SUPREME COURT OF YUKON

Citation: *Kiselbach v DeFilippi*, 2024 YKSC 29

Date: 20240617
S.C. No. 17-A0041
Registry: Whitehorse

BETWEEN:

CRAIG KISELBACH and C.S.H. OUTFITTING LTD.

PLAINTIFFS

AND

RICHARD R.E. DEFILIPPI, RICHARD R.E. DEFILIPPI LAW CORPORATION, AND BOUGHTON LAW CORPORATION

DEFENDANTS

Before Justice E.M. Campbell

Counsel for the Plaintiffs — J.J. McIntyre

Counsel for the Defendants — Michael Armstrong, KC

REASONS FOR DECISION

INTRODUCTION

[1] On March 14, 2024[1], I dismissed the plaintiffs' claim of professional negligence against their former lawyer, Richard R.E. DeFilippi, and law firm, Boughton Law Corporation ("Boughton Law"), and I granted Boughton Law's counterclaim against the plaintiff Craig Kiselbach ("Kiselbach") for unpaid legal accounts. In my reasons for judgment, I invited the parties to provide written submissions on pre-judgment and post-judgment interest. These are my reasons for decision on this issue.

[1] *Kiselbach v DeFilippi*, 2024 YKSC 7

[2] The defendant Boughton Law seeks pre-judgment and post-judgment interest at the contractual rate of 12% as provided in the retainer agreement. Kiselbach opposes that request and submits that the applicable statutory scheme affords a wide discretion to the Court to impose a rate of interest that is appropriate to the circumstances of each case. Kiselbach seeks that pre-judgment and post-judgment interest be granted at the prime rate, as defined in the *Judicature Act*, RSY 2002, c 128 (the "*Act*"), that is to say 2.45% for pre-judgment interest and 7.2% for post-judgment interest.

FACTS

[3] Kiselbach retained Boughton Law to represent him in a dispute opposing him and his corporation C.S.H. Outfitting Ltd. to his former business partner, Aaron Florian ("Florian"). On April 26, 2016, Kiselbach entered into a retainer agreement with Boughton Law. The retainer agreement was filed as evidence at trial and its terms are not in dispute. The agreement specifically addresses the issue of interest on unpaid legal invoices as follows: "[u]npaid bills will accrue interest at the rate of 12% per annum from the 31st day after the date of the bill until it is paid in full. No interest will be payable if the bill is paid in full within thirty days of its date".

[4] Boughton Law represented Kiselbach until September 20, 2016, when DeFilippi briefly withdrew as counsel. However, on the same day, DeFilippi agreed to resume as counsel at Kiselbach's request. It is not disputed that Kiselbach renewed his retainer on September 20, 2016, and that the retainer continued to be in place until December 19, 2016, when DeFilippi withdrew as counsel for the second time. Also, it is not disputed that Kiselbach refused to pay Boughton Law's last three invoices - November 28, 2016, December 12, 2016, and January 24, 2017. At trial, Kiselbach did not take issue with

the amounts of these outstanding invoices (except for the application of the British Columbia Provincial Sales Tax), nor did he question that the work for which he was charged was performed by Boughton Law. However, counsel for the plaintiffs argued, on behalf of Kiselbach, that, but for the negligence of DeFilippi, Kiselbach's legal dispute with Florian would have settled on September 2, 2016. Therefore, Boughton Law was not entitled to payment for legal work performed after that date because it was superfluous and the result of DeFilippi's negligence.

