

CANADA / JUDGMENT

King v. Mounce

2022 BCSC 2028

COURT

Supreme Court of British Columbia

DECIDED

22 November 2022

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2022 BCSC 2028 King v. Mounce

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

King v. Mounce,

2022 BCSC 2028

Date: 20221122

Docket: S202224

Registry: Victoria

Between:

Edwin King and Debra King

Plaintiffs

And

Gerald Mounce, G.M. Landco Management Ltd., and C-1 Contractors Ltd.

Defendants

Before: The Honourable Justice Branch

Supplementary Reasons for Judgment on Interest and Costs

Counsel for Plaintiffs:

K. Hamilton

Counsel for Defendants:

G. Harney

Written Submissions received:

August 26, 2022,

October 5 and 19, 2022,

and November 1, 2022

Place and Date of Judgment:

Victoria, B.C.

November 22, 2022

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I. INTRODUCTION

[1] This was an action by the plaintiffs for recovery of amounts the defendants wrongly extracted from a company in which the plaintiffs and Mr. Mounce were partners. I ruled in favour of the plaintiffs in reasons reported at King v. Mounce, 2022 BCSC 1195. I will not repeat the facts set out therein, and will use the same defined terms. These reasons address the residual issues of interest and costs.

II. COSTS

- [2] The plaintiff seeks an award of special costs against the defendants. They argue that the defendants were aware from the outset of the certainty of an award against them, yet they persisted in their defence, and ensured that the plaintiffs' recovery was unnecessarily delayed.
- [3] The plaintiffs' efforts to pin the defendants down to a position was akin to "trying to nail jello to the wall". The defendants did assert arguments which had little merit and/or were confusing. Admissions came more slowly than they should have. However:
- a) the defendants did admit that they owed "an amount to be determined" in their Amended Response to Civil Claim filed March 9, 2022;
 - b) the defendants admitted oppression, breach of contract, breach of fiduciary duty, conversion, and breach of the partnership agreement in their Further Amended Response to Civil Claim filed March 15, 2022;

- c) by the first day of trial, the defendants were admitting to a large proportion of the damages claimed; and
 - d) the defendants called no evidence at trial.
- [4] The defendants also note that they did make a settlement offer in the amount of \$200,000 on December 10, 2021. While less than the amount awarded at trial, it was a substantial sum, reflecting some awareness of the (lack of) strength in their position.
- [5] Further, the case proceeded through the court system with relative dispatch, although surely not as quickly as the plaintiffs would have liked. The claim, commenced on July 6, 2020, reached trial by May 16, 2022, in the midst of a global pandemic with its associated court closures and restrictions.
- [6] The case did require several court appearances at which the defendants' positions remained opaque. It also required the issuance of several production orders. However, I note that the plaintiffs have already been the beneficiary of certain interim costs orders in their favour. The costs determination here should avoid duplicating the purpose and effect of those earlier costs orders.
- [7] There were delays in the provision of information prior to the commencement of the proceeding that should not have happened. But special costs are based on litigation conduct, not conduct that occurred before the litigation commenced: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134. I have already made an award of punitive damages that incorporated a consideration of the inappropriate pre-litigation conduct.
- [8] In terms of the necessity for a trial, if nothing else, the issue of the entitlement to, and quantum of, punitive damages did remain at issue, and raised triable issues. As the plaintiff themselves acknowledge in their reply argument:

Despite the Defendants' assertions, quantum was not the only issue to be decided and it was not within the purview of a registrar's hearing. Punitive damages remained at issue, and the damages issue was not simply one of an arithmetic exercise but rather required an exploration and analysis of and findings of credibility on the various withdrawals made from Goldstream Gates by Mr. Mounce and his companies and what if any liability that Mr. Mounce's companies had to pay to return such amounts to the Plaintiffs via Goldstream Gates. Such an analysis and findings of fact are not in the purview of a registrar's hearing.

