Federal Court  Cour fédérale

Date: 20121012

Docket: T-1148-01

Citation: 2012 FC 1192

Vancouver, British Columbia, October 12, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

UNIVERSAL SALES, LIMITED, ATLANTIC TOWING LIMITED, J. D. IRVING, LIMITED, IRVING OIL COMPANY, LIMITED AND IRVING OIL LIMITED

Plaintiffs

and

EDINBURGH ASSURANCE CO. LTD., ORION INSURANCE CO. LTD., BRITISH LAW INSURANCE CO. LTD., ENGLISH & AMERICAN INS. CO. LTD., ECONOMIC INSURANCE CO. LTD., ANDREW WEIR INS. CO. LTD., INSURANCE CO. OF NORTH AMERICA, LONDON & EDINBURGH GENERAL INS. CO. LTD., OCEAN MARINE INS. CO. LTD., ROYAL EXCHANGE ASSURANCE, SUN INSURANCE OFFICE LTD., SPHERE INSURANCE CO. LTD., DRAKE INSURANCE CO. LTD., EAGLE STAR INSURANCE CO. LTD. AND STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582

Defendants

REASONS FOR JUDGMENT AND JUDGMENT
(INTEREST AND COSTS)

[1] On 25 April 2012, I granted judgment in favour of Universal Sales Limited, Atlantic Towing Limited and J.D. Irving Limited against the defendants, severally, but not jointly, in the amount of $4,946,001.86. On consent, interest and costs were left to be dealt with later. The plaintiffs have now moved with respect thereto, and the defendants have replied. Both have led evidence.

[2] The judgment shall be as if it were rendered at the same time as were the issues of liability and quantum. I say this because since then some of the defendants have settled, while others have taken the case to appeal. This judgment shall ignore that fact since whatever agreement had been reached was reached and, obviously, will take precedence. As the defendants were not jointly liable, the parties can work out for themselves whatever calculations are required.

INTEREST

[3] With respect to interest, the issues are:

a. Since there is always a burden on a plaintiff to move a case along, and since it took 11 years to get to trial, should the plaintiffs be deprived of some of the interest they might otherwise have been awarded?

b. From when should interest run: from the date the particularized claim was sent to the underwriters, the date the action was instituted, or some other date?

c. At what annual rate should interest be awarded?

d. Should interest be compounded semi-annually, or at some other interval? and

e. Should post-judgment interest be calculated at the same rate as pre-judgment interest?

COSTS

[4] With respect to costs, the issues are:

a. Should the plaintiffs be awarded enhanced costs and, if so, on what basis?

b. Should costs be reduced on a divided success basis given that the plaintiffs obtained less than 50 percent of what they sought, and did not succeed on major issues?

c. To what extent, if any, should settlement offers withdrawn before trial be taken into account?

d. The complexity of the case, time wasted, and the many other factors enumerated in Rules 400 and following of the *Federal Courts Rules*.

DELAYS

[5] In my reasons for judgment, 2012 FC 418, [2012] FCJ No 536 (QL), I stated I would want some explanation as to why this matter took 11 years to get to trial. During argument, I had mentioned the decision of Mr. Justice Joyal in *Santa Marina Shipping Co SA v Madeg Holdings Inc*, 6 FTR 269, 1 ACWS (3d) 302, [1986] FCJ No 636 (QL) (the "*Marina*"). In that case, there had also been an interval of 11 years from the date of the institution of the action until trial. He ascribed a fair portion of this delay to the plaintiff and only awarded interest at 60 percent of the average bank prime rate from the date of the institution of the action, which was some four years after the cause of action had arisen.

[6] In this case evidence was led by David Jamieson, executive vice-president and assistant secretary of J.D. Irving Limited and assistant secretary of Universal Sales Limited and Atlantic

Towing Limited, and by Martin Futter, the lead claims adjuster for the underwriters subscribing to the Lloyd's Policy. Neither was cross-examined.

[7] I am satisfied that delays were no more caused by the plaintiffs, than by the defendants. There had been a change of solicitors by the defendants; both sides needed a great deal of time to collect documents as the Irving Whale had sunk in 1970; there were serious issues with respect to discovery of documents and privilege. There were appeals, and the matter was under case management. Mr. Jamieson was examined for discovery on four separate occasions. There was general cooperation between counsel. I conclude that the circumstances are not such that the plaintiffs should be deprived of the interest which they would otherwise be awarded.

STARTING DATE

[8] The parties are well aware that in admiralty the trial judge enjoys wide discretion, and that interest is a function of damages. Indeed, while section 36 of the *Federal Courts Act* deals with pre-judgment interest, subsection 7 provides that the section does not apply if relief is sought under Canadian maritime law, as is the case here. To cite but one example, in *Kuehne + Nagel Ltd v Agrimax Ltd*, 2010 FC 1303, 382 FTR 47, [2010] FCJ No 1623 (QL), it was held that pre-judgment interest in maritime cases is actually an aspect of damages, is at the Court's discretion, and if properly pleaded runs from the date the debt is due, not from the institution of the action.

[9] In this case, a particularized claim was only presented to underwriters on 10 November 2000. The plaintiffs concede that they could not have expected payment by return mail. Some of the relevant events went back some 30 years. Documents were missing, and the many aspects of the

case had to be investigated. In these circumstances, I consider the proper starting date to be the date the defendants were served with the statement of claim, which was 12 July 2001.

RATE OF INTEREST

[10] There is some confusion in Mr. Jamieson's testimony. In his first affidavit, he stated that the funds paid to the Crown in settlement of its action were borrowed from the Royal Bank of Canada pursuant to J.D. Irving's line of credit. He said that the annual rate at the time was 5.22 percent.

[11] Initially, both sides had provided Bank of Canada interest rates. I pointed out that when the Court speaks of commercial rates it invariably has in mind bank prime lending rates, and so Mr. Jamieson subsequently provided information from the Royal Bank of Canada, both as to its prime rate, and as to its lending rate to J.D. Irving. The payment to the Crown was on or about 13 July 2000. At that time, apparently, the Royal Bank of Canada's lending rate to J.D. Irving was the prime rate, which was 7.5 percent.

[12] I take Mr. Jamieson's more specific evidence that J.D. Irving had borrowed $4.7 million from the Royal Bank of Canada at the initial rate of 5.22 percent. He does not state whether any subsequent repayments were specifically made attributable to the Irving Whale settlement.

[13] The evidence shows that the Royal Bank's prime rate of 7.5 percent dropped in January 2001 to 7.25 percent, and continued to drop. Indeed, for a short time in 2009 it was only 2.5 percent. The rate since October 2009 has been 3 percent. In their original statement of claim, the plaintiffs claimed pre-judgment interest in accordance with Canadian maritime law. As aforesaid, this is a

rather open-ended proposition. They now ask for interest at the annual rate of 5 percent in accordance with the *Interest Act*. Section 3 thereof provides:

Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five percent per annum.	Chaque fois que de l'intérêt est exigible par convention entre les parties ou en vertu de la loi, et qu'il n'est pas fixé de taux en vertu de cette convention ou par la loi, le taux de l'intérêt est de cinq pour cent par an.

[14] The premise behind previous decisions of this Court to grant interest at a commercial rate, such as the bank prime lending rate, or one or two percent above, was that the commercial rate was considerably higher than the legal rate and what we are really doing is assessing damages. However, as the Royal Bank figures show, its prime lending rate fell below the legal rate in November 2001, rose above in February 2006, then dropped and has remained below since May 2008.

[15] In the *Marina*, referred to above, the average bank prime rate from 1975 through to 1986 had been 12.35 percent. Even when a contractual rate has been agreed, the Court, in its discretion, may grant interest at a different rate (*Mount Royal / Walsh Inc v Jensen Star (The)*, [1986] 17 FTR 289, 9 ACWS (3d) 61, [1988] FCJ No 141 (QL), varied, but not on this point, [1990] 1 FC 199, 99 NR 42 (FCA), [1989] FCJ No 450 (QL).

[16] The defendants have made calculations based on Mr. Jamieson's evidence. For the most part, Irving's rate was the same as the Royal Bank's prime rate, but as the prime rate dropped, it was

charged some basis points over prime. The average Royal Bank prime rate was 4.28653846 and the rate on Irving's line of credit was 4.75769231.