[5] In my reasons for decision, I found that DeFilippi had breached the duty of care he owed to the plaintiffs, because (i) he did not inform them, in a timely manner, of Florian's late acceptance of Kiselbach's offer to settle on September 2, 2016 (which constituted a new offer), and (ii) he did not explain to Kiselbach that he had the option of accepting Florian's late acceptance, even if Florian decided not to file an application with the court to "enforce" his late acceptance by a certain date. However, I dismissed the plaintiffs' claim in professional negligence against the defendants because I determined that DeFilippi's breach was not the cause of the plaintiffs' alleged loss. I found that Kiselbach knew that Florian had attempted to accept his offer to settle at $550,000; and that Kiselbach also knew he could accept Florian's offer to settle, when the offer was still capable of acceptance, without Florian having to make an application to the court to enforce his late acceptance. I also found that Kiselbach chose not to accept Florian's offer to settle at $550,000 because he believed he was in a good position to obtain more. I note that the alleged loss relates to Kiselbach's decision in March 2017, while represented by a different law firm, to settle the dispute with Florian for a lesser amount.

[6] Having dismissed the plaintiffs' claim and having considered the argument Kiselbach put forward to explain his decision not to pay Boughton Law's last invoices, I concluded there was no reason not to grant Boughton Law's counterclaim against him for the payment of its outstanding invoices. I also concluded that I did not have jurisdiction to determine whether the British Columbia Provincial Sales Tax applied to all, some, or none of the charges contained in those invoices. However, in their written submissions on the issue of interest, the parties agreed that, in my Reasons for Decision, I overlooked certain charges and/or miscalculated the total amount due to Boughton Law based on those invoices. They agreed that, based on my findings, the total amount due to Boughton Law, excluding the British Columbia Provincial Sales Tax but inclusive of GST, comes to $90,604.51, and that pre-judgment and post-judgment interest should be calculated on that revised amount. After review, I agree that, based on the findings I made in my Reasons for Decision, the amount arrived at by the parties is the correct amount.

POSITIONS OF THE PARTIES

Boughton Law

[7] Boughton Law argues that the contractual rate of interest expressly set by the parties in the retainer agreement signed by Kiselbach is the basis upon which it is entitled to pre-judgment and post-judgment interest. Boughton Law submits that, on that basis, it is entitled to pre-judgment and post-judgment interest at the contractual rate of 12% on its unpaid legal invoices, rather than the statutory rate provided by ss. 35(2) and 36(2) of the *Act*.

[8] Boughton Law submits that ss. 35(6) and 36(8) expressly exclude an award of interest under ss. 35 and 36 of the *Act* where interest is payable by a right independent of those provisions, such as a right arising out of a contract. Boughton Law argues that, as a result, ss. 35 and 36 of the *Act* do not govern the adjudication of pre-judgment and post-judgment interest in this case because Boughton Law's right to claim interest comes from another source, that is the retainer agreement entered into by the parties.

[9] Boughton Law submits that the Court's broad discretion to deviate from the pre-judgment and post-judgment statutory rate of interest found at ss. 35(7) and 36(5) applies only to interest awarded under the statute, not to interest derived from an independent right, such as a contractual interest rate as is the case here. Boughton Law argues that, as a result, it is unnecessary to engage in the analysis underlying the exercise of the Court's wide statutory discretion to deviate from the statutory rate under the *Act*, as argued by the plaintiffs.

[10] Boughton Law also submits that there is no reason for this Court to depart from the contractual interest rate expressly set out in the retainer agreement and that it should prevail because (i) Kiselbach does not dispute he agreed to this interest rate; and (ii) Kiselbach does not take the position that the agreed upon rate is extraordinary, unreasonable, or uncoverable as a matter of law.

[11] Boughton Law submits that, even if ss. 35 and 36 were found to govern the award of interest in this case, the rate of pre-judgment and post-judgment interest should still be set at 12% because:

(i) the parties expressly agreed to a 12% rate of interest on unpaid legal accounts;

(ii) there is no judicial basis for departing from the agreed upon rate;

(iii) Kiselbach has not challenged the legal accounts by assessment before the Registrar or otherwise, nor the reasonableness of the 12% rate;

(iv) Boughton Law has been deprived of funds, and the opportunity to employ those funds, for the time they have been withheld; and

(v) Kiselbach has chosen to use the withheld funds in the purchase and operation of a new profