Federal Court of Appeal

Cour d'appel fédérale

Date: 20170912

Docket: A-146-16

Citation: 2017 FCA 184

CORAM: **NADON J.A.**
DAWSON J.A.
GAUTHIER J.A.

BETWEEN:

PLATYPUS MARINE, INC.

Appellant

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "TATU" and THE SHIP "TATU"

Respondents

Heard at Vancouver, British Columbia, on May 17, 2017.

Judgment delivered at Ottawa, Ontario, on September 12, 2017.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: DAWSON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us are an appeal and a cross appeal from a judgment (2016 FC 501) of Hughes J. (the Judge) of the Federal Court dated May 4, 2016 wherein he determined the rate of interest payable by the respondents on an undisputed amount owing to the appellant.

[2] For the reasons that follow, I would allow the appeal and I would dismiss the cross appeal.

II. Facts

[3] The appellant, Platypus Marine, Inc. (Platypus), is a ship repairer based in Port Angeles, in the State of Washington, U.S.A. Platypus provided repairs and maintenance (the work) to the respondent ship "Tatu," owned by the respondent Platinum Premier Corporation Limited (Platinum). The work was conducted over several months in 2014 and, in due course, Platypus sent Platinum ten invoices between May 28, 2014 and September 19, 2014 totalling the sum of US $285,508.92. Each invoice was marked "INVOICE DUE UPON RECEIPT" and made no mention of interest.

[4] The final invoice sent to Platinum by Platypus is dated September 19, 2014. At that time, Platinum had not paid any of Platypus' previous invoices. Shortly after the sending of the last invoice, the parties came to an agreement (the oral agreement) made at the suggestion of Platinum whereby it agreed to pay to Platypus the sum of US $100,000 as interest on the amount due for the work performed by Platypus. In consideration thereof, Platinum would not have to effect payment of Platypus' invoices before the end of January 2015.

[5] Because of Platinum's failure to settle Platypus' invoices by the end of January 2015, Platypus arrested the "Tatu" (by way of a caveat release) and on October 29, 2015 commenced an action against the respondents (hereinafter referred to as Platinum).

[6] On December 4, 2015, Platypus brought an *ex parte* motion against Platinum for judgment in the Canadian dollar equivalent of US $385,508.92 (US $285,508.92 plus US $100,000.00). Platypus' motion was heard by Fothergill J. of the Federal Court on December 15, 2015, at which time he heard representations from counsel for both Platypus and Platinum. At the end of the day, he granted judgment in favour of Platypus in the following terms:

> Judgment is granted to the Plaintiff against the Defendants in the amount of $363,455.61, representing the Canadian dollar equivalent (on January 30, 2015) of the amounts shown on the invoices issued to the Defendants by the Plaintiff between the dates May 28, 2014 and September 19, 2014, exclusive of interest.
>
> (emphasis added)

[7] Fothergill J. also allowed a motion brought by Platinum for an extension of time to file a Statement of Defence to Platypus' claim for interest.

[8] On January 25, 2016, Platinum paid the principal sum owed to Platypus in full, including costs and post judgment interest on that amount.

[9] On April 12, 2016, Platinum filed a motion for summary judgment pursuant to rules 213 and 216 of the *Federal Courts Rules*, SOR/98-106 seeking the dismissal of Platypus' claim for US $100,000 in interest and any other claims to interest. More particularly, Platinum sought the dismissal of the US $100,000 on the ground that it constituted a rate of interest contrary to section 347 of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46 (the *Criminal Code*), which prohibits charging annual interest rates above 60%.

[10] Platinum's motion was heard by the Judge on May 3, 2016 and, on the following day, he rendered the following judgment:

> **FOR THE REASONS PROVIDED, THIS COURT'S JUDGMENT is that:**
>
> 1. The agreement to pay interest at the sum of US $100,000.00 is set aside.
>
> 2. The Defendants shall pay to the Plaintiff the sum of $35,000.00 as interest.
>
> 3. No Order as to costs.

