COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hardy v. Graham,*
2024 BCCA 67

Date: 20240216
Docket: CA49079

Between:

Jeffery Les Hardy and Lifeguard Health Inc.

Appellants
(Defendants)

And

Anne Graham

Respondent
(Plaintiff)

Before: The Honourable Justice Griffin
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated April 21, 2023, and amended by Supplementary Reasons dated May 2, 2023 (*Graham v. Hardy*, 2023 BCSC 645 and 2023 BCSC 802, Vancouver Docket S215404).

Oral Reasons for Judgment

Counsel for the Appellants:	T.M. Pontin J.M. Kindrachuk
Counsel for the Respondent:	E.M. MacKinnon C.W. Garton T. Miller, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia February 16, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 16, 2024

Summary:

The appellants appeal the judge's finding that they are liable to the respondent for contractual interest on unpaid amounts under a loan at an effective annual interest rate of 60%. Held: Appeal allowed. The order is varied to provide that the respondent is entitled to prejudgment interest from the time of default under the Court Order Interest Act. The judge made a palpable and overriding error in finding that the parties agreed to the appellants' ongoing liability for interest at an effective annual rate of 60% in the absence of evidence of such agreement.

[1] **HORSMAN J.A.**: The appellants, Jeffrey Hardy and Lifeguard Health Inc. ("Lifeguard"), appeal an order of the chambers judge, as reflected in supplemental reasons issued after judgment, awarding the respondent interest on an unpaid loan after December 31, 2019, at an effective annual rate of 60% (the "Supplemental Judgment"). The appellants do not appeal the main judgment, in which the judge found the appellants liable on a loan agreement with the respondent, and fixed the amount owed as of December 31, 2019 (the "Original Judgment").

[2] On appeal, the appellants argue that the judge's findings in the Supplemental Judgment directly contradict her findings in the Original Judgment that the parties never agreed to an effective annual rate of interest on the loan. The appellants also say that there is no basis in the evidence, or the judge's findings, to support the existence of any agreement on interest. Instead, the judge created an agreement for the parties that they themselves did not make.

[3] The respondent counters that the two judgments are not inconsistent, and that there is evidence to support the judge's conclusion that the parties agreed that interest continued to accrue after the date the loan became due. The respondent says that the judge's factual findings are owed deference on appeal, absent palpable and overriding error which has not been shown.

Factual background

The loans

[4] Lifeguard is the creator and owner of Lifeguard App, a mobile application designed to connect people using drugs to emergency responders automatically if

they are unresponsive. The appellant, Mr. Hardy, is the founder and chief executive officer of Lifeguard.

[5] The respondent is a business management consultant. She was introduced to Mr. Hardy in 2018 by a business planning advisor at BC Business. Following this introduction, the respondent acted as an advisor and mentor to Lifeguard. She also made four separate loans to the company through 2018 and 2019. The loans were made on an informal basis, and were mostly documented by way of text message exchange between the respondent and Mr. Hardy.

The Original Judgment

[6] While the parties agreed on the timing and quantum of the funds loaned, they did not agree on whether the loans were made to Lifeguard alone or also to Mr. Hardy personally, and what, if any, terms were agreed to regarding interest payments. To resolve these issues, the respondent applied for judgment on a summary trial.

[7] In the Original Judgment, the judge set out the chronology of the four loans, and reviewed the communications between the parties at the time funds were advanced, which, as noted, were largely of an informal nature.

[8] On March 28, 2019, Mr. Hardy prepared a handwritten document referred to as a Promissory Note (the “March Note”) reflecting the details of the first three loans. The total amount of the first three loans was $128,000. The March Note provided for monthly “interest” of $635, and stated that a total of $194,206 was to be “paid back no later than Dec. 31/2019”. The details were broken down as follows:

i. Loan 1 for $50,000 – amount to repay $77,206.00
ii. Loan 2 for $53,000 – amount to repay $79,500.00
iii. Loan 3 for $25,000 – amount to repay $37,500.00

[9] The judge found that the terms of the loans crystallized in the March Note. The respondent advanced Mr. Hardy a further $30,000 in October 2019. The judge

found that these funds were subject to repayment on the terms set out in the March Note.

