

CANADA / JUDGMENT

## Chavez-Salinas v. Tower

2023 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 89 Chavez-Salinas v. Tower

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chavez-Salinas v. Tower,

2023 BCSC 89

Date: 20230119

Docket: M119256

Registry: New Westminster

Between:

Delia L. Chavez-Salinas

Plaintiff

And

Kenneth Tower

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

P.C.M. Formby

Counsel for the Defendant:

S. Amendolagine

Place and Date of Hearing:

New Westminster, B.C.

August 23, 2022

Place and Date of Judgment:

New Westminster, B.C.

January 19, 2023

## Introduction

- [1] This application centres on the plaintiff's claim for post-judgment court order interest on a personal injury damages award made November 15, 2017 and indexed at 2017 BCSC 2068 (the "Trial Decision"). At trial, the plaintiff was awarded \$320,800 inclusive of all heads of damage after a deduction for contributory negligence. On December 12, 2017 the plaintiff filed for appeal of the Trial Decision. The appeal was eventually heard January 7, 2022 and judgment issued February 2, 2022, indexed at 2022 BCCA 43.
- [2] The defendant has not paid the judgment amount nor has he at any time brought any application for a stay of the judgment.
- [3] On appeal, the Trial Decision was reversed in part on the question of the plaintiff's contributory negligence and a small reduction in the plaintiff's recovery for cost of care. The appeal resulted in an increase in the plaintiff's recovery in the order of \$80,000, for a total of \$400,800.
- [4] The plaintiff applies for prejudgment interest on all pecuniary awards to the date of the Trial Decision, post-judgment interest from the date of the Trial Decision to the time the amounts are paid, Scale C costs for the action and a summary determination of the number of units and disbursements claimed in her bill of costs.
- [5] The defendant accepts that the trial judge awarded the plaintiff's costs of the action, concedes the plaintiff's entitlement to prejudgment interest, and asks to defer the question of the appropriate scale of costs and summary determination of units and disbursements.
- [6] My determination of the plaintiff's application for post-judgment interest will turn on whether she waived her entitlement to post-judgment interest by agreement (the "Waiver Agreement"), as claimed by the defendants, and the extent to which the appeal was delayed inordinately by the plaintiff.

## Background

- [7] The plaintiff was injured in the subject accident in December 2008. Her damages award was made in November 2017 and varied on appeal in February 2022. When the plaintiff commenced her appeal, she was representing herself. Subsequently she was represented by counsel. Counsel for the defendant on the appeal was Alison L. Murray, K.C.
- [8] The defendant filed its Notice of Appearance on the appeal on December 17, 2017. The sequence of events after December 2017 was as follows:
- a. On February 14, 2018 the plaintiff applied for an order extending the time to file the appeal record, transcripts and factum; an extension was granted until April 30, 2018.
  - b. On April 23, 2018 the plaintiff applied again to extend time to file her factum and transcripts, apparently because some transcripts were missing. On May 3, 2018 the deadline to provide those transcripts to Ms. Murray was extended to May 17, 2018 and the deadline to file the same was set as May 31. She was also required to file her factum by July 31, 2018.
  - c. On June 18, 2018 the plaintiff sought a further extension of time to file the transcripts; the Court extended the time for this filing to June 29, 2018.
  - d. On July 6, 2018, the plaintiff requested a further extension to file the transcripts and her factum. On July 18, 2018 the Court excused the plaintiff from filing written transcripts and allowed her to file electronic transcripts. Further, the Court extended the time for filing appeal books to August 20, 2018. The time for filing the plaintiff's factum was extended to October 17, 2018.
  - e. On August 20, 2018 the plaintiff appointed, D. Blake Hobson as counsel to act on her behalf on the appeal.
  - f. On December 18, 2018 the plaintiff's appeal was placed on the Court of Appeal's inactive appeal list.
  - g. On April 11, 2019 Ms. Murray wrote to plaintiff's counsel recounting the delay in the appeal up to that point and informing him that she had instructions from her client to consent to the late filing of the appeal books on certain terms, including that "[t]he appellant agrees that the defendant or ICBC are not obliged to pay any post judgment interest on the outstanding judgment as a consequence of the inordinate delay in having this appeal proceed".
  - h. Also on April 11, Mr. Hobson responded to Ms. Murray's email stating, inter alia, "[m]y client will agree to the conditions set out in your email, specifically: The appellant agrees that neither the defendant nor ICBC are obliged to pay any post judgment interest on the outstanding judgment as a consequence of the inordinate delay in having this appeal proceed". This correspondence reflects the Waiver Agreement.
  - i. On May 29, 2019 the plaintiff's appeal books were filed.

- j. On June 7, 2019 a consent order (flowing from the Waiver Agreement) was entered, providing, inter alia, that the plaintiff would file her appeal books within five days of the entry of the order and her factum would follow within 30 days from the date that the appeal books were filed (the "Consent Order").
- k. On June 28, 2019 the plaintiff's factum was filed.
- l. On February 28, 2020, the plaintiff's appeal was scheduled for hearing October 5, 2020.
- m. The plaintiff's filed appeal books were deficient and a supplementary appeal book was produced around June 16, 2020.
- n. On September 18, 2020 plaintiff's counsel requested an adjournment of the appeal, which was reset for March 16, 2021.
- o. As of January 24, 2021, defendant's counsel was informed that Mr. Hobson no longer represented the plaintiff.
- p. On March 12, 2021, the plaintiff requested an adjournment of the appeal hearing from March 16, 2021. The appeal was reset for September 28, 2021 and was "peremptory on the appellant".
- q. On July 15, 2021 the plaintiff retained new counsel for the appeal, Jeremy Shragge, who requested an adjournment from the September 28, 2021 date to January 7, 2022.
- [9] Regarding the current application, the defendants filed a response to application on June 16, 2022 and provided a supplementary response to application filed July 22, 2022. The latter response was restricted to the issue of post-judgment interest entitlement.

## Issues

- [10] The key issue on this application is whether the plaintiff is entitled to post-judgment interest from the date of the Trial Decision to time the judgment amounts are paid.
- [11] In determining this issue, the Court will consider the following:
  - a) whether the plaintiff waived her entitlement to post-judgment interest under the Waiver Agreement; and
  - b) whether the plaintiff is otherwise not entitled to post-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 [Act] to the extent that her conduct resulted in inordinate delay of the appeal.

## Parties' submissions

## Defendant's submissions

- [12] The defendant argued there was an agreement between the parties that the plaintiff would not be entitled to receive any post-judgment interest on the outstanding judgment given the Waiver Agreement. The defendant submitted that the Waiver Agreement is enforceable and not in any way ambiguous. This was the only argument advanced in the defendant's initial response to the plaintiff's application.
- [13] In the defendant's supplemental application response, he argued that no post-judgment interest should be granted to the plaintiff due to her inordinate delay between the filing of the notice of appeal in December 2017 to the hearing of the appeal in January 2022.
- [14] In the supplemental application response, the defendant reviewed some authorities dealing with the issue of what constitutes inordinate delay in different circumstances. The defendant argued that, in this case, the appeal books and factum should have been filed 90 days after the notice of appeal was filed. He argued the plaintiff's delay was inordinate because it was only after the plaintiff was granted multiple extensions and breached the Court's order concerning conduct of the appeal that she filed her appeal books on May 29, 2019 and factum on June 28, 2019, 14.5 months after the original due dates.
- [15] The defendant contends that the April 11, 2019 email exchange between Mr. Hobson and Ms. Murray constituted an agreement to suspend the plaintiff's entitlement to post-judgment interest and that payment of that interest "should be waived up to April 11, 2019, and then to June 28, 2019".
- [16] The defendant went on to argue that the delay of the appeal hearing from October 5, 2020 until January 7, 2022 was also caused by the plaintiff and constituted inordinate delay that should deprive her of her entitlement to post-judgment interest during that time span.
- [17] The defendant contends that this Court should adopt the holistic approach referred to in the authorities to find the plaintiff's behaviours constituted inordinate delay from her first failure to comply with the appeal rules, thereby depriving her of post-judgment interest.

## Plaintiff's submissions

- [18] The plaintiff relied on the Act as the foundation for her claim for post-judgment interest. The relevant sections of the Act include:

## Court order interest

1 (1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

## Interest not awarded in certain cases

2 The court must not award interest under section 1

- (a) on that part of an order that represents pecuniary loss arising after the date of the order,
- (b) if there is an agreement about interest between the parties

### 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.
- (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...

### Court may vary rate

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.