[17] In *Kuehne + Nagel*, above, and in *Société Telus Communications et al v Peracomo Inc et al*, 2011 FC 494, 389 FTR 196, [2011] FCJ No 602 (QL), affirmed 2012 FCA 199, 433 NR 152, [2012] FCJ No 855 (QL), I awarded interest at the legal rate of 5 percent, as commercial rates had been low. I do so again in this case.

COMPOUND INTEREST

[18] Although it is convenient in giving reasons to separate the rate of interest from the issue of whether or not it should be compounded, in reality they are related. The underlying rationale is to make the plaintiffs whole.

[19] This Court has often awarded compound interest without providing a full set of reasons. A reason sometimes given is that a plaintiff has already been deprived of full recovery because of limitation provisions, for instance the *Hague-Visby Rules* limit liability on a per package or unit basis. In this case however the insurance cover limit of $5,000,000.00 was contractually agreed and no doubt was reflected in the premium.

[20] I accept that the Court in its discretion, judicially exercised, may grant compound interest. See for example: *Canastrand Industries Ltd v Lara S (The)*, [1993] 2 FC 553, [1993] FCJ No 134 (QL), affirmed 1994 (176 NR 31, [1994] FCJ No 1652 (QL)). However, in my opinion, evidence must be led to show that compound interest is necessary in order for the plaintiffs to be fairly

compensated (*Alcan Aluminum Ltd v Unican International SA*, 1996 113 FTR 81, 64 ACWS (3d) 11, 1996 FCJ No 843 (QL), *Elders Grain Co Ltd v M/V Ralph Misener (The)*, 2004 FC 1285, 134 ACWS (3d) 320, [2004] FCJ No 1558 (QL), and *Telus*, above).

[21] Plaintiffs rely on the decision of the Supreme Court in *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43, [2002] 2 SCR 601, [2002] SCJ No 44 (QL). That was a breach of contract case in which the agreement contemplated compound interest. It is distinguishable from the present case. As Mr. Justice Nadon stated in the *Ralph Misener*, above, at paragraphs 9 and 10:

> 9 For the reasons that follow, I am not prepared to make the award sought by the defendants. For this conclusion, I need only refer to paragraph 55 of the Reasons of Major J. in Bank of America Canada, supra, where he states:
>
> > An award of compound pre- and post-judgment interest will generally be limited to breach of contract cases where there is evidence that the parties agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest or damages. It may be awarded as consequential damages in other cases but there would be the usual requirement of proving that damage component.
>
> 10 Although this is a breach of contract case, there is no evidence before me that the plaintiffs "agreed, knew, or should have known, that the money which is the subject of the dispute would bear compound interest as damages". Therefore, this case falls in Major J.'s second category of cases, i.e. those cases where proof of compound interest, as a component of damage, must be made. As the defendants have not adduced any proof on that count, their claim for compound interest must fail.

[22] Simple, not compound, interest shall be awarded, as no evidence has been led to justify compounding. Indeed Irving's borrowing rate has been less than the legal rate of 5 percent.

POST-JUDGMENT INTEREST

[23] Given that the current bank prime rate is 3 percent, and Irving's current borrowing rate is 4.5 percent, and given that post-judgment interest runs on both the principal and pre-judgment interest, I consider an annual rate of 4.5 percent to be fair and reasonable.

COSTS

[24] Costs are also a matter of discretion. The plaintiffs submit that they should be entitled to costs on a partial indemnity basis. I do not agree. While the case did have its complexities, in itself that is insufficient to oust the Federal Court's Tariff (*Canadian Pacific Forrest Products Ltd v Termar Navigation Co*, 146 FTR 72, 78 ACWS (3d) 674, [1998] FCJ No 384 (QL)). There was no reprehensible conduct on the part of the defendants which would justify chastising them in any way. Indeed, if they wasted some time pursuing points on which they were not successful, so too did the plaintiffs.

[25] This brings me to the defendants' point that the plaintiffs were only partially successful. Indeed, they recovered nothing on their sue and labour claim.

[26] However, the general principle is that costs follow the event, and in this case the plaintiffs obtained judgment. In *Liquilassie Ltd v MV Nipigon Bay (The)*, [1975] 2 Lloyds Rep 286, [1975] FCJ No 209 (QL), a crowding case, the plaintiff recovered its full costs notwithstanding it was found to be 20 percent to blame. In *Sanofi-Aventis Canada Inc et al v Apotex Inc*, 2009 FC 1138, [2009] FCJ No 1626 (QL), at paragraph 8, Madam Justice Snider pointed out that, absent an abuse of process, a successful party should be entitled to costs. She then went on to give examples of cases

where success was truly divided. I do not consider this to be such a case. The prime issues were whether or not there was insurance coverage, and whether Irving acted as a volunteer in settling the Crown's action for the cost of raising the Irving Whale. It succeeded on both points.

[27] Both sides made offers which were withdrawn before trial. The plaintiffs recovered more than the defendants' last offer, which would therefore have been irrelevant even if kept open until trial. As Mr. Justice Hugessen said in *Barzelex Inc v the MV EBN Al Waleed et al*, 94 ACWS (3d) 434, 1999 FCJ 2002 (QL), in order to get enhanced costs, the offer must not only be close, it must be sufficient. However, on 20 July 2006 the plaintiffs made a written offer to settle for $4,500,000.00 all inclusive. It had no expiry date. It was rejected in writing within a week, and the parties continued on. The defendants made escalating offers. It was only on 10 February 2012, eight days before trial, that the plaintiffs withdrew in writing their $4,500,000.00 settlement offer. They did better than that at trial.

[28] Federal Courts Rule 420 provides that unless otherwise ordered where a plaintiff makes a written offer to settle and obtains a judgment as least as favourable, it is entitled to double party and party costs from the date of service of the offer, but not double disbursements. However, it is a proviso that such an offer not be withdrawn and not expire before the commencement of the trial. Nevertheless, the Court may consider settlement offers which do not fall within that Rule.

[29] One question is whether Irving's offer was open for six days, or six years. In the normal give and take of contractual offer and acceptance, an offer does not survive its refusal. Unlike some provinces, our *Federal Courts Rules* do not specifically deal with this point. According to

Halsbury's Laws of Canada, 1st Edition, Civil Procedure II (Markham: LexisNexis, 2008) at page 763, Manitoba, Ontario, Prince-Edward-Island and the Northwest Territories allow a party to accept an offer to settle which has not been withdrawn or expired, even if the offer was originally rejected, or counter-offers were made. In *MK Plastics Corp v Plasticair Inc*, 2007 FC 1029, 161 ACWS (3d) 31, [2007] FCJ No 1348 (QL), the plaintiff, who had refused a valid settlement offer, relied on article 1392 of the *Quebec Civil Code*, which provides that an offer lapses if it has been rejected. Nevertheless, Madam Justice Tremblay-Lamer applied Rule 420 of the *Federal Courts Rules*.

[30] In *Termar*, above, Mr. Justice Rothstein wrote at paragraph 15:

> […] In the context of ongoing litigation, in the absence of some action or correspondence that expresses or implies that the offer is being revoked, I see no reason why an open-ended offer does not remain open indefinitely.

[31] On the basis of comity, I find that this offer was open for some six years, and should have a bearing on costs.

OTHER FACTORS

[32] The other remaining essential factor is the complexity of the case. Several difficult issues were in play, such as insurance cover, public nuisance, and the apportionment of defence costs. Surprisingly enough, given that the claim was for in excess of $11 million, the difference between Column III, the default column, and Column V, the highest column, is not that great. Fees under Column III would be just under $60,000, while under Column V they would be just over $100,000. In both cases the drafts provided by the plaintiffs allowed for second counsel at trial. Both sides had second counsel at trial, and I consider it appropriate to award second counsel fees.

[33] The Court has a penchant to award lump-sum costs where practicable. My thought was to award costs based on Column IV, low end. However, also taking into account the offer which was made, I fix the fee portion of the taxable costs at $85,000 all inclusive.

[34] As to disbursements, some questions arose. Counsel for the defendants should have the opportunity of getting better particulars. If an agreement cannot be reached, the disbursements are to be taxed in the normal way.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. Pre-judgment interest is to be calculated at the simple rate of 5 percent per annum from 12 July 2001 until 25 April 2012.

2. Post-judgment interest is to be calculated at the simple rate of 4.5 percent per annum.

3. Taxable fees are hereby fixed at $85,000 all inclusive.

4. Failing agreement, claimed disbursements shall be taxed.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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