[10] The manner in which the parties structured the loans raised issues about the interest payments because of the provisions of s. 4 of the Canada *Interest Act*, R.S.C. 1985, c. I-15 and s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[11] Section 4 of the *Interest Act* restricts the interest rate to 5% per annum where the agreement between the parties provides for monthly interest on overdue accounts but contains no express statement of the yearly percentage to which the monthly rate is equivalent. The judge found that the $635 monthly payment provided for in the March Note was not, in fact, "interest" as that term is commonly understood. Instead, she found the parties treated the $635 monthly payment as a "fee" that would apply towards the total "fee" payable by December 31, 2019. The judge stated:

> [120] For that reason, I do not find the *Interest Act* applies. The parties agreed on a loan, with a fee, both payable on December 31, 2019. The monthly $635 payments were partial payments of the fee.

[12] Section 347 of the *Criminal Code* prohibits a person from charging a criminal rate of interest, which is defined as an effective annual rate of interest of over 60%. The judge emphasized that the parties' agreement did not include an annual rate of interest. She stated:

> [45] …Ms. Graham's position is that neither of them contemplated the effective annual rate, but not that they never came to an agreement on interest. In fact, the evidence is consistent that before the March Note, they both viewed the arrangement as an amount loaned, to which a "fee" was added to determine the amount to be repaid….
>
> [46] The only reason the parties now have to think about effective annual rates of interest is because of the prohibition in s. 347. The important point is that annual interest was at no time part of their agreement, and for a time before the March Note they did not think in terms of "interest" but fees.
>
> [47] I find the March Note clearly illustrates that the parties came to an agreement about the amount that had been loaned, how much had to repaid, when it was due, and the breakdown between principal and other amounts owing.
>
> [Emphasis added.]

[13] The question, then, was how to address the fact that the repayment amounts may provide for an effective annual rate of interest that exceeds 60%, even if that had not been the parties' intention. The judge rejected the appellants' argument that the provision for payment of fees on top of principal under the March Note should be severed (so that only principal was owed), rather than read down (so as to limit the effective interest to 60%). The judge stated:

> [100] In the present case, the evidence is undisputed that neither party turned their mind to what the effective annual rate of interest was on any of the loans. In my view, that is sufficient to distinguish *Canmerica*. I add that Ms. Graham specifically deposed she was unaware of the criminal prohibition. I cannot, in those circumstances, conclude Ms. Graham [knew] or intended that the loans would contravene s. 347 of the *Criminal Code*.
>
> [Emphasis added.]

[14] In order to read the effective interest rate down so as to limit it to 60%, it was necessary to determine the annual interest rate, despite the fact that the parties had not agreed to a rate. The judge directed the parties to use the following method:

> [117] In my view, the agreement is clear: the parties agreed on March 28, 2019, to a loan of $128,000 (most of which had already been advanced) to be repaid on December 31, 2019, in the amount of $194,206.
>
> [118] Accordingly, the parties need to determine what is the effective annual interest rate for a loan of $128,000 given on March 28, 2019, which became due on December 31, 2019. If that amount is over 60%, then Ms. Graham is limited to 60% repayment, whatever that amount would be. I trust the parties will be able to come to an agreement about the applicable effective annual interest rate given my conclusions.
>
> …
>
> [124] The parties agree that after the March Note, Mr. Hardy requested and Ms. Graham agreed to loan money to help fund his trip to Washington D.C. She advanced $30,000 on October 29, 2019. The evidence is clear that the loan was "on the same terms" as the March Note. Thus, I find she expected $30,000 to be due on December 31, 2019, together with a "fee" that represents an amount calculated when the effective annual interest rate determined by the parties for the March Note (see above, para. 117 and 118) is applied to that amount.
>
> [Emphasis added.]

[15] Pursuant to the judge's order, the parties were granted leave to reappear before her to resolve any disagreement on the amounts to be paid under the judgment.