- [19] The plaintiff argued that her daughter, Sarah Senior, was her litigation guardian throughout the appeal and neither the plaintiff nor her daughter were informed that her claim to post judgment interest would be waived during times when she inordinately delayed the appeal process. In the plaintiff's affidavit on this application she deposed "I never agreed to it" and "I also understand that my daughter Sarah Senior (nee [sic] Kurtika) nor Mr. Formby was advised of" the Waiver Agreement until May 2022.
- [20] In a reply to the defendant's submissions, the plaintiff contends that the words in defence counsel's April 11, 2019 email limited the plaintiff's waiver to actions that inordinately delayed the appeal process. The plaintiff contends that the Waiver Agreement was ambiguous and the expression "inordinate delay", without reference to any details concerning that delay, render the agreement unenforceable.
- [21] She argues the Waiver Agreement was drafted by defendant's counsel and that the principles of contra proferentum should be applied meaning that "where a promise or agreement is ambiguous, the preferred meaning should be the one that works against the interests of the party which provided the wording". The plaintiff cited a number of cases including: *Laxton v. Morriss*, 2007 BCSC 1690; *Ontario (Minister of Transportation) v. 407ETR Concession Company Ltd.*, [2005] O.J. No. 19, 2005 CanLII 362 (ONSC); and *Cariboo Redi-Mix & Contracting Ltd. v. Barcelo*, [1991] B.C.J. No. 2038, 1991 CanLII 881 (SC).
- [22] The plaintiff did not refer to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] for the principles of contractual interpretation and processes to be followed by this Court.

[23] When asked by the Court about the application of Sattva, the plaintiff did not deal with its principles in the context of its argument regarding the interpretation of the Waiver Agreement in this case.

## Analysis

[24] At the outset of my analysis, it is important to note that the defendant has not paid the judgment amount and did not at any time obtain a stay of the judgment.

[25] The defendant did not bring any application under s. 8 of the Act seeking to vary the commencement date of post judgment interest or the rate payable under the Act.

Whether the plaintiff waived her entitlement to post-judgment interest

## Whether the parties entered into an agreement

[26] The test for whether an agreement was formed asks whether it would be clear to an objective, reasonable bystander informed of the material facts, that the parties intended to contract, and whether the essential terms of that contract can be determined with reasonable certainty: see *Provincial Health Services Authority v. Sayyari*, 2022 BCSC 2092 at para. 49; *Lacroix v. Loewen*, 2010 BCCA 224 at para. 36.

[27] In *Berthin v. Berthin*, 2016 BCCA 104, the Court of Appeal said at para. 46:

[46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15 . . .

[28] These principles were summarized by the Court of Appeal in *Oswald Start Up SRL*, 2021 BCCA 352 at para. 34, quoting with approval from the respondent's factum:

- (a) there must be an intention to contract;
- (b) the essential terms must be agreed to [by] the parties;
- (c) the essential terms must be sufficiently certain;
- (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and
- (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

- [29] In my view, a reasonable bystander informed of the material facts (namely, the April 11, 2019 emails between Ms. Murray and Mr. Hobson and the context of the delay of the appeal up to that time) would conclude that the parties intended to contract and agreed on the essential terms of the Waiver Agreement.

### Enforceability of the Waiver Agreement

- [30] The plaintiff deposed that she did not agree to the Waiver Agreement. Her counsel at the time Mr. Hobson, in his affidavit, did not confirm whether he had instructions to enter into the agreement nor whether he had failed to inform the plaintiff and her daughter about the Waiver Agreement. The plaintiff argued she was represented by her litigation guardian during the appeal and that Ms. Senior was not informed about the Waiver Agreement.
- [31] The defendant relies on the decision of *McClaghry v. Pollock*, 2021 BCSC 1913 dealing with a typographical error in a settlement agreement made between counsel. In that case, plaintiff's counsel sent an email to defence counsel indicating the plaintiff had instructed them to accept the defendant's offer. Before the Court, the plaintiff claimed that undue influence, unconscionability and mistake should vitiate the agreement. The Court found that while undue influence from one's own counsel, if made out, may be grounds for claims against one's own counsel, it is not grounds for setting aside the agreement itself: *McClaghry* at para. 29. This case is not particularly helpful in determining the enforceability of the Waiver Agreement, as the plaintiff in this case has not alleged undue influence, unconscionability, or mistake.
- [32] In *Baldissera v. Wing*, 2000 BCSC 1788, Justice Bennett concluded the following based on a review of cases where it was argued that a solicitor had acted without instructions:
- [31] The law appears to be that where a solicitor has apparent but does not have actual authority to enter into a settlement agreement, or compromise the action, the settlement agreement will nevertheless be binding upon the client unless the client has limited the authority of the solicitor and the opposing side had notice of this limitation. However, the court will refuse to recognize a settlement and refuse to grant a stay of proceedings if, in addition to the limitation element referred to immediately above,
- (a) there was a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;
  - (b) there was fraud or collusion; or
  - (c) there was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.

See *Hawitt v. Campbell & Cameron* (1983), 1983 CanLII 307 (BC CA), 46 B.C.L.R. 260 (C.A.)

[33] A solicitor acting for a client stands in the position of an agent for the client: Baldissera at para. 29. For an agent's actions to be binding on their principal, "the agent must have actual, or at minimum, apparent authority to act": Baldissera at para. 30. The issue then arises as to whether Mr. Hobson had the authority to enter into negotiations and agree to the terms of the Waiver Agreement: Baldissera at para. 30. It was the plaintiff's evidence that she never agreed to the Waiver Agreement and did not become aware of it until May 2022. In his April 11 email in response to Ms. Murray, Mr. Hobson said:

Thank you for your cooperation. Inder is away sick so I will respond. My client will agree to the conditions set out in your email, specifically:

The appellant agrees that neither the defendant nor ICBC are obliged to pay any post judgment interest on the outstanding judgment as a consequence of the inordinate delay in having this appeal proceed;

The appellant will, upon receiving the consent order allowing the late filing of the appeal books, see that the appeal books are filed within five business days;

The appellant will file her factum within 30 days from the date that the appeal books are filed; and,

The appellant will grant any necessary extension of time requested by the respondent to file his factum.

[34] Mr. Hobson's April 11 response to Ms. Murray was a clear, unambiguous acceptance of the terms proposed by the defendant, which led the defendant to believe he possessed authority. The plaintiff did not allege or adduce evidence to suggest that any limitation was placed on Mr. Hobson's authority as her legal representation. Even if there was a limitation on Mr. Hobson's authority, the defendant had no notice of any limitation: Baldissera at para. 31. Absent an allegation on the part of the plaintiff that Mr. Hobson misapprehended the instructions of the plaintiff, or that there was fraud, duress, collusion, mutual mistake, or lack of capacity, I am satisfied that the Waiver Agreement is binding and enforceable on the parties. I find that Mr. Hobson was acting either within his actual or apparent authority when he accepted the defendant's offer. In reaching this conclusion, I considered the fact that the Consent Order, signed by both parties' counsel, states that "no person involved is under any legal disability".

## Interpretation of the Waiver Agreement

- [35] In *Sattva*, the Supreme Court clarified and affirmed principles to be used in interpreting contracts, stating that the interpretation of contracts engages common sense principles and is "not dominated by technical rules of construction": para. 47. The goal of contractual interpretation is "to ascertain the objective intent of the parties": *Sattva* at para. 49.
- [36] Contracts must be interpreted as a whole, rather than interpreting individual parts: *Sattva* at para. 47. The factual matrix existing at the time when the contract is formed can be considered without any precondition that the terms of the agreement are ambiguous; rather, considering the factual matrix surrounding the making of a contract is one part of the interpretive exercise: *Sattva* at paras. 46-50.
- [37] When interpreting a contract, it is not appropriate to consider the parties' subjective intentions: *Sattva* at paras. 58-60. Rather, contractual interpretation relies on an objective assessment of the facts known (or that reasonably ought to have been known) to the parties when they made their agreement: *Sattva* at para. 58. A court may consider anything that could affect the way a reasonable person would have understood the language of a document: *Sattva* at para. 58.
- [38] Surrounding circumstances or consideration of the factual matrix cannot overwhelm the words of the agreement itself: *Sandhu v. Sidhu*, 2019 BCCA 465 at para. 24, citing *Sattva* at para. 57. Contract interpretation should be centered on the core meaning of the entire contract, and consideration of background facts should only come from objective evidence extant at the time of the execution of the contract: *Sattva* at para. 58.
- [39] The Supreme Court also confirmed that surrounding circumstances cannot be used to "deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57, citing *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62, 1997 CanLII 4085 (C.A.).
- [40] Before *Sattva*, the Ontario Court of Appeal discussed the interpretation of agreements and concluded the process can be assisted by analysis of related documents and agreements where the court finds the contract is ambiguous (*Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673):
- [16] The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good

business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole--like a complex commercial transaction--and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements

[Emphasis added.]

[41] Evidence of events or conversations happening after the making of an agreement cannot be relied on in the interpretive process unless there is ambiguity in the agreement after considering the pre-contract circumstances. Thus, it is only if a court finds a contract ambiguous after attempting to interpret the contract in light of the factual matrix and the words of the agreement that it may look to subsequent events: *Wade v. Duck*, 2018 BCCA 176 at para. 28; *Canadian National Railways v. Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242, 1978 CanLII 1975 (B.C.C.A.), *aff'd* [1979] 2 S.C.R. 668, 1979 CanLII 229.

[42] The overarching principles to be considered in the interpretation of agreements include:

- a) the court must ask what objective intentions of the parties existed at the time the agreement was made;
- b) words in the contract should be given their plain and ordinary meaning, while being construed in the context of the agreement as a whole;
- c) the words of the agreement must be considered in the context of the factual matrix of events preceding the making of the agreement;
- d) the parties' subjective intentions are not to be considered - the interpretation is based on the perspective of a reasonable person informed by an objective assessment of the surrounding circumstances known at the time;
- e) the court should not interpret words according to their literal meanings if the result would be a commercial absurdity;
- f) the court looks to determine whether there is only one reasonable meaning of the words in question or whether the meaning of the words is ambiguous in the sense of being reasonably capable of two different interpretations; and
- g) it is only if the meaning of the words is ambiguous or if interpreting the words according to their literal construction would result in a commercial absurdity that the court may rely on extrinsic evidence, including facts arising after the agreement was made.

[43] I recognize that the parties did not set out in the Waiver Agreement with any precision which activities of the plaintiff constituted "inordinate delay". However, I am able to discern an objective interpretation of the agreement based on the email by Ms. Murray to Mr. Hobson on April 11, 2019. Most importantly, in that letter she began with "[m]y client has

been very patient and is frustrated by the delay ", then set out a lengthy description of events which had resulted in a delay in the hearing of the appeal thus far. According to her April 11 email, Ms. Murray continued to advise the plaintiff of her obligations concerning the appeal and by letter of June 19, 2018 what was expected of her. This warning was repeated on July 3, 2018 again pointing out she had an obligation to file appeal books within 30 days of the appeal record being filed. She noted that on July 7, 2018 Mr. Justice Savage had granted her an extension to file her appeal books to August 20, 2018. There appears to have been a four-month delay before the appeal books were ordered when the deadline had been extended only to August 20, 2018. By the writing of the April 11, 2019 email the plaintiff remained in default of those obligations.

[44] Ms. Murray's April 11, 2019 email culminated with the following offer:

Assuming that you have the appeal books in hand, I have instructions from my client to consent to the late filing of the Appeal Books on the following terms:

1. The appellant agrees that the defendant or ICBC are not obliged to pay any post judgment interest on the outstanding judgment as a consequence of the inordinate delay in having this appeal proceed;
2. The respondent will sign a consent order to the late filing of the appeal books providing the appeal books are filed within five days;
3. The appellant will file her factum within 30 days from the date that the appeal books are filed; and,
4. The appellant will grant any extensions of time requested by the respondent to file his factum.

[45] As noted above in these reasons, Mr. Hobson responded to Ms. Murray agreeing that the defendant would not be obliged to pay any post judgment interest on the outstanding judgment as a consequence of "the inordinate delay" in having the appeal proceed.

[46] I find that the intentions of the parties objectively ascertained from the facts known to them at the time of the email exchange between counsel was that the plaintiff's entitlement to post-judgment interest would be extinguished during any periods that constituted "the inordinate delay in having the appeal proceed" in exchange for the defendant's consent to reinstating the appeal. The question then arises: what did the parties mean by "the inordinate delay"?

[47] The defendant argues that "the inordinate delay" refers to all delay caused by the plaintiff from the filing of the appeal in December 2017 to the date of the Waiver Agreement in April, 2019, and then to June 28, 2019 when the plaintiff filed her factum.

- [48] The plaintiff argues that her entitlement to post-judgment interest has not been waived by the Waiver Agreement because the steps taken by her as described in Ms. Murray's April 11, 2019 email, viewed holistically, do not constitute inordinate delay.
- [49] The plaintiff refers to a number of authorities dealing with the issue of inordinate delay and inexcusable delay in the context of applications to dismiss an action for want of prosecution, to reactivate appeals moved to the inactive list, and to reinstate appeals dismissed as abandoned. These include *Wiegert v. Rogers*, 2019 BCCA 334; *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 [Ed Bulley]; *van Melle v. Mohammed*, 2021 BCCA 217; *Galiano Conservancy Assn. v. British Columbia (Minister of Transportation and Highways)* (1997), 40 B.C.L.R. (3d) 171, 1997 CanLII 4128; *Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503 at paras. 23-24; and *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2004 BCCA 40.
- [50] The relevant principles can be summarized as follows:
- a. An assessment of inordinate delay must take into account the circumstances of the particular case.
  - b. Each action is different and inordinate delays should be construed as "in excess of what was reasonable having regard to the nature of the issues in the action and the circumstances of the case": *Royal Bank of Canada v. Levy*, 2020 ABCA 338 at para. 14, quoting with approval from *Kuziw v. Kucheran Estate*, 2000 ABCA 22 at para. 31.
  - c. the assessment of inordinate delay is a fact-driven inquiry engaging the type and complexity of the underlying action: *Northwest Organics, Limited Partnership v. Sam*, 2017 BCSC 1088 at para. 15, *aff'd* 2018 BCCA 7, the court should consider any delay in prosecuting the appeal after it was commenced: *Ed Bulley* at para. 38.
- [51] There is a significant and important distinction between the facts of these authorities and the circumstances of the instant case. The term "inordinate delay" in this case is informed by the delay between the reasonable deadlines for filing transcripts and factums after commencement of the appeal and April 2019. In this case, the plaintiff had recovered a judgment for substantial sums which attract rates of interest higher than prejudgment interest until paid.
- [52] The plaintiff's delay was significant, exceeding the prescribed limits under the rules, after many opportunities were given to perfect her appeal within reasonable time limits. Both parties turned their minds to the plaintiff's need to have her appeal heard within a reasonable time. The plaintiff was dilatory at many points and her delays increased the financial burden on the defendant.
- [53] The plaintiff argued extensively around the issue of inordinate delay in attempting to convince me that the decisions in other cases concerning dismissal for want of prosecution or reinstatement of appeals after long delays were applicable to the circumstances in this case. The plaintiff argued that her delays did not rise to the levels seen in other cases and

that her delay was not inordinate. While I am satisfied that some of the cases referred to by plaintiff's counsel contained some helpful information, more generally they did not address the specific circumstances of this case involving an express agreement between parties taking into account a lengthy history of delay in moving the appeal along. Decisions informed by those cases may be helpful in explaining general principles concerning inordinate delay. However, this case deals with the parties agreement to suspend the payment of post judgement interest due to the plaintiff's inordinate delay as set out in Ms. Murray's letter to Mr. Hobson.

- [54] Thus, I find that , the Waiver Agreement does not engage the same considerations as those involved in *Ed Bulley Ventures Ltd.*, *Wiegert*, or *Melle*.
- [55] In this case, the plaintiff exchanged her entitlement to post judgment interest for the defendant's agreement to consent to the reinstatement of the appeal. Objectively, the parties intended that the plaintiff's entitlement to post judgment interest would be suspended because she had repeatedly delayed moving the appeal forward. The Waiver Agreement must be objectively construed in the context of the bargain the plaintiff wanted to make to continue her appeal and the defendant's objective desire to conclude the litigation while minimizing his costs stemming from the running of time.
- [56] I conclude that the Waiver Agreement releases the defendant and ICBC from any obligations to pay post-judgment interest on the outstanding judgment between May 30, 2018, the date that the plaintiff was required by the second first court order to file the appeal record and May 29, 2019, the date on which the plaintiff delivered her appeal books.
- [57] In my view, whether the plaintiff's actions constituted inordinate delay because her delay in pursuing the appeal as unreasonable in view of the indulgences she had been granted up to May 30, 2018. The defendant showed some tolerance and understanding in the plaintiff's inability to perfect the appeal but was entitled to negotiate the Waiver Agreement based on subsequent delays stemming from her failure to move forward with the appeal as of May 2018.
- [58] After multiple failures by the plaintiff to meet the timelines, she became represented by counsel in August 2018 but, by December 2018 had still failed to prosecute the appeal resulting in it being placed on the inactive list.
- [59] Almost one year passed while she was in breach of her obligation to perfect the appeal including filing the appeal books and a factum. I am satisfied that in the context of the dealings between the parties and the defendant's goal in attempting to move the appeal along, the objective intention of the parties in entering into the Waiver Agreement was that the plaintiff would not be entitled to post-judgment interest between May 30, 2018 and May 29, 2019 due to her inordinate delay in filing her appeal books and factum.
- [60] In the result, I conclude the plaintiff is not entitled to recovery of post-judgment interest for the period May 30, 2018 until May 29, 2019 when her appeal books were filed.

