

CANADA / JUDGMENT

C.M. v. N.L.

2022 BCSC 1533

COURT

Supreme Court of British Columbia

DECIDED

31 August 2022

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2022 BCSC 1533 C.M. v. N.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.M. v. N.L.,

2022 BCSC 1533

Date: 20220831

Docket: E162203

Registry: Vancouver

Between:

C.M.

Claimant

And

N.L.

Respondent

Before: The Honourable Madam Justice Tucker

Corrected Judgement: The text of this judgment was corrected at paragraphs 11, 32, 34 and 36 on September 9, 2022.

Reasons for Judgment

In Chambers

Counsel for the Claimant/Applicant, appearing via videoconference:

J.W.C. Wong

Counsel for the Respondent, appearing via videoconference:

N. Allen

Place and Date of Hearing:

Vancouver, B.C.

March 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2022

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I. Introduction

- [1] The parties dispute whether the claimant is entitled to post-judgment interest with respect to a compensation payment order made following a family trial.
- [2] The notice of application sought a number of orders. At the hearing, the parties advised that the post-judgment interest question was the sole matter remaining in dispute.

II. Facts

- [3] Justice Dillon's trial decision is indexed as C.M. v. N.L., 2020 BCSC 3. Her final order was pronounced on January 3, 2020 ("Final Order").
- [4] Paragraph 32 of the Final Order ("Original Term") obliged the respondent to pay the claimant a defined amount ("Original Amount") as a compensation payment:
32. The Respondent shall pay the Claimant a compensation payment of \$2,635,363.20 (the "Compensation Payment") in satisfaction of her interest in family property.

- [5] The respondent appealed the trial decision and advised that he would seek a stay of the Final Order. Following an exchange of email, on April 14, 2020, claimant's counsel sent the following email to respondent's counsel:

We write to confirm the following:

1. Upon receipt of a payment from your office to our offices in trust in the amount of \$300,000, [the claimant] will not seek enforcement of the order of Dillon J. for the compensation payment ordered thereunder until your client's application for a stay is heard and judgment has been rendered on that matter.

2.

Would you be kind enough to send a trust cheque to our offices in the amount of \$300,000.

- [6] The respondent provided the \$300,000 on April 27, 2020.
- [7] The appeal was set for November 2021.
- [8] The parties subsequently settled the litigation. They agree that the terms of settlement are as set out in the respondent's offer letter dated September 20, 2021:
- i. [The respondent] will make a compensation payment to [the claimant] of \$2,000,000. After factoring the \$300,000 he has already paid, [the respondent] will likewise provide [the claimant] with an additional sum of \$1,700,000.
 - ii. [The claimant] will retain her pension and there will be no division pursuant to Part 6 of the Family Law Act.
 - iii. A Notice of Settlement or Abandonment of the BC Court of Appeal Action No. CA 46669 will be filed.
 - iv. Both parties will waive all further claims to property/debt division, tax relief, costs or ancillary matters pursuant to Part 5 and 6 of the Family Law Act.
- [9] Thus, the settlement reduced the Original Amount (\$2,715,363.20) to \$2,000,000 ("Reduced Amount").
- [10] The parties agree that post-judgment interest was not raised as an issue in reaching the agreement not to enforce or in the settlement negotiations.
- [11] The claimant filed the underlying notice of application on December 7, 2021. After the application was filed, the parties settled all issues other than post-judgment interest. To that end, they filed a January 21, 2022 consent order ("Consent Order"). The relevant paragraph of the Consent Order reads:
2. BY CONSENT. The Order of the Honourable Justice Dillon pronounced January 3, 2020 shall be varied such that Paragraph 32 shall be deleted and replaced with:

"The Respondent shall pay to the Claimant a compensation payment of \$2,000,000 (the "Compensation Payment"), of which \$1,401,291.18 has already been paid, in satisfaction of the Claimant's interest in family property. The balance owing from the Respondent to the Claimant towards the Compensation Payment is \$598,708.82."

- [12] Thus, the Consent Order varied the Final Order by deleting the Original Term and substituting the one set out above ("Varied Term").
- [13] As the math suggests, a further \$1,101,291.18 in trust with respondent's counsel was released to the claimant at the time of the Consent Order. The respondent paid the final balance owing against the Reduced Amount on February 16, 2022.
- [14] The present dispute is whether post-judgment interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79 [COIA] is owing on the Reduced Amount back to the date of the Final Order.

III. Positions

- [15] Counsel for both parties advised the Court that they were unable to locate any case law or authority dealing with the disputed issues. They provided the Court with their respective submissions based on "first principles".
- [16] The claimant says post-judgment interest under the COIA runs by operation of law and that nothing was done to stop it from running. As the Original Amount subsumed the Reduced Amount, the Reduced Amount was always payable and accruing interest. Taking the respondent's interim payments into account, the claimant calculates the interest owing as \$137,501.91.
- [17] The claimant contends that she is owed interest back to the Final Order as a consequence of the settlement, and that the court has limited discretion to decline to enforce a settlement: *Carlton v. Carlton*, 2017 BCSC 603 at paras. 36-38.
- [18] The respondent says the applicable general principle here is that interest is not payable until the amount owing is crystallized: *Boutsakis v. Alexis House Café Ltd.*, 2014 BCSC 221, and *Jacobs v. Yehia*, 2019 BCSC 2086. He says the Reduced Amount was only determined by the September 20, 2021 settlement, and that prior to the Consent Order there was no judgment ordering payment of the Reduced Amount.
- [19] The respondent further contends that the claimant agreed to stay the enforcement of the Original Term. He says that stay remained in operation up until the September 2021 settlement, and that interest did not accrue by virtue of the stay.
- [20] The respondent submits that post-judgment interest can only possibly be owing on the amount of the final installment (\$598,708.82) and in respect of the period between the Consent Order and the February 16, 2022 final payment.

IV. Analysis

[21] Part 2 of the COIA includes the following provisions:

Part 2 -- Post-judgment Interest

Interest rate

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.

(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.

Interest deemed to be included in judgment

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.

A. The Agreement Not to Enforce

[22] The judicial enforcement of a money judgment is commonly referred to as "execution". An agreement or order not to enforce a money judgement is thus commonly referred to as a "stay of execution." The terms stay of enforcement and stay of execution are sometimes used interchangeably when the order is one for the payment of money: see, e.g., *Cultivate Capital Corp. v. 1011173 B.C. Ltd.*, 2021 BCSC 2573 at paras. 1-4.

[23] I am satisfied that the "enforcement" agreement made by the parties constituted a stay of execution regarding the Original Term.

[24] A useful definition of the term "stay of execution" is found in *Collins Dictionary of Law*, s.v. "stay of execution" <<https://legal-dictionary.thefreedictionary.com/stay+of+execution>> (August 24, 2022):

stay of execution

1 an order that operates to prevent the judgment creditor from putting in operation the legal process of execution or legal enforcement; it does not affect rights acquired independently of the process stayed .

[Emphasis added.]

[25] There is, unsurprisingly, considerable case law on point.

[26] In *B.A.J. v. V.L.*, 2012 BCSC 560, Masuhara J. held that a stay of execution by order does not impact the accrual of interest unless expressly stated:

- [15] In terms of the effect of a stay of execution on the accrual of post-judgment interest, the stay does not itself stay the accrual of interest unless the order specifically so states. In this case, there is no such term.
- [27] B.A.J. was treated favourably in *First Majestic Silver Corp. v. Davila*, 2013 BCSC 1126, where Myers J. wrote:
- [20] In *B.A.J. v. V.L., Masuhara J.* noted, at para. 15, that a stay of execution does not itself stay the accrual of interest unless it is specifically provided for in the stay order. That is not the case here.
- [21] Further, and in any event, the fact that Mr. Davila agreed to a stay does not mean he agreed to be, or should be, deprived of interest. The order is neutral in that regard and First Majestic has had the benefit of the use of the money. It should not reap a windfall from that. Therefore, I exercise my discretion under s.8 and conclude that post-judgment interest on the \$623,579 should run at the standard court rate from the time of the order of Pitfield J.
- [28] Finally, this precise factual situation - a stay of execution by agreement - was recently addressed in *Kim v. Choi*, 2020 BCSC 1790. Ms. Kim was awarded a monetary judgment. Both parties appealed. The parties agreed to a stay of execution pending appeal on terms requiring Ms. Choi's counsel to hold \$350,000 in trust. When the appeals were dismissed, Ms. Kim sought a declaration that she was entitled to post-judgment interest back to the date of judgment.
- [29] Ms. Kim was held to be entitled to the interest sought. Dley J. wrote:
- [25] The issue of post-judgment interest does not arise until the judgment is paid because it is only then that the calculation can be made. Entitlement to post-judgment interest is deemed to be included in a judgment: the Act, s. 9(1). As such, it is not necessary to include it in an order: *Hockin v. Bank of British Columbia*, (1996), 73 B.C.A.C. 234 at paras. 8-12.
- [26] Ms. Choi argues that an award of post-judgment interest would be prejudicial because she:
- a) was unaware that interest would be sought when she entered into the terms of the stay of execution agreement;
 - b) did not have the benefit of the value of the funds placed into her lawyer's trust account under the stay of execution agreement; and
 - c) promptly paid the judgment following the dismissal of her appeal.
- [27] The stay of execution agreement was a convenient vehicle for Ms. Choi to protect her assets from Ms. Kim who was entitled to the fruits of her judgment. Ms. Kim also received the benefit of the agreement because she was assured of having access to funds in the event Ms. Choi's appeal was dismissed. It may have been prudent to have placed the funds in an interest-bearing account for the credit of the parties pending the appeal.

- [28] I do not consider any of the factors urged by Ms. Choi to be prejudicial. If she had not entered into the stay of execution agreement, it was open to Ms. Kim to realize on her judgment. Promptly paying the judgment after an unsuccessful appeal is not a reason to ignore the provisions of the Act. Therefore, I have no hesitation in concluding that post-judgment interest must be paid.
- [30] Thus, the point has been decided. Further, I fully agree with Dley J.
- [31] Post-judgment interest accrues under the COIA by operation of law. Unless an order or agreement specifically provides otherwise, accrual continues. An agreement to stay execution is not, in and of itself, an agreement otherwise, as a stay of execution does not impact the underlying right to be paid.
- [32] The question of interest could have been raised and addressed at the time of the stay agreement, at the time of the settlement agreement, or at the time of the Consent Order. As it was not and no agreement was ever reached providing otherwise, interest accrued.

B. Impact of the Consent Order

- [33] The Final Order always existed, the Consent Order only varied its terms. A term requiring a compensation payment to be made was in place at all times. In effect, the Consent Order did not make the amount of \$2,000,000 payable, but rather made \$715,363.20 of the Original Amount no longer payable.
- [34] The respondent remained in possession of the \$2,000,000, and the claimant remained held out of that amount, following the pronouncement of the Final Order. By staying in possession, the respondent either avoided paying interest and/or had the opportunity to earn interest. On a policy basis, it is only fair that the claimant be in the position she would have been in had the Final Order always included the Varied Term.
- [35] This is the same principle that governs when the amount of a judgment is varied on appeal: *Pallos v. Insurance Co. of British Columbia* (1995), 1995 CanLII 1463 (B.C. C.A.) at para. 8, 7 B.C.L.R. (3d) 211; *Hockin v. Bank of British Columbia* (1996), 1996 CanLII 3685 (B.C. C.A.) at para. 11, 134 D.L.R. (4th) 96; *Rhodes v. City of Surrey*, 2020 BCSC 1318 at para. 15.

C. Crystallization

- [36] There is no merit to the argument that nothing at all was owing until the Consent Order "crystallized" an amount by substituting the Varied Term. The amount owing under the Final Order was clear and determined, both under the Original Term and Varied Term.

V. Disposition

- [37] Post-judgment interest is payable on the Reduced Amount back to January 3, 2020, to be calculated taking into account the respondent's interim payments. The claimant submitted the interest owing amounts to \$137,501.91. The respondent did not dispute the claimant's calculation at the hearing, but may have objections that were not raised given the focus of the application. If the calculation is disputed, the dispute should be taken before the registrar.
- [38] As costs are intended to offset the expense of counsel's hearing preparation, there will be no order for costs.

"Tucker J."

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