- [9] I agree that this case should have been resolved earlier. But that is true of many cases that come before the court. I agree that the defendants were more difficult to nail down to a position than should have been the case. Again, that is unfortunate, but not unusual. While the defendants' conduct was undoubtedly frustrating, I do not find that it rises to the level of being "reprehensible". A special costs order is not justified.
- [10] That said, I am prepared to give the plaintiff increased costs. Appendix B, s. 2(5) of the Rules provides:

- (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs at that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).
- [11] Increased costs may be awarded where, as a result of "unusual circumstances", an award at the normal scale would be "grossly inadequate or unjust". The purpose of increased costs is indemnification, not punishment. This is in recognition of the increased costs associated with the time and effort required to respond to a party's litigation conduct that unnecessarily complicates or lengthens a trial: *Henderson v. Myler*, 2022 BCSC 1530 at paras. 86-88. I find that the plaintiffs were required to respond to such conduct here, and that constraining them to the usual scale of costs would be grossly inadequate or unjust.
- [12] The plaintiffs also submit that the defendants should pay double costs for steps taken after their formal offer to settle for \$550,000 dated May 10, 2022, pursuant to Rule 9-1.
- [13] The base award at trial was \$515,291.89. However, when the agreed pre-judgment interest amounts of \$38,204.21 and \$36,736.63 are added, the total award at trial was in excess of the \$550,000 offer.
- [14] I find that the offer should be compared to the amount payable after the application of the prejudgment interest awards. The offer did not speak specifically to the question of pre-judgment interest, but it did state that the offer was "to settle all claims in this action". In *F.M. Hunt Construction Company v Van Jaarsveld*, 2016 ONSC 8189, the offer was also silent on the issue of prejudgment interest, but the court treated the offer as inclusive of prejudgment interest for costs purposes:
- [8] The offer to settle was silent on the issue of prejudgment interest.
- []
- [19] In the present case, there is no room for doubt as to what the plaintiff was offering to settle. It was "the action and the counterclaim". Following the approach taken by the Divisional Court in *Mathur v. Commercial Union*, the correct approach is to take the principal amount awarded by the arbitrators and calculate the prejudgment interest that had accrued on that amount up to the date of the plaintiff's offer. That amount, \$121,317.89, falls short of the principal amount which the plaintiff offered to settle for on 21 December 2012. Accordingly, the costs consequences of Rule 49.10(1) are not engaged. The plaintiff is therefore presumptively entitled to only partial indemnity cost throughout.
- [15] In *Johnson v. Cline*, 2017 ONSC 5144, the court stated:
- [7] The Johnsons' offer to settle was silent as to the question of interest. Their counterclaim, which was dated May 23, 2013, included a claim for prejudgment and post-judgment interest in accordance with the Courts of Justice Act. I see no reason why they should not be entitled

to it. The applicable prejudgment interest rate appears to be 1.3%. This would result in total prejudgment interest from the date of this claim to the date of the offer to settle in the amount of \$1,766.69, and results in a total award to the Johnsons in the amount of \$34,500 plus \$1,766.69, or \$36,266.69.

- [8] This same situation arose in *F.M. Hunt Construction Co. v. Van Jaarsveld*, 2017 ONSC 8189. There it was held at para. 19 that the appropriate calculation upon which to determine the consequences of a Rule 49 offer was to include the principal amount recovered, plus the prejudgment interest on that amount up to the date of the offer to settle .

See also *Wiebe v. Wiebe*, 2018 BCSC 1062 at para. 53.

- [16] I find that offer was reasonable and one that ought to have been accepted, particularly given the weaknesses in the defendants' position. Furthermore, there is no evidence that a consideration of the relative financial circumstances should cause the court to decline to apply double costs. Hence, the plaintiffs are entitled to double costs after the date of the offer.

III. INTEREST

- [17] The issue in relation to interest relates to whether interest should apply to the award of punitive damages, and in what amount.
- [18] As a preliminary matter, the plaintiffs argued that the defendants had waived their right to advance this argument when they agreed to a form of order from the trial that included a term providing for a specific interest amount to be paid on the punitive damage award. The defendants responded that their signature on this order was an error and an oversight on their part. From the court's perspective, its "manifest intention" in approving the order as submitted was based on the erroneous assumption that the defendants had intentionally agreed to an interest term that the court itself had not yet been required to opine upon. It was not the court's intention to opine on an issue not in fact consented to, but still in fact in dispute between the parties. I am prepared to accept the defendants' explanation that their execution was accidental, and apply the "slip rule" at Rule 13-1(17) to the entered order such that the relevant paragraph should be struck from the earlier order and resubmitted: *Lochhead v. Lochhead*, 2011 BCSC 1662 at paras. 20-29; *Harrison v. Harrison*, 2007 BCCA 120 at paras. 28-29
- [19] Moving to the substantive issue, the law is clear that interest should apply to a punitive damages award. The same cases that speak to this point are also of assistance in establishing an appropriate rate.
- [20] In *ICBC v. Sun*, 2003 BCSC 1175, a case involving the staging of motor vehicle accidents, the court stated:

PREJUDGMENT INTEREST ON PUNITIVE DAMAGES

- [28] Next, there is the question of what prejudgment interest should be awarded to the defendants in respect of punitive damages.
- [29] It is conceded by the defendants who are present that prejudgment interest is to be awarded under Court Order Interest Act on punitive damages even though they are not out-of-pocket expenses. I am satisfied that that is a correct statement of law.
- [30] The fact that prejudgment interest is awarded on punitive damages is a bit of an anomaly in that jury awards of punitive damages are typically based on current values, and at least an inflationary component of interest, therefore, is included inferentially in the award.
- [31] Mr. Waller suggests that I follow the example of the Court of Appeal in *V. (J.L.) v. H. (P.)*, [1998] B.C.J. No. 1546, 109 B.C.A.C. 165 (B.C. C.A.) and award interest at the rate of one-tenth of one percent on the punitive damages.
- [32] Elements of inflation have been included in the award of the jury, which is obviously in current dollars. That said, there were inevitable delays in bringing these matters to trial, and, for a period of time, I.C.B.C. has not had the use of money that it has ultimately been found to be entitled to.
- [33] In my view, the appropriate response is to award pre-judgment interest on punitive damages, but to reduce the rate of interest below the level normally provided under the Court Order Interest Act. The rates normally provided under the Act over the period in question have fluctuated between about two percent and about 6.5 percent. In this case, I award interest on the punitive damages from the date of the first payment by I.C.B.C. to or on behalf of each defendant (whichever is earliest) at the rate of two percent per annum simple interest.
- [21] In *Waters v. Bains*, 2009 BCSC 286, the court stated:
- [3] Section 1 of the Court Order Interest Act, R.S.B.C. 1996, c. 79, provides that a court must add to a pecuniary judgment an amount of interest. Punitive damages come within the definition of a pecuniary judgment.
- [4] Section 6 of the Act establishes that this does not apply to a cause of action that arose prior to June 1, 1974. The plaintiff submits that the cause of action commenced at some date in 1967, but continued beyond June 1, 1974. Therefore, the interest would commence June 1, 1974 and continue to the date of final judgment.
- [5] Section 1(1) of the Act provides that the prejudgment interest is to be at a rate that the court considers appropriate.
- [6] The defendants had suggested that the interest rate should be no greater than 1/10th of 1% per annum. This was relying upon the decision in *Osborne v. Harper*, 2006 BCSC 51.

- [7] Counsel for the plaintiff points out there is no longer a minimum rate of interest provided for in the Act. Counsel for the defence agree. In suggesting that this court should fix an appropriate rate in all the circumstances, counsel for the plaintiff suggests a rate of interest similar to the amount awarded in the decision of Mr. Justice Bouck in *S.Y. v. F.G.C.* (1997), 32 B.C.L.R. (3d) 235 (S.C.), 5%.
- [8] That was a case where the plaintiff had been sexually and physically abused by her stepfather over a period of eleven years.
- [9] In my view it is appropriate to fix a higher rate than in *Osborne v. Harper*; prejudgment interest will be awarded from June 2, 1974 to June 25, 2008 at the rate of 3%.
- [22] In *Logeman v. Rossa*, 2006 BCSC 692, the court awarded 1/10th of 1% on the punitive damages aspect of the award in an arson case.
- [23] The defendants here also argued for a rate of 1/10th of 1%. I agree that my award of punitive damages was intended to speak in current dollars, thereby undercutting the primary purpose of an interest award. In light of the fact that this was not an abuse case, and consistent with the approach in the above noted authorities, I find the rate proposed by the defendants in appropriate.

IV. CONCLUSION

- [24] I find that under Appendix B, s. 2(5) of the Rules, increased costs at 1.5 times Scale B should be awarded to the plaintiffs up to the date of the plaintiffs' offer, and double costs awarded thereafter.
- [25] Secondly, the defendants shall pay interest on the punitive damages award, but limited to a rate of 1/10th of 1%.

"The Honourable Mr. Justice Branch"

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Prepared on 26 October 2026 · Esheria