The Supplemental Judgment

[16] Following the Original Judgment, the parties could not agree on what interest was payable on unpaid amounts after December 31, 2019, and they had a further hearing before the judge. The appellants took the position that, in light of the judge's findings in the Original Judgment, there was no contractual interest or fees owing after December 31, 2019, rather that the respondent was entitled to prejudgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*]. The respondent argued that the contractual annual interest rate determined in accordance with the method set out in paras. 117–118 of the Original Judgment should continue to apply until all the amounts owing are repaid.

[17] In the Supplemental Judgment, the judge accepted the respondent's submissions. Her reasoning is reflected in the following passages:

> [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.
>
> [Emphasis added.]

[18] The result is that the appellants are liable for interest on unpaid amounts at an annual effective rate of interest of 60% after December 31, 2019.

On appeal

[19] The appellants allege that the judge erred in awarding an effective rate of interest of 60% on unpaid amounts to the respondent from December 31, 2019, onward in the absence of any agreement between the parties as to interest after that date.

The parties' positions

[20] The appellants say that the judge erred in issuing a Supplemental Judgment that was fundamentally inconsistent with her findings in the Original Judgment. In her Original Judgment, the judge found that the parties did not agree to, or contemplate, an annual interest rate, but rather agreed to the repayment of a set amount, which included "fees", by December 31, 2019. The appellants say it is not surprising that the judge reached the conclusions that she did in the Original Judgment because there was no evidence to support a finding that the parties agreed to interest after December 31, 2019. They say that in the absence of any evidence of an agreement, the judge committed a palpable and overriding error in finding the parties agreed to the payment of interest after December 31, 2019.

[21] The respondent counters that there was evidence to support the judge's finding that whatever fee or interest the parties agreed was owing prior to December 31, 2019, also applied after December 31, 2019. This included the respondent's evidence about her ongoing cost of capital, and the ongoing risk associated with Mr. Hardy's start-up business and his repeated defaults. The respondent argues that it was "entirely reasonable to find that these concerns would be reflected in an ongoing interest arrangement as long as Ms. Graham remained unpaid": Respondent's factum at para. 30. She says there is no inconsistency between the Original Judgment and the Supplemental Judgment because the judge used the same factual findings from the Original Judgment to determine the appellants' liability for contractual interest in a different time period.

Analysis

[22] At the hearing of this appeal, the appellants no longer pressed the argument that inconsistency between the judge's findings in the Original Judgment and the Supplemental Judgment constitutes an independent ground of appeal. Rather, they advance one argument: that the judge's findings, and the evidence, does not support the existence of an agreement on interest after default. Accordingly, the issue is simply whether, in light of the judge's factual findings, and other relevant evidence, the judge erred in law or fact in interpreting the parties' loan agreement to include agreement to the payment of interest at an annual effective rate of 60% on unpaid amounts after December 31, 2019.

[23] The principles that govern the interpretation of a contract are well-established. The interpretation of a written contract must be grounded in the text of the contract. While surrounding circumstances may be considered, they cannot be allowed to overwhelm the wording of the agreement so that the court effectively creates a new agreement for the parties: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. Because contractual interpretation is an objective exercise, the relevant surrounding circumstances consist only of objective evidence of the background facts at the time of the execution of the contract; that is, what the parties mutually knew or ought to have known as of the date of the contract: *Sattva* at paras. 49, 58. One party's subjective state of mind or intention has no independent place in the analysis: *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 30.

[24] In this case, the judge found that the parties' agreement regarding the loan payments crystallized in the March Note. The March Note contained express provision for the loan amounts, along with a fee in a specified amount, to be repaid on December 31, 2019. The March Note does not contain any provision regarding the ongoing payment of interest or fees in the event that these amounts were not repaid by December 31, 2019. The judge acknowledged this. The judge did not find that such a term was necessary to give business efficacy to the contract, or as meeting the officious bystander test because the parties would have obviously assumed the existence of such a term. She also did not find that an implied term

was justified as a matter of law as a legal incident of this particular type of contract without regard to the presumed intention of the parties. See *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 762–764, 1987 CanLII 55; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 at para. 27, 1999 CanLII 677.

