COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chang v. GEA Refrigeration Canada Inc.,* 2023 BCCA 22

Date: 20230110
Docket: CA48210

2023 BCCA 22 (CanLII)

Between:

Kin Hung (Jeffrey) Chang, Aihua (Alex) Chen, Justin Lai, Xiao (Mary) Hua Wu, Guang Hao (Frank) Xu, and FPS Food Process Solutions Corporation

Appellants
(Defendants)

And

GEA Refrigeration Canada Inc.

Respondent
(Plaintiff)

And

Chen Yoiet (Andrew) Chu, Josephine Leung, Xiao Fan Qu and Cam Man Wong

(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated March 8, 2022 (*GEA Refrigeration Canada Inc. v. Chang*, Vancouver Docket S125293).

Oral Reasons for Judgment

Counsel for the Appellants:	J.R. Shewfelt
Counsel for the Respondent, GEA Refrigeration Canada Inc.:	M.C. Stacey M.R. Milne
Place and Date of Hearing:	Vancouver, British Columbia January 10, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 10, 2023

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Summary:

At trial the appellants were ordered to pay damages of approximately $7 million to the plaintiff, GEA. When the appellants decided to appeal, the appellant FPS reached an agreement with GEA that execution would be stayed on the basis that the FPS would pay the approximate $7 million to GEA's lawyers in trust for GEA. It was agreed that if the appellants succeeded on appeal the money would be paid back in part or in full depending on the appeal result, plus prejudgment interest, and the lawyers for GEA were on an undertaking in this regard. After the appeal was dismissed, GEA sought payment of post-judgment interest under the Court Order Interest Act, net of the interest earned on the monies when in the lawyers' trust account. When FPS refused, GEA sought and obtained a declaration that post-judgment interest was owing. FPS appeals, taking the position that post-judgment interest stopped running when it paid funds to GEA's lawyers in trust pending appeal.

Held: Appeal dismissed. Because FPS sought and obtained the lawyers' undertaking regarding the judgment funds pending appeal, the lawyers had to hold the funds in trust. GEA did not have the use of the funds until after the appeal proceedings were dismissed and the monies were paid out to it. Post-judgment interest continued to run but the judge had discretion to vary it pursuant to s. 8 of the Court Order Interest Act. GEA conceded that it was seeking net post judgment interest, after deducting actual interest earned while the monies were held in trust. The judge did not err in the exercise of his discretion.

[1] **GRIFFIN J.A.**: The question on appeal is whether a payment of a judgment into a trust account to be held pending appeal, stopped the running of post-judgment interest under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COI Act*]. The terms of the payment into trust were silent about post-judgment interest.

[2] The appellant FPS Food Process Solutions Corporation ("FPS") appeals from a declaration that post-judgment interest pursuant to the *COI Act* continued to accrue on a judgment debt, notwithstanding FPS's payment of the judgment into an interest bearing trust account of the judgment creditor's lawyer, pending appeal. For the reasons that follow, the appellant has not demonstrated any error in the judge's finding that post-judgment interest continued to run on the judgment debt until the debt was paid unconditionally.

[3] In brief, the respondent GEA Refrigeration Canada Inc. ("GEA") was successful as plaintiff at trial in a claim against FPS and the other appellants, arising out of the appellants' misappropriation of confidential engineering drawings. On

January 8, 2018, GEA obtained judgment for damages in the amount of $7,137,087.00. The trial judgment is indexed at 2018 BCSC 23.

[4] FPS filed an appeal from the trial judgment.

[5] Pending the appeal, on January 25, 2018 counsel for FPS wrote to counsel for GEA, proposing terms for a consent stay of execution of the trial judgment. Ultimately those terms were accepted in June 2018.

[6] The terms of the consent stay of execution, offered by FPS and accepted by GEA, were as follows ("Stay of Execution Agreement"):

> The proposal in this letter regarding a consent stay of execution pending appeal revokes and replaces the proposal in our letter and emails dated January 12, 2018."
>
> We ask that you seek instructions from the Plaintiff to agree to the following:
>
> (a) the defendant, FPS food Process Solutions ("FPS") shall make payment toward the Judgment in the amount of $7,287,037.00 by certified trust cheque from Miller Thomson LLP payable to "Singleton Urquhart Reynolds Vogel LLP, in trust" for the Plaintiff (the "Payment");
>
> (b) the Plaintiff shall agree to return the Payment to FPS in the event that the Judgment is reversed on appeal, or such lesser amount of the Payment as may be applicable in the event that the amount of the Judgment is reduced on appeal, together with interest at the prejudgment interest rate prescribed by the Registrar under the *Court Order Interest Act*;
>
> (c) in addition to the Plaintiffs agreement under paragraph (b) above, the solicitors for the Plaintiff shall provide a solicitor's undertaking promising to return the Payment to FPS in the event that the Judgment is reversed on appeal, or such lesser amount of the Payment as may be applicable in the event that the amount of the Judgment is reduced on appeal, together with interest at the prejudgment interest rate prescribed by the Registrar under the *Court Order Interest Act*;
>
> (d) the Payment is not a release and is made without prejudice to the Plaintiffs right to collect any further amounts owing under the Judgment but only after all avenues of appeal have been exhausted;
>
> (e) in exchange for the Payment, the Plaintiff shall take no steps to execute or collect upon the Judgment, including against any of the Defendants until all avenues of appeal have been exhausted, including an appeal to the Supreme Court of Canada.