III. The Federal Court's Reasons

[11] Before the Judge, Platypus argued that the US $100,000 did not constitute a criminal rate of interest and consequently that it was entitled to the full amount. In support of its submission, Platypus presented a chart in which it calculated interest beginning from the day after the issue of each invoice to January 31, 2015. According to this calculation, US $100,000 equals an effective annual interest rate of 59.5%. The Judge did not accept those calculations. At paragraph 15 of his reasons, he made the following remarks:

> I question calculations that use the invoice date as the basis for start time of accrual of interest, as the second affidavit of Linnabary [Mr. Judson Linnabary, the President of Platypus], April 21, 2016, paragraph 3 says that the invoices were "usually" delivered on the date of the invoice and, in any event, all were e-mailed within two days of the invoice date. Even a change of two days would render a calculation of interest in excess of 60%.

[12] The calculations put forward by Platinum before the Judge were based on interest accumulating from September 19, 2014, the date of the last invoice and approximate date of the oral agreement to pay, to January 31, 2015. Platinum calculated that the effective annual interest rate was 95.4% (appeal book, page 33). Its calculation is as follows:

Principal	Percentage per annum	From Date	To Date	Days	Interest
$285,508.92	.954044%	Sept 19, 2014	Jan 31, 2015	134/365	$100,000

[13] The Judge found that the interest rate, using either Platypus' or Platinum's calculations, constituted a criminal rate of interest. At paragraph 17 of his reasons, he expressed his view as follows:

> 17. I find that the sum of US $100,000.00 represents an interest rate in excess of 60% per annum. Even the Plaintiff's calculations, properly considered, would come to that. No demand for interest was made in the Statement date of August 27, 2014. No interest seems to have been discussed until on or after the date of the last invoice, September 19, 2014. Beginning on whichever of those dates, the interest rate is well in excess of 60% per annum.

[14] The Judge then turned to the question of whether he should strike the contract to pay the US $100,000 or substitute a different rate of interest. He began by indicating that the leading case on point was the Supreme Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249 (*Transport North American Express*) where the Supreme Court gave its approval to the view expressed by the Ontario Court of Appeal in *William E. Thomson Associates Inc. v. Carpenter* (1989), 1989 CanLII 185 (ON CA), 61 D.L.R. (4th) 1. More particularly, at paragraph 24 of her reasons for a majority of the Supreme Court in *Transport North American Express*, Arbour J. made the following remarks:

> 24. In *Thomson*, at p. 8, Blair J.A. considered the following four factors in deciding between partial enforcement and declaring a contract void *ab initio*: (i) whether the purpose or the policy of s. 347 would be subverted by severance; (ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) whether the debtor would be given an unjustified windfall. He did not foreclose the possibility of applying other considerations in other cases, however, and remarked (at p. 12) that whether "a contract tainted by illegality is completely unenforceable depends upon all the circumstances surrounding the contract and the balancing of the considerations discussed above and, in appropriate cases, other considerations".

[15] This led the Judge to the following determination at paragraph 18 of his reasons:

> 18. Turning to the four factors outlined by Blair J.A. in the *Thomson* case as set out in paragraph 18 of the *Canmerica* decision above, those four factors are directed to whether the contract as a whole can be declared void or whether there can be a severance of the interest portion from the rest. In this case a severance has already been effected by the Order of Justice Fothergill. The principal debt has been ordered to be paid and has been paid. The only question is whether the US $100,000.00 should be allowed as interest or some other amount, or none.

[16] As Fothergill J. had already severed the two parts of the dispute and as the principal amount had been paid, the Judge was of the view that the only remaining question was what amount, if any, should be substituted as interest.

[17] The Judge then pointed out that the parties had agreed that if the US $100,000 was set aside, the 5% interest rate provided in section 3 of the *Interest Act*, R.S.C. 1985, c. I-15, should prevail. He calculated that a 5% rate, rounded to an even figure, resulted in $35,000 of interest owing.

[18] Then, at paragraph 21 of his reasons, he set aside the oral agreement and ordered the payment of $35,000. As success was divided in his view, he made no award of costs.