[25] The respondent does not argue, in her factum, that the judge applied the principles regarding implied terms of contract. However, in oral submissions, the respondent appears to suggest that the judge was free to imply a term of this sort based on the evidence before her that the appellant had incurred her own borrowing costs to make the loan and it was a risky loan. Respectfully, I disagree. Such a finding is not consistent with the evidence in this case, or with the findings of the judge.

[26] In finding that the terms of the parties' loan agreement included agreement to the appellant's ongoing liability for interest at an effective rate of 60% for unpaid amounts after December 31, 2019, the judge pointed to two considerations.

[27] First, she cited evidence that the respondent had informed the appellants that she borrowed funds from her bank to advance the loans. There is no direct evidence regarding the amount of the respondent's borrowing costs, including the interest rate charged by the bank on her loan. The judge also referenced evidence that the respondent sought to renegotiate the loan terms to provide her with a rate of return that reflected the risky nature of the loan. It is difficult to see how this evidence could overcome the judge's finding that the terms of the parties' agreement crystallized in the March Note. Even assuming that the respondent subjectively intended the appellants' liability for "fees" at an effective interest rate of 60% would continue after December 31, 2019, despite her evidence that she never turned her mind to an interest rate, there is no evidence that the appellants agreed to such a term. Such a term cannot be found in the wording of the March Note. It was not open to the judge to use the factual matrix to rewrite the parties' agreement. As noted, the judge did not find that such a term could be implied.

[28] Second, the judge suggests that the appellants will receive a "significant windfall" if they are not found liable for the payment of interest at an annual effective rate of 60% after December 31, 2019. Quite apart from the fact that such fairness concerns are not a proper basis for rewriting the parties' agreement, the nature of the windfall is entirely unclear. The appellants have been found liable to repay the respondent the amounts provided for in the March Note, which includes fees representing an effective annual rate of interest of 60% up to December 31, 2019. After December 31, 2019, the appellants will be liable to pay pre- and post-judgment interest under the *COIA*. It is unnecessary to impose an obligation on the appellants to pay an excessive rate of interest over the four-year period leading up to trial in order to avoid a windfall.

[29] For these reasons, I conclude the judge erred in her Supplemental Judgment in finding that the parties had agreed the appellants would continue to pay "fees" to the respondent after December 31, 2019 at the same effective interest rate provided for in the March Note. The judge's finding was reached without consideration of the express terms of the parties' written agreement, or principles of contractual interpretation. To the extent her finding can be seen as a finding of fact, the judge committed a palpable and overriding error in finding an agreement in the absence of any evidence to support the finding.

Disposition

[30] I would allow the appeal. The parties have agreed that if the judge is found to have erred in finding that the parties agreed that a 60% rate of interest would continue to accrue after default, then the respondent is entitled to prejudgment interest under the *COIA* at the Registrar's rate.

[31] Therefore, I would order that terms 1(a) and (b) of the judge's April 21, 2023 order be set aside and replaced with the following terms:

1. The Plaintiff Anne Graham be and is hereby awarded judgment against the Defendants Jeffery Hardy and Lifeguard Health Inc., jointly and

severally, in the principal amount of $158,000, plus interest thereon, and the following rates from the following dates:

a. 60% per annum, on the sum of $128,000, from and after March 28, 2019 to December 31, 2019, and prejudgment interest at the Registrar's rate under the *COIA* from January 1, 2020 to the date of judgment, less the sum of $9,635;

b. 60% per annum, on the sum of $30,000, from and after October 29, 2019 to December 31, 2019, and prejudgment interest at the Registrar's rate under the *COIA* from January 1, 2020 to the date of judgment.

[32] **GRIFFIN J.A.**: I agree.

[33] **DEWITT-VAN OOSTEN J.A.**: I agree.

[34] **GRIFFIN J.A.**: The appeal is allowed. Terms 1(a) and 1(b) of the judge's April 21, 2023 order are set aside and replaced as set out in these reasons for judgment.

"The Honourable Madam Justice Horsman"