[7] Following the parties' Stay of Execution Agreement, counsel for FPS paid $7,287,087.00 "in trust" to counsel for GEA (the "Judgment Funds").

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[8] Counsel for GEA held the Judgment Funds in an interest bearing trust account.

[9] Eventually the appeal to this Court was dismissed on December 14, 2020, with reasons indexed at 2020 BCCA 361. FPS sought leave to appeal to the Supreme Court of Canada, but that application was dismissed on August 12, 2021.

[10] Following the dismissal of the leave application, and after notice to FPS's counsel, GEA's counsel paid out of trust to GEA the Judgment Funds plus the interest that had accumulated on the funds while in trust.

[11] The amount of interest earned while the judgment funds were held in trust was less than the amount of interest that GEA would have been entitled to under Part 2 of the *COI Act* had judgment not been paid. GEA demanded that FPS pay the difference (i.e., post judgment interest less the actual interest that had been earned). The balance of the post judgment interest, after deduction of interest earned in the trust account, amounted to approximately $644,000 (I will round to the nearest thousand dollars).

[12] FPS refused the demand to pay approximately $644,000 in post-judgment interest, although it did make a payment of post-judgment interest calculated from the date of the trial judgment to the date when FPS paid the Judgment Funds to GEA's lawyers, approximately $121,000. The balance remained at issue between the parties. GEA sought a declaration that the balance was owed to it.

[13] On March 8, 2022, GEA obtained the declaration that the balance of the post judgment interest was due to it, with oral reasons. This is the judgment under appeal. The amount at issue is in the range of approximately $520,000.

[14] FPS submits that the judge made two errors:

a) First, in interpreting the Stay of Execution Agreement as requiring the Judgment Funds to be held in trust; and,

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b) Second, in concluding that post-judgment interest under the *COI Act* continued to accrue after the payment of the Judgment Funds.

[15] The first ground of appeal raises questions of interpretation of the parties' agreement, considered in light of the factual matrix. Unless the appellant identifies an extricable question of law, this is a question of mixed fact and law attracting appellate deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 51, 54.

[16] I am of the view that the first ground of appeal is answered entirely by the term of the Stay of Execution Agreement that required GEA's solicitors to give an undertaking to repay the Judgment Funds, plus interest calculated at *COI Act* prescribed rates for prejudgment interest, if FPS was successful on appeal. For all practical purposes, as the judge correctly noted, "this could only happen if the funds were held in trust" (at para. 11). It was FPS that sought this term.

[17] On appeal FPS argues that the primary obligation to repay the Judgment Funds was on GEA, and so the lawyers did not need to hold the Judgment Funds in trust.

[18] However, GEA's obligation does not mean that the lawyers had no obligation. As stated by the Law Society of British Columbia in *Re Sandrelli*, 2014 LSBC 44 at para. 40, "[i]t is fundamental to legal ethics that the public can rely on a lawyer's undertaking". This is why, when GEA's lawyers gave their undertaking to repay the funds plus prejudgment interest if FPS was successful on appeal, the lawyers had a professional duty to ensure the funds remained available to them. The judge did not err in concluding that the way to do this was for the lawyers to hold the funds in trust.

[19] In short, the terms of the Stay of Execution Agreement do not assist FPS in its argument on appeal. The terms were silent about what was to happen with the running of post-judgment interest under the *COI Act*. Given the lawyers' undertaking, which required the Judgment Funds to be held in trust, it cannot be said that there was an implicit term that post-judgment interest stopped running.

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[20] The appellant goes on to submit that regardless of whether the funds were required to be held in trust, the payment was agreed to be a "payment toward the Judgment", as defined in the first paragraph of the Stay of Execution Agreement, and the judge made an extricable error of law in failing to recognize this. FPS says there may well have been agreement by GEA that the judgment payment would be held in trust, but that does not change the fact that the payment was a payment toward the judgment.

[21] I do not agree that the judge made an extricable error of law. There was no express term as to what was to happen to the running of post-judgment interest. It was within the judge's purview to consider that the term requiring the solicitor's undertaking required the Judgment Funds to be held in trust and that therefore the payment was not an unconditional payment "toward judgment" but a form of security for judgment. I cannot see any basis to interfere in that conclusion.

[22] Had FPS wished to take the position that the agreement stopped the running of post-judgment interest, FPS should have proposed that as an express term. Given that it was not a part of the agreement, we do not know whether GEA would have agreed to that term.

[23] Turning to the second ground of appeal, FPS submits that regardless of the fact that there were terms imposed on the payment of the Judgment Funds, the payment constituted payment of the judgment and therefore, as a matter of first principle, post-judgment interest under the *COI Act* stopped running.