Whether the plaintiff is otherwise disentitled to post judgment interest pursuant to the Act to the extent that her conduct resulted in inordinate delay of the appeal

- [61] The second issue on the application is: if there is no binding agreement concerning post-judgment interest, could this Court otherwise make such an order limiting her right to post-judgment interest based on inordinate delay? Although I have found that the Waiver Agreement is binding on the parties, I will consider this question in the case I am wrong.
- [62] The defendant did not bring an application pursuant to s. 8 of the Act to change the date from which post-judgment interest must be calculated, based on the plaintiff's dilatory approach to an appeal of the trial judgment. Regardless, the defendant argued vigorously that his application response raised an issue concerning the commencement date for payment of post-judgment interest under the Act and that I should infer from the defendant's Application Response that the defendant was applying to reduce his post-judgment interest obligation.
- [63] To begin, Rule 8-1(10) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 requires that an application response "briefly summarize the legal bases on which the orders sought should not be granted". On the question of interest, the application response focused on the waiver agreement alone. The defendant argued that his application response and oral argument were sufficient to satisfy the defendant's responsibility to set out the legal bases for the response.
- [64] Part 2 of the Act speaks to post-judgment interest. Section 7(2) stipulates that pecuniary judgments bear simple interest in this case from the date money is payable under the judgment. Section 8 of the Act authorizes the court to, on an application of a person affected by or interested in a judgment, vary the rate of interest under section 7 or fix a different date from which the interest must be calculated, if the court considers it appropriate.
- [65] Post-judgment interest rates are included in the Act at ss. 7(3) and (4). Although the defendant did not mention an application to vary the interest rate or commencement date for post judgment interest on the first day of this hearing, he claimed that his oral argument was sufficient to satisfy the defendant's responsibility to set out his Legal Basis in the response.
- [66] The defendant did not offer any authority to support his claim to an order under s. 8 of the Act. In *Le Soleil Hospitality Inc. v. Louie*, 2017 BCSC 1390, the Court addressed the question as follows:
- [153] Section 8 of the Court Order Interest Act permits the court to either vary the date from which postjudgment interest is payable or to vary the rate of postjudgment interest. An order under s.8 is discretionary. However, there is no discretion to deprive postjudgment interest to a party entirely. The court should be slow to make exceptions to s.8. The purpose of postjudgment interest is to compensate a judgment creditor who does not receive his money when it is due: *B.A.J. v. V.L.*, 2012 BCSC 560 at para. 14; *Gillis v. Kralj*, [1992] B.C.J.

No. 2464 (S.C.); *Misley v. 420746 B.C. Ltd.*, [1996] B.C.W.L.D. 1174 (S.C.) at para. 11; *Misley v. 420746 B.C. Ltd.* (1997), 46 B.C.L.R. (3d) 166 (C.A.), at paras. 22-23

[174] The Louie Group rely on *Bay v. Pasioka*, 2014 BCSC 809 and *S.R.M. v. N.G.T.M.*, 2017 BCSC 34. However, both cases deal with the award of costs itself, not with a court's discretion under s.8 of the Court Order Interest Act. In any event, the court noted in both cases, that delay is not enough, a party must prove prejudice arising from the delay. In *S.R.M.* the successful party delayed bringing an application for costs, and there was extensive evidence before the court regarding the circumstances and context in which that delay arose, as well as evidence of actual prejudice.

[67] The varying of an interest rate or setting a different date from which to calculate interest is discretionary and under s. 8, the discretion permits one or the other but not both: see *B.A.J. v. V.L.*, 2012 BCSC 560 at para. 13.

