose and the date of judgment. It would be unfair from a timing point of view to have interest running for the entire period from the date of the cause of action to the date of judgment, if the damage or expense arose after the date of the cause of action.

[15] The result of this interpretation is that a pre-trial wage loss will be treated as special damage, not because it is ascertainable and calculable, but because it occurs at different times between the date of the cause of action and the date of judgment.

[16] This interpretation is relatively simple and straightforward. It avoids the problems that might arise from the various definitions of special damages that may be appropriate in other contexts.

[17] It is also consistent with the view of Seaton J., in *Baart* v. *Kumar*, *supra*, where he stated at para. 63:

> In our legislation the term special damages is used to single out damages incurred over the period before trial. A special means of calculating interest is provided. The term special damages is capable of encompassing lost earnings and is usually used to do so. Such earnings come in a stream and should earn interest in the manner provided for special damages in the Act. The Act can and should be interpreted sensibly to cover them.

[18] Although the wording of the relevant section of the British Columbia *Court Order Interest Act* differs somewhat from s. 35 of the *Judicature Act*, I am of the view that the practical approach adopted in *Baart* v. *Kumar*, *supra*, applies to the Yukon statute as well.

[19] Professor Cooper-Stephenson in his text entitled, *Personal Injury Damages in Canada*, 2nd ed. (Toronto: Carswell, 1996) at 127-129, addressed the uncertainty that arises in calculating a pre-trial loss of working capacity and a pre-trial loss of homemaking capacity. The difficulty has always been to determine whether these claims are general or special damages. Cooper-Stephenson concludes at page 129:

> On the general issue of classification as between special and general damages, it should never be forgotten that the matter is one of form not substance, and that the end result — even with respect to the onus of presenting relevant evidence — should not be made to turn on an issue

> of form. The classification is surely not dependent on the terminological preference for “loss of earnings” over “loss of earning capacity” as some might have it. After all, the governing principle is compensation calculated in the fairest manner as can be judged.

[20] I do not find the timing of payments by the insurer to the plaintiffs, and the replacement of certain destroyed property of the plaintiffs, to have any relevance at all in this analysis. Those issues are between the insurer and the plaintiff by contract and do not enter into the analysis. The fact that it is the insurer bringing a subrogated action simply means that the insurer steps into the shoes of the plaintiffs and has the same rights and duties of the plaintiff as against the defendant.

[21] In my view, whether one pursues a contextual interpretation or simply prefers substance over form, special damages as set out in s. 35(4) of the *Judicature Act* should be those damages that arise after the date of the cause of action, where fairness dictates pre-judgment interest be calculated at six-month intervals. Conversely, s. 35(3) covers those damages that arise at the date of the cause of action and run to the date of judgment.

[22] I therefore find that TNTA and Robert Cameron have calculated the pre-judgment interest correctly and that the only special damages are those set out in paragraph 8 above. The same reasoning applies to all of the plaintiffs.

ISSUE 2: SHOULD THE PRE-JUDGMENT INTEREST RATE BE REDUCED FROM 7.5 PERCENT TO THE AVERAGE RATE OF 5.21 PERCENT?

[23] Section 35(7) gives the trial judge a wide discretion to vary the rate of interest charged where it would be “just to do so in all the circumstances.”

[24] All parties agree that the applicable rate of interest for this case is 7.5 percent. This is the prime rate of the Bank of Canada that was in effect in October 2000, the month preceding the month in which TNTA commenced its action.

[25] However, North 60 points out that the average rate for the period October 2000 to March 2003 is 5.21 percent. Counsel states that the difference in the rate amounts to more than $1 million over a four-year period.

[26] North 60 also submits that the objective of pre-judgment interest is to be compensatory, but not punitive. While I agree with that statement, it must also be remembered that each party knows the pre-judgment interest rate once the claim is filed. The defendant, and particularly insurers, can take steps, such as setting reserves to protect themselves in the event of an unfavourable decision. Dramatic or massive fluctuations in the interest rate would be one example where it may be “just” to modify. It is also important to keep in mind that we are dealing with prime rates and not commercial rates.

[27] I do not find the difference between the applicable rate and the average rate to be significant. The fact that it amounts to $1 million over a four-year period is more a function of the large damage award than a punitive pre-judgment interest rate.

[28] I do not find that the discrepancy between an interest rate of 7.5 percent mandated by the *Judicature Act* and the average rate of 5.21 percent sufficient to exercise my discretion to lower the rate.

[29] I order that the pre-judgment interest rate shall be 7.5 percent.

ISSUE 3: SHOULD TRANS NORTH TURBO AIR BE GRANTED SPECIAL COSTS OR INCREASED COSTS?

[30] TNTA applies for special or increased costs. There is no doubt that TNTA carried the burden of proving liability in a very complex factual case, with a considerable number of experts.

[31] In my Reasons for Judgment, *supra*, I awarded ordinary costs to the plaintiffs on Scale 5. As stated earlier, I invited counsel to address any costs issues since costs were not addressed at the end of the trial. I am informed by counsel for TNTA that ordinary costs on Scale 5 amount to $144,132.60, excluding disbursements. The total fees, called special costs, that were billed to their client to the end of trial, exceed $825,000 and have been paid in full. The result is that a calculation of ordinary costs results in a recovery of approximately 17.5 percent of the special costs billed to the client.

[32] Appendix B of the Supreme Court Rules provides for increased costs in s. 7:

> *Increased costs*
> 7(1) Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).
> (2) Where costs are ordered to be assessed as increased costs, the assessing officer shall fix the fees that would have been allowed if an order for special costs had been made under Rule 57(3), and shall then allow ½ of those fees, or a higher or lower proportion as the court may order, together with all proper expenses and disbursements.
> (3) No order for increased costs may be made after July 1, 2002.

[33] Special costs are found in Rule 57(3), which states:

> *Special costs*
> (3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers

were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including

(a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
(b) the skill, specialized knowledge and responsibility required of the solicitor,
(c) the amount involved in the proceeding,
(d) the time reasonably expended in conducting the proceeding,
(e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,
(f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
(g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.

[34] A good summary of the law of costs is found in the trial decision of Bouck J. in *Bradshaw Construction Ltd.* v. *Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (affirmed in [1992] B.C.J. No. 1657 (C.A.)). He stated as follows at page 324:

Summary

1. There are 3 types of party-and-party costs articulated in the 1990 Rules: ordinary costs, increased costs and special costs.

2. When determining the proper scale for ordinary costs, the importance and difficulty of the litigation are the main factors. Difficult issues of fact as well as difficult issues of law should be taken into account.

3. Scales 1 to 5 of App. B describe the amounts a successful litigant is entitled to recover on an assessment of ordinary costs. In most instances, those scales are designed to provide a rough indemnity of approximately 50 per cent of special costs.

4. Special costs are mostly reserved for those situations where the unsuccessful party has been guilty of gross misconduct or the like. They are assessed on an objective basis: What would a reasonably competent solicitor charge for the services rendered? They will usually result in about an 80 to 90 per cent indemnity for fees assessed by the successful solicitor against the successful party under the Legal Profession Act.

> 5. Increased costs may be ordered in place of ordinary costs if an award of ordinary costs would yield an unjust result. By regulation, they are a minimum of 50 per cent of a bill of costs assessed as special costs.
>
> 6. Bradshaw is entitled to an award of increased costs at the rate of 60 per cent of its special costs. In view of the conduct and nature of the proceedings and the probability that an award of ordinary costs under Scale 4 would yield less than a 38 per cent indemnity of its special costs, it would be unjust to assess its costs as ordinary costs.

[35] As I indicated, special costs refer to the actual fees that would reasonably be billed by a competent solicitor to a client. The reference to ordinary costs being a minimum of 50 percent of special costs means that the intention of awarding ordinary costs was that they should be close to one-half of the winner's actual legal fees.

[36] The difference between special costs under Rule 57(3) and increased costs in Appendix B is somewhat obscure. I accept that Bouck J. got it right in saying that special costs are reserved for situations of gross misconduct on the part of the unsuccessful party. There is also the difference that Rule 57(3) sets out a list of factors that go well beyond the conduct of a party, whereas increased costs can be based upon any reason that would be an unjust result if costs were assessed on Scales 1 to 5.

[37] In *Rieta* v. *North American Air Travel Insurance Agents Ltd.*, [1988] B.C.J. No. 640 (C.A.) (Q.L.), Donald J.A. stated that increased costs will only be awarded if there is some unusual feature of the case or misconduct which justifies greater indemnity than provided for by ordinary costs (para. 50). In other words, the sole fact of a significant disparity between ordinary costs and special costs is not sufficient on its own to justify increased costs.

[38] There is a further issue, in that s. 7(3) of Appendix B prohibits an award of increased costs after July 1, 2002. In this case, the cause of action occurred on January 18, 1999. The claim was commenced by TNTA in November 2000 and that delay must be laid at the feet of North 60 for reasons set out below. The remaining plaintiffs commenced their actions in January 2001. The trial commenced on May 6, 2002 and concluded on August 3, 2002. In my view, it is an appropriate case for invoking Rule 1(10), and I order that the rules of court in force at the time of commencement of this action be continued to the conclusion of this case. Thus, I will consider the appropriateness of both increased and special costs.

[39] The disparity between the ordinary costs on Scale 5 and the legal fees reasonably incurred by TNTA is significant. In my view, 17.5 percent is well off the target of 50-percent recovery.

[40] There is also the further aspect of the reprehensible conduct of Messrs. O'Hagan and Larkin in denying their use of the oxyacetylene torch from the day of the fire on January 18, 1999 to the fall of 2000, when they disclosed it only after the service of the TNTA Writ of Summons. It was not until February 6, 2001 that they admitted the use of the torch to the RCMP, and they refused to be interviewed by the RCMP.

[41] It is also a fact that the defendants showed the RCMP, during their investigation the day after the fire, the North 60 sign which had no torch marks on it. However, they did not show the base of the sign, which was put in a dumpster and never produced. The base of the sign may have revealed the tell-tale marks that result from the use of an oxyacetylene torch.

[42] In addition, the denials of the defendants O'Hagan and Larkin had an impact on the trial process. The defendants were not candid in their replies to Notices to Admit. For example, when asked to admit on August 9, 2001 that the defendants used an oxyacetylene torch on the roof of Hangar C on January 18, 1999, they replied:

> The Defendants deny the allegation … for the specific reason that the allegation is that an oxyacetylene torch was used on the roof on Hangar C on January 18, 1999.

[43] After a further Notice to Admit dated January 18, 2002, just over three months before trial, when asked if Patrick O'Hagan used an oxyacetylene torch, the Defendants replied:

> The Defendants are unable to admit the facts set out in paragraph 8 of the Plaintiff's Notice to Admit for the specific reason that the procedure followed by the Defendants to remove the sign was not accurately stated.

[44] During the trial, defence counsel was critical of the fire investigation, conducted by the City of Whitehorse fire department, for spending so much time in the southeast corner of the building to determine the origin and cause of the fire and the condition of the base of the sign. Had the defendants admitted the use of the oxyacetylene torch and produced the base of the sign, the fire investigation would likely have been conducted differently.

[45] Defence counsel did come forward at trial and admit that Messrs. O'Hagan and Larkin had used the oxyacetylene torch to remove the sign. But that candidness was over three years after the event. In my view, the conduct of the defendants and the failure to make the proper admission until trial amounts to reprehensible conduct, deserving of rebuke, as mentioned by Lambert J.A. in *Garcia* v. *Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

[46] The trial was conducted over three months and involved a number of complex factual and legal issues, including:

(i) the extensive expert evidence on the issue of fire cause and origin and the investigation that was carried out;

(ii) the issue of trespass and its application to liability;

(iii) the issue of spoliation and its impact on liability;

(iv) the damage amount involved and the importance to the parties; and

(v) the issue of contributory negligence.

[47] I am almost persuaded to award special costs in this matter. However, to be fair, counsel for the defendants agreed on many facts and a significant number of damage items and, but for the issues mentioned previously, cooperated in the actual trial process and case management.

[48] Given the combination of a significant disparity between ordinary costs on Scale 5 and special costs, the complexity of the facts and law, and the reprehensible conduct worthy of rebuke, I order that TNTA be granted increased costs at 70 percent of its special costs of $825,000, plus its proper expenses and disbursements.

[49] The remaining plaintiffs who did not seek special or increased costs shall have ordinary costs on Scale 5.

ISSUE 4: SHOULD THE PLAINTIFFS RECEIVE DOUBLE COSTS PURSUANT TO RULE 37(23)?

[50] I will now deal with the plaintiffs' applications for double costs separately from the increased costs analysis as required by *Rieta* v. *North American Air Travel Insurance Agents Ltd.*, *supra*, at paragraph 46.

[51] Double costs are provided for in Rule 37(23) as follows:

> *Consequences of failure to accept plaintiff's offer to settle a monetary claim*
>
> (23) If the plaintiff has made an offer to settle a claim for money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[52] As I understand *Jamieson* v. *Duteil*, [2001] B.C.J. No. 1850 (C.A.) and *Brown* v. *Lowe*, [2002] B.C.J. No. 76 (C.A.), there is no discretion to refuse double costs where the plaintiff's offer to settle falls within the Rule. Finch, C.J.B.C. made the following observation in *Brown* v. *Lowe*, *supra*, at para. 120:

> The court's discretion with respect to costs is an important means of controlling the conduct of parties in court, and in the pre-trial process. It can be used to reward responsible and reasonable behaviour that is conducive to the better administration of justice, including good faith efforts to achieve amicable settlements, and to punish irresponsible and unreasonable conduct that has the opposite effect. The discretionary power is not completely unfettered. It must be exercised judicially and must give effect to the rules promulgated, so far as they apply. The rules are a "code", but because of the court's residual discretion, the code is not exhaustive. There remains in the court a power to make or refuse awards of costs in circumstances which the rules did not contemplate.

[53] There was no dispute over TNTA and Robert Cameron's claim for double costs. I therefore award TNTA (from March 26, 2002) and Robert Cameron (from April 12, 2002) double costs at the rate of 70 percent of special costs, which shall include double disbursements.

[54] The applications for double costs for Almon and Summit are contested. The facts with respect to Almon's claim are as follows:

1. Almon delivered an offer to settle pursuant to Rule 37(23) on April 15, 2002 in the amount of $731,281 U.S. A covering letter of the same date explained

that it represented damages of $675,000 U.S., plus pre-judgment interest calculated at 7.5 percent.

2. North 60 and Almon agreed to settle the damages for Almon at $675,000 U.S., the sum I granted to Almon in my judgment of March 27, 2003.

3. There is no evidence that North 60 objected to the reference to U.S. funds until Almon applied for double costs pursuant to Rule 37(23).

[55] The first argument raised by North 60 is that the offer to settle is a nullity because it is not expressed in Canadian dollars as required by the *Currency Act,* R.S. 1985, c. C-52. The applicable provisions of the *Currency Act* are:

> 12. All public accounts established or maintained in Canada shall be in the currency of Canada, and any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada.
>
> 13.(1) Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing relating to money or involving the payment of or the liability to pay money shall be made, executed, entered into, done or carried out in the currency of Canada, unless it is made, executed, entered into, done or carried out in
>
> (a) the currency of a country other than Canada; or
>
> (b) a unit of account that is defined in terms of the currencies of two or more countries.

[56] Counsel for North 60 cleverly pointed out that its agreement to settle the damages with Almon in an amount expressed in a foreign currency is permissible pursuant to s. 13(1)(a) of the *Currency Act*, but Almon's offer of settlement does not comply with s. 12 of the *Currency Act*. I view this submission as specious at best. In my view, the offer to settle is not required to be in Canadian funds (see *Champion International Corp.* v. *Sabina (The)*, [2003] F.C.J. No. 64). Further, the use of Canadian

funds would lead to the second argument raised by North 60, i.e. what date of conversion should be applied? I note that North 60 provided the alternatives of the date of cause of action, the date of offer and the date of judgment in its written submission. The attractiveness of using U.S. funds for the damage figure is that a conversion date is irrelevant as both parties recognize that Almon is entitled to U.S. funds regardless of the conversion rate.

[57] Although it is unusual to add the interest amount to an offer to settle in light of Rule 37(3), North 60 did not raise this issue and had no misunderstanding of the base amount of damages that Almon offered to settle for. In fact, North 60 agreed to settle for that amount during the trial.

[58] I order that Almon is entitled to double costs from April 15, 2002, including double disbursements.

[59] Summit was given judgment in the amount of $1,102,000 on March 27, 2003. Summit filed an offer to settle on April 15, 2002, in the amount of $1,386,938. Once again, Summit explained its offer in a covering letter, which stated that the $1,386,938 figure included pre-judgment interest to April 15, 2002 in the amount of $128,938. In other words, the offer to settle, exclusive of interest, was $1,258,000.

[60] Summit is therefore not entitled to double costs.

[61] I will deal with costs on these applications separately for the plaintiffs. TNTA shall have its costs against North 60 at 70 percent of special costs on its applications for the appropriate calculation of pre-judgment interest, the rate of pre-judgment interest,

increased costs and double costs. Almon shall have its costs against North 60 on its application for double costs on Scale 5. North 60 shall have its costs against Summit on Scale 5 on the double costs application.

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VEALE J.