IV. The Parties' Submissions on the Appeal

[19] Platypus first argues that the sum of US $100,000 does not violate the criminal interest provisions of the *Criminal Code* and refers to the calculations which it filed before the Judge, using the day following the date of each invoice as the starting date for calculating the accruing interest to the end of January, 2015.

[20] In response to the Judge's concerns regarding the effective delivery date of each invoice, Platypus submitted a chart of calculations wherein its calculation of the interest began three days after the date of each invoice (i.e. to allow a three day grace period for delivery and receipt of the invoice). It should be remembered that the Judge held that a two day difference in delivery would result in a criminal rate of interest. However, what Platypus' calculations show is that using a 60% interest rate, a three day grace period results in a payment higher than $100,000. The margin is, however, very narrow - the resulting interest is $100,082.21 (by their calculations). Consequently, on the basis of that calculation, the rate does not violate the *Criminal Code*.

[21] Platypus argues that interest begins to accrue on the date of the invoice and that there is no support for Platinum's submissions to the contrary. Even absent an agreed upon interest rate, Platypus says that it could have sued on the principal amount and received pre-judgment interest from the date of each breach.

[22] Platypus further argues that it never conceded that the 5% interest rate from the *Interest Act* was an appropriate substitute to the US $100,000. If that sum cannot stand, Platypus says

that the rate of interest should be reduced to 60% as the best reflection of the parties' intention, as was done in *Transport North American Express.* By failing to address this argument, Platypus says that the Judge made an error of law.

[23] In response to Platinum's cross appeal, Platypus argues that the $35,000 of interest determined by the Judge was a rounded figure which was within his discretion to fix. Alternatively, it says that if the calculations are to be re-done, interest should be calculated from the date of each invoice.

[24] Platinum, not surprisingly, argues that the US $100,000 amount violates the criminal interest provisions of the *Criminal Code*. It maintains that the appropriate date to start calculating interest is the date of the oral agreement, i.e. September 19, 2014 and therefore that the interest rate is a criminal rate of 95%.

[25] Because the determination of the appeal and the cross appeal turns, in my view, on the commencement date for the calculation of the interest, I will set out in greater detail Platinum's argument. If Platinum is correct that we should start calculating from September 19, 2014, then there can be no doubt that the US $100,000 constitutes a rate which is well beyond 60%. However, if the calculation is to be made, as Platypus suggests, from the date of the invoices or within three days thereof, the rate is slightly below 60% and therefore does not infringe the provisions of the *Criminal Code*.

[26] Platinum's argument can be summarized as follows. It says that before September 19, 2014, there was no agreement on interest and in support of that proposition, it says that the invoices do not refer to interest, nor is there any other document which requires it to pay interest on the amounts invoiced by Platypus.

[27] Thus, in Platinum's view, it owed no contractual interest before the oral agreement of September 19, 2014 and consequently it says that the US $100,000 "was new money" (paragraph 43 of Platinum's memorandum of fact and law).

[28] Platinum further argues that Platypus confuses contractual interest with pre-judgment interest which requires no agreement, adding that pre-judgment interest will accrue from the date of the cause of action. As Platypus seeks contractual interest, the onus is on it to establish the terms of the agreement. As there is little evidence regarding the oral agreement, it cannot be seriously argued that the interest agreed to as a result of the oral agreement should be retroactive to the dates of the ten invoices.

[29] Platinum further submits that the Judge did not make a finding that Platypus consented to the alternative 5% interest rate, but rather that the Judge examined, and rejected, Platypus' submissions on interest. However, Platinum concedes that Platypus' alternative position before the Judge was to the effect that the interest rate should be reduced to 60%.

[30] Platinum also says that the Judge made no error in substituting the 5% rate. In its view, once the US $100,000 was invalidated, the replacement rate was discretionary. However,

Platinum says, on its cross appeal, that the Judge's calculation of interest based on the 5% per annum figure is incorrect. It says that 5% calculated from September 19, 2014 until the date of payment of the principal amount equals $24,794.64.