[68] The Court of Appeal commented on the exercise of the court's discretion under s. 8 of the Act in *Misley v. 420746 B.C. Ltd.* (1997), 46 B.C.L.R. (3d) 166, 1997 CanLII 4034 (C.A.):

[22] The chambers judge dealt with this provision at para. 11 of her reasons for judgment:

I adopt the observation of Low J. in *Gillis v. Steven et al.* (1992) 14 C.P.C. (3d) 315 at 319 (B.C.S.C.) that the Court should be slow to make exceptions under s. 8 of the Act. In my opinion, there are no circumstances which would justify varying the interest rate to conform with the rate of interest [sic] stipulated by the Right to Purchase. The purpose of postjudgment interest is to compensate a creditor who does not receive his or her money when it is due. The respondents have enjoyed a favourable interest rate since March 1992. The petitioner has not had the use of the monies due to her under the judgment.

[23] I am not persuaded that the chambers judge erred in the exercise of her discretion under s. 8. This Court has frequently stated that it will not interfere with the exercise of a discretion by a trial judge unless that judge has taken into account irrelevant factors, failed to consider relevant factors or otherwise erred in law or in fact. No such error has been demonstrated in this case.

[69] In *Wei v. Mei*, 2018 BCSC 1057, aff'd 2019 BCCA 114, Mr. Justice Macintosh referred to the discretion available to the court to vary post judgment interest rates:

[68] In his claim for postjudgment interest, Mr. Wei asks that I add 3% to the postjudgment interest rate that is derived from s. 7 of the Court Order Interest Act. Section 8 of that Act gives the Court the discretion to vary the rate of interest applicable under s. 7, or to set a different date from which interest is to be calculated. I decline that request, and the postjudgment interest will be calculated in accordance with s. 7. I adopt the observation of Low J., as he then was, in *Gillis v. Kralj et al.* (1992), 14 C.P.C. (3d) 315 at 319 (B.C.S.C.), that the Court should be slow to make exceptions under s. 8 of the Act. I note that Low J.'s observation was also adopted by Allan J. in *Misley v. 420746 B.C. Ltd.*, [1996] B.C.J. No. 736 (S.C.) at paras. 9-11.

- [70] In this case, the defendant seeks to reduce the claimant's entitlement to post-judgment interest based on delays in prosecuting her appeal. In my view, this is not an appropriate basis to make the requested order. As noted, the Court should be slow reduce a plaintiff's entitlement to court order interest; I accept that delay is not a sufficient reason absent some clear evidence of prejudice.
- [71] Notably, the defendant could have paid the judgement amounts notwithstanding the appeal or applied to stay the trial judgment pending the appeal; he did neither. I am satisfied the defendant cannot succeed under s. 8 of the Act on the merits. Moreover, the defendant did not make any application as required under s. 8.
- [72] The defendant referred the court to *Radiant Global Logistics Inc. v. Border Express Services Ltd.*, 2018 BCSC 1817 where the judgment creditor successfully applied to register a judgement obtained in the state of Washington. A secondary issue arose concerning the rate of post-judgement interest set under s. 7 of the Act. The judgement debtor argued that the court could not make an order under s. 8 for a different interest rate because the petitioner had not brought an application. The petitioner successfully contended that the petition itself was an application to vary the rate.
- [73] At para. 22, the Court concluded it was satisfied the petition meets the requirement under Act to bring an application. The defendant argued that *Radiant Global Logistics Inc.* stands for the proposition that if the matter is fully argued before the court as he contends it was in this case, there is no need for a separate to be brought pursuant to the Act. I cannot agree.
- [74] In this case, the defendant candidly acknowledged that he was not aware of the Court's discretion set out in s. 8 of the Act but that, inferential he had addressed the issue on the first day of hearing. That did not happen and the defendant's reliance on s. 8 was not raised until well into the second day of hearing. Furthermore, there was no reference to s. 8 nor of a claim for relief except by enforcement of the Waiver Agreement.
- [75] Overall, the facts in this case do not justify the exercise of discretion to permit the defendant to invoke s. 8 of the Act.

## Conclusion

- [76] In summary, I find that the Waiver Agreement is valid and enforceable and resulted in the plaintiff waiving her right to post-judgment interest from May 30, 2018 until May 29, 2019.
- [77] Absent submissions as to costs on this application within 30 days, I will order each party to bear their own costs. In my view, the success on this application was divided.

"Armstrong J."

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