IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Graham v. Hardy,*
2023 BCSC 802

Date: 20230502
Docket: S215404
Registry: Vancouver

Between:

Anne Graham

Plaintiff

And

Jeffery Les Hardy and Lifeguard Health Inc.

Defendants

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	P. Roberts, K.C.
Counsel for the Respondents:	M. Pontin
Place and Date of Trial/Hearing:	Vancouver, B.C. April 28, 2023
Place and Date of Judgment:	Vancouver, B.C. May 2, 2023

[1] **THE COURT:** This judgment addresses an issue arising after judgment in this matter was rendered on April 21, 2023, indexed as *Graham v. Hardy*, 2023 BCSC 645 (the "Reasons").

[2] The issue in this case was whether the defendant Jeffrey Hardy was liable in his personal capacity for money loaned by the plaintiff, Anne Graham. I concluded he was, rejecting his position that at all times the loans were made only to his company, the defendant Lifeguard Health Inc. ("Lifeguard").

[3] The parties also disagreed on what amount over the principal amount of money loaned, which totalled $158,000, could be recovered by Ms. Graham. The parties disagreed on the terms of the loan regarding repayment. They did agree that a promissory note was executed at one point. In relation to the March Note (as defined at para. 33 of the Reasons), I concluded that it illustrated that the parties came to an agreement about the amount that had been loaned, how much had to be repaid, when it was due, and the breakdown between principal and other amounts owing.

[4] At paras. 104–24 of the Reasons, I addressed the dispute about what amount over and above the principal had to be repaid. In regard to that issue, among other things, I held the following:

- The parties' arrangements were at first fluid, subject to change.
- Once the loans were extended, their repayment terms were changed from gross amounts to be paid, sometimes with fees, to gross amounts to be repaid, sometimes with interest.
- The parties never agreed to an annual rate, nor contemplated effective annual rates of interest.
- The parties eventually came to an agreement regarding an additional amount that would have to be paid, because they contemplated the payment of fees.

[5] The parties' agreements were crystallized in the March Note, which accurately represented their agreements going forward. The March Note set out the terms of the loan, including for the purpose of calculating the effective annual rate of interest. The March Note provided that the loan of $128,000 was to be repaid by December 31, 2019, in the amount of $194,206.

[6] The $30,000 loan made by Ms. Graham in October 2019 was also subject to the same terms as the March note.

[7] Ultimately, I concluded that the parties did not turn their minds to an effective annual rate of interest. Accordingly, the *Interest Act*, R.S.C. 1985, c. I-15 did not apply to the loans. This conclusion rested to a large degree on the undisputed evidence that both parties understood the loans to be short-term bridge financing for a business in the early stages of development. The importance of that conclusion was to address the allegation that no money, other than the principal, could be repaid because of the criminal prohibition on interest rates over 60 percent.

[8] At para. 125 of the Reasons, I directed the parties to calculate the fee associated with the total $158,000 loan on the basis of the terms of the March Note. The parties were tasked with calculating the effective annual rate of interest represented by the payment of $66,206 on a loan of $128,000 advanced on March 28, 2019, to be repaid on December 31, 2019.

[9] If the parties calculated a rate above 60 percent, they would have to apply an effective annual rate of 60 percent to the loan.

[10] While my judgment settled the question of what principal and fee was owing up until December 31, 2019, the parties disagree on what fee is payable after December 31, 2019, which is the sole issue the parties sought to resolve before me in chambers on April 28, 2023.

[11] The defendants argue that my statement at para. 125(f) of the Reasons is definitive that the only amounts to be repaid under the March Note are the principal and fees or interest up until December 31, 2019. The defendants submit that any

interest to be applied to the amount owing after December 31, 2019 ought to be considered pre-judgment or post-judgment interest, as the case may be, and calculated in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[12] The plaintiff says whatever the rate of interest determined under para. 125(c)–(e) of the Reasons ought to continue to accrue and apply until the loans are repaid.

[13] My conclusion at para. 125(f) of the Reasons specifically addressed what amount Mr. Hardy was liable to Ms. Graham for under the terms of the agreement they came to as per the March Note. The March Note contains terms relevant to the amount owing on the principal and fees up until December 31, 2019. The March Note did not specifically address what was to occur in the event of a default on the loans after December 31, 2019. Therefore, para. 125(f) does not constitute a conclusion on what the parties' agreement was if the $158,000 was not repaid by December 31, 2019.

[14] I must now consider, given the evidence before me, what the parties' agreement was if the loans remained unpaid after December 31, 2019.

[15] In the series of texts leading up to the creation of the March Note, Ms. Graham informed Mr. Hardy that she borrowed the funds for the loans from her bank and was paying monthly compounded interest on those funds. She sought to renegotiate the loan terms to reflect that fact and to provide her a rate of return reflective of the risky nature of the loan for a start-up business.

[16] Given that factual context, I cannot find that the parties agreed no further fees or interest would accrue if Mr. Hardy failed to repay the loans by the end of 2019. Further, I repeat my conclusion at para. 97 of the Reasons that accepting the defendants' position, including on the fees owing after December 31, 2019, would amount to a significant windfall for Mr. Hardy and Lifeguard, and that is because they continued to have the benefit of the use of the money, and there is no dispute that no amount of the principal has been repaid (Ms. Graham has so far only received $9,635 as a return on her investment).

[17] Therefore, I find that whatever fee or interest the parties calculate pursuant to para. 125 of the Reasons applies to the funds owing from December 31, 2019 to the date of the Reasons. In other words, the defendants are liable to Ms. Graham for the amount under para. 125(f) of the Reasons, plus the additional fee or interest that accrued on the outstanding loans, given the rate calculated by the parties, from December 31, 2019 to April 21, 2023.

[18] As I understand it, pre-judgment interest pursuant to s. 2(b) of the *Court Order Interest Act* does not apply where there is an agreement about the interest between the parties.

[19] Given my conclusions as noted above, and especially at paras. 106 and 112 of the Reasons, the parties came to an agreement about the terms of repayment, including an amount in addition to the principal sometimes described as a fee, but also sometimes described as interest. I was not given any authority about the interpretation of the word "interest" in the *Court Order Interest Act*. Therefore, I assume it is appropriate and acceptable for it to be interpreted in a way consistent with how I applied it in the Reasons.

[20] I would consider any interest accruing after the date of my judgment until the amounts are actually repaid to be post-judgment interest pursuant to s. 7 of the *Court Order Interest Act*.

“Sharma J.”