[31] As each party makes submissions in the alternative and further alternative, I have summarized their desired outcomes in the table below:

Party	Argument	Alternative	Further Alternative
Platypus	US $100,000 is not criminal	60% under the notion of severance	~5% under the *Interest Act,* as calculated by the Judge, i.e. $35,000 Canadian
Platinum	Zero interest	~3% under *Court Order Interest Act*, R.S.B.C. 1996, c. 79	5% under the *Interest Act*, recalculated to equal $24,794.64 Canadian

V. Issues

[32] This case raises the following three issues:

1. Did the Judge err in finding that the US $100,000 constituted criminal interest?
2. Did the Judge err in substituting 5% as an appropriate rate?
3. On the cross appeal: If 5% is the appropriate interest rate, did the Judge err in calculating the amount of interest owing?

VI. Analysis

[33] A few preliminary remarks are in order. First, the standards of review relevant to this appeal are the ones enunciated by the Supreme Court in *Housen v. Nikolaisen*, 2002 SCC 33,

[2002] 2 S.C.R. 235, i.e. that errors of fact or mixed fact and law are to be reviewed on the basis of the overriding and palpable error standard and errors of law are to be reviewed on the standard of correctness.

[34] Second, it is worth noting that the existence of the oral agreement to pay US $100,000 is not contested by Platinum. On this point, the Judge did not have much to say other than that the evidence before him was “scant”. In particular, at paragraph 10 of his reasons, he said that “[t]here appears to have been an oral agreement of some kind entered into between the President of the Plaintiff (Linnabary) and the owner of the Tatu (Sims)” and he then referred to paragraph 9 of Mr. Linnabary’s affidavit of December 3, 2015 and paragraph 4 of his affidavit of April 21, 2016. For the sake of completeness, those paragraphs read as follows:

> 9. After the work had been provided, Mr. Sims agreed to pay an additional US $100,000.00 as interest for work provided as referred to in paragraphs 4 and 6 in exchange for Platypus agreeing to defer payment until January 2015. He agreed that the interest would be secured by the “TATU”.
>
> 4. With respect to the agreement referred to in paragraph 9 of my December 3, 2015 Affidavit, it was Mr. Sims who offered the arrangement. He advised that he was low on cash and wanted additional time to pay the invoices and I agreed.

[35] Third, the dates pertaining to the oral agreement are also taken by default and not contested. The oral agreement was made after the date of the last invoice. The parties have not supplied an agreed-upon date, but the Judge held that the effective date was September 19, 2014 as this was the earliest possible date that the oral agreement could have been made. The oral agreement was to delay the date of payment to “until January” and the parties have taken this to mean the last day of the month: January 31, 2015.

[36] Fourth, it must be noted that although the Judge held that changing the calculation date from the date of the invoices to two days after those dates resulted in a rate of interest above 60% (paragraph 15 of the Judge's reasons), he did not provide any calculation to support that view. The same remark applies to the Judge's determination that 5% of interest in lieu of the agreed US $100,000 resulted in an amount of $35,000.

[37] Fifth, it should also be noted that the parties do not challenge each other's mathematics, nor did they do so before the Judge. In other words, the parties arrive at different results because they do not calculate the interest from the same date. As already indicated, Platinum begins its calculation from September 19, 2014 whereas Platypus begins its calculation from either the day after the date of the invoices or from three days after the date of the invoices.

A. *Was the contractual interest illegal?*

[38] Whether or not the US $100,000 breaches the 60% threshold depends on the period used to calculate the interest owed on the principal sum. The Judge avoided making a determination regarding which period was appropriate, finding that the parties' calculations both resulted in criminal rates. In my respectful view, not only did the Judge not make proper calculations, he failed to consider that Platinum did not dispute Platypus' calculations.

[39] In my respectful view, the Judge clearly erred in concluding, as he does at paragraph 17 of his reasons, that Platypus' calculations show an interest rate in excess of 60% per annum. First, as I have just indicated, the Judge did not provide any calculations in support of his finding

and second, it appears to me that Platypus' calculations are correct. Further, before us on the appeal and the cross appeal, Platinum does not challenge any of Platypus' calculations.

[40] I cannot agree with Platinum's position. My reasons for that view are as follows. Platypus is correct that in the absence of an agreement on interest, it would have been entitled to claim pre-judgment interest starting from the date of the breach (or rather, in this case, ten different dates of breach). In *Canadian General Electric Co. v. Pickford & Black Ltd.*, [1972] S.C.R. 52, the Supreme Court of Canada made it clear that in admiralty matters, interest was owed from the time the debt became payable. Ritchie J., who wrote for a unanimous court, made the following comments at pages 56 and 57:

> The rule in the Admiralty Court is the same as that in force in admiralty matters in England, and in my view the position is accurately stated by Mr. Justice A. K. McLean, sitting as President of the Exchequer Court, in the case of *The Pacifico v. Winslow Marine Railway and Shipbuilding Company*, where he said:
>
>> The principle adopted by the Admiralty Court in its equitable jurisdiction, as stated by Sir Robert Phillimore in *The Northumbria (1869)*, 3 A. & E. 5, and as founded upon the civil law, is that interest was always due to the obligee when payment was delayed by the obligor, and that, whether the obligation *arose ex contractu* or *ex delicto*. It seems that the view adopted by the Admiralty Court has been, that the person liable in debt or damages, having kept the sum which ought to have been paid to the claimant, ought to be held to have received it for the person to which the principal is payable. Damages and interest under the civil law is the loss which a person has sustained, or the gain he has missed. And the reasons are many and obvious I think, that a different principle should prevail, in cases of this kind, from that obtaining in ordinary mercantile transactions.
>
> (emphasis added and footnote omitted)

[41] More recently, in *Kuehne + Nagel Ltd. v. Agrimax Ltd.*, 2010 FC 1303, 196 A.C.W.S. (3d) 3, Harrington J. of the Federal Court, at paragraph 24 of his reasons, made the same point as follows:

> [24] The provisions with respect to pre-judgment interest set out in section 36 of the *Federal Courts Act* do not, as provided in subsection 7 thereof, apply in respect to claims under Canadian maritime law. There is a great wealth of jurisprudence which establishes that pre-judgment interest in maritime cases is a function of damages, is at the Court's discretion, and if properly pleaded runs from the date the debt was due. One of the early cases is *Bell Telephone Co. of Canada v. Mar-Tirenno (The)*, [1974] 1 F.C. 294, affirmed by the Federal Court of Appeal at [1976] 1 F.C. 539.
>
> (emphasis added)

[42] Consequently, irrespective of the oral agreement, Platypus would have been entitled to claim interest from the date of the invoices (by "date of invoice" I mean the date upon which the invoice was delivered to or received by Platinum) which clearly indicated that the amount covered thereunder was payable upon receipt. Thus, the oral agreement must be characterized and understood in the light of the fact that interest was indeed owed by Platinum on the amounts covered by the ten invoices.

[43] As I indicated earlier, there is very little evidence on the record pertaining to the oral agreement which explains why the Judge, at paragraph 10 of his reasons, made the point that the evidence in regard thereto was "scant". Notwithstanding the lack of evidence, I have no difficulty finding that it was an implicit term of the oral agreement that the US $100,000 would subsume the interest to which Platypus was already entitled at the time the oral agreement was made. In other words, the US $100,000 was a lump sum intended to cover all interest accrued on

the principal amount until the end of January 2015 when Platypus expected Platinum to pay both the principal and the interest.

[44] Thus, in my view, interest should therefore be calculated using the date of each invoice. However, given the Judge's finding, based on Mr. Linnabury's testimony, that the invoices were not always delivered on the date shown on the invoice, a two-day grace period to account for delivery seems appropriate and fair in the circumstances.

[45] Consequently, I cannot subscribe to Platinum’s arguments that the calculation should begin only on September 19, 2014. While it is true that as of September 19, 2014, Platypus was not entitled to contractual interest (indeed the invoices are silent on this), it is also true that Platypus was entitled to pre-judgment interest because, as the case law makes clear, in admiralty matters pre-judgment interest is a function of damages and runs from the date of the breach. Thus, the only difference, for present purposes, between admiralty pre-judgment interest and agreed contractual interest is the rate. In all other respects, there is no difference.

[46] Thus, by September 19, 2014, interest was owed to Platinum and it is therefore incorrect to say, as Platinum does at paragraph 43 of its memorandum of fact and law, that the US $100,000 “was new money”. It may have been more money, but it was not “new money”.

[47] Platinum also says that because Platypus was only entitled to pre-judgment interest as of September 19, 2014, it cannot be argued that the oral agreement of September 19, 2014 somehow entitles Platypus to retroactive interest. In other words, Platinum argues that it cannot

be said that the US $100,000, i.e. the contractual interest, began to run from the time the first invoice was issued or received by it. In my respectful view, Platinum's argument misses the point. The issue is not whether the payment of the US $100,000 was retroactive to the date of the first invoice, but rather what the US $100,000 represents. As I indicated above, it is my view that that sum was meant to cover all interest owed by Platinum between the time of the first invoice to the end of January, 2015. Consequently, on that understanding, calculation of the rate of interest must begin at the time of the initial breach by Platinum.

[48] Thus, I find that the US $100,000 does not constitute a criminal rate of interest. As set out in the following chart, if interest ran from two days after the invoice date (one day after the date of the breach, and the guaranteed date of delivery of the invoice), then 60% per annum would result in a payment of US $100,529.78. As US $100,000 is lower, the rate of interest does not exceed the 60% effective rate.

Invoice	Principal USD	Date of invoice (2014)	Number of days from breach until January 31, 2015	Rate	Number of days from date of delivery	Interest
1	$10,941.79	May 28	248	60%	246	4424.68
2	$10,557.02	Jun 4	241		239	4147.61
3	$31,845.97	Jun 11	234		232	12145.09
4	$43,096.78	Jun 18	227		225	15939.9
5	$71,936.92	Jun 25	220		218	25779.04
6	$36,998.86	Jul 2	213		211	12833.03
7	$21,907.10	Jul 9	206		204	7346.38
8	$44,753.35	Jul 14	201		199	14639.86
9	$9,287.50	Aug 27	157		155	2366.40
10	$4,183.63	Sep 19	134		132	907.79
TOTAL						$100,529.78

[49] I wish to point out that the calculations provided by Platypus at paragraph 27 of its memorandum of fact and law regarding a three day grace period contain some minor errors.

Rounded to the nearest dollar figure, I arrive at the figure of US $100,060 using the same calculation. However, this figure is still larger than US $100,000 and so Platypus' point remains valid: even with a three day grace period, the US $100,000 does not amount to a criminal rate of interest.

[50] Because of my view that the Judge erred in finding that the US $100,000 constituted a criminal rate of interest, I need not address the remaining two issues.

VII. Conclusion

[51] For these reasons, I would allow the appeal and I would dismiss the cross appeal. I would set aside the decision of the Federal Court and, rendering the judgment which ought to have been rendered, I would award to Platypus the Canadian equivalent of the sum of US $100,000, plus post-judgment interest at 5% per annum.

[52] As Platypus seeks costs on the cross appeal, but none on the appeal, it shall have its costs on the cross appeal only.

"M Nadon"
J.A.

"I agree.
Eleanor R. Dawson J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-146-16

(APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE JUSTICE HUGHES DATED MAY 4, 2016 DOCKET NUMBER T-1833-15)

STYLE OF CAUSE:	PLATYPUS MARINE, INC. v. THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "TATU" and THE SHIP "TATU"
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 17, 2017
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	DAWSON, GAUTHIER JJ.A.
DATED:	SEPTEMBER 12, 2017

APPEARANCES:

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