[24] The provisions of the *COI Act* dealing with post judgment interest are:

> 7 (1) In this section, "interest rate" means an annual simple interest rate that is equal to the prime lending rate of the banker to the government.
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> (2) A pecuniary judgment bears simple interest from the later of the date the judgment is pronounced or the date money is payable under the judgment.
>
> (3) During the first 6 months of a year interest must be calculated at the interest rate as at January 1.
>
> (4) During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

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> (5) Despite subsection (2), interest in respect of a judgment pronounced before April 1, 1992 must be calculated from the later of that date or the date the money is payable under the judgment.
>
> 8 If the court of original jurisdiction considers it appropriate, it may, on the application of a person affected by or interested in a judgment, vary the rate of interest applicable under section 7 or set a different date from which interest must be calculated.
>
> 9 (1) Interest under this Part is deemed to be included in the judgment for enforcement purposes.
>
> (2) A partial payment of a judgment must be applied first to outstanding interest owed on the judgment.

[25] The *COI Act* does not state when post-judgment interest stops running. However, I accept that it stops running when the judgment is paid by the judgment debtor to the benefit of the judgment creditor such that the judgment creditor has use of the funds. This is because the purpose of statutory pre- and post-judgment interest is to compensate the judgment creditor for having been deprived of the use of the funds, and to discourage delay in paying the judgment creditor what is due to it. During the time the judgment creditor is deprived of the funds, it has lost the opportunity to use the funds to earn income, and may have been required to borrow funds and to make interest payments on the borrowed funds: see *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610 at para. 214.

[26] When FPS paid the Judgment Funds under the terms of the Stay of Execution Agreement, GEA still did not have use of the funds, because of the requirement of the lawyers' undertaking which necessitated the lawyers holding the funds in trust. It was within the judge's purview to consider that at most GEA had security for the judgment and an easy way of executing on the judgment once the appeal process completed.

[27] The appellant relies on *Steenblok v. Funk*, 1990 Carswell BC1440 (B.C.C.A.) as support for the proposition that when a judgment is paid into an interest bearing trust account pending appeal, that stops the running of post-judgment interest under the *COI Act*. Respectfully, that decision is not helpful in addressing the issue on this appeal. It refers to an agreement of the parties and payment of funds into an interest bearing trust account after the appeal was concluded. The decision does not set out

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the terms of the parties' agreement and the focus of the decision is on the appropriate rate of interest in the exercise of the Court of Appeal's discretion.

[28] More closely analogous to the facts of this case are the facts of *Unruh (Guardian ad litem of) v. Webber*, [1995] B.C.J. No. 895, 6 B.C.L.R. (3d) 332 (B.C.C.A. in Chambers). There the judge in Chambers considered that interest earned pursuant to terms of a stay of execution, pending appeal, did not stop the running of post-judgment interest under the *COI Act*. Rowles J.A. held:

> [2] The issue the parties wish to have determined is whether the defendant is liable for post-judgment interest on the amount of the trial judgment in excess of the amount of interest which accrued on various securities held by defendant's counsel in compliance with an order of a justice of this Court staying execution pending appeal. The plaintiff contends that he is not limited to the interest which accrued but rather is entitled to post-judgment interest as provided in s. 7 of the *Court Order Interest Act*, R.S.B.C. 1979, c. 76, as amended, which came into effect 1 April 1992.
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> [3] The point in issue highlights the distinction between interest accruing on security for a stay of execution of a judgment and post-judgment interest accruing on the judgment itself.
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> ….
>
> [29] There is a difference between interest accruing on security put up to stay the execution of a judgment and the concept of interest accruing by statute on the judgment itself. In my view, the defendant's argument ignores that difference.
>
> [30] While the security stands behind the judgment, the security does not replace it, and the statutory rate on the judgment remains operative. In my view, the plaintiff is entitled to interest on the judgment in accordance with s. 7 of the *Court Order Interest Act*.

[29] In *Unruh* the funds were held by the judgment debtor's counsel; in the present case they were secured by payment to the judgment creditor's counsel who was on an undertaking to repay the funds if the appellant was successful on appeal. Nevertheless, I agree with the analysis in *Unruh*. There is a difference between interest earned on funds securing a judgment, and statutory interest under the *COI Act*. Interest earned on funds securing a judgment does not replace the statutory interest under the *COI Act*, although parties may agree otherwise.

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[30] There remains a discretion of the court to vary the rate or the dates for post-judgment interest, pursuant to s. 8 of the *COI Act*. In the exercise of such discretion, the court may account for circumstances where judgment funds have been secured in trust as part of a stay of execution and have earned interest while secured. These facts were acknowledged here.

[31] Here the judge accepted GEA's position that adjusted the amount of post-judgment interest due by deducting the actual interest earned when the Judgment Funds were held in trust. Accepting this position meant that GEA did not obtain a windfall or duplication of interest. FPS does not contend that the judge erred in the exercise of this discretion.

[32] For these reasons, I would dismiss the appeal.

[33] **WILLCOCK J.A.**: I agree.

[34] **SKOLROOD J.A.**: I agree.

[35] **WILLCOCK J.A.**: The appeal is dismissed.

"The Honourable Justice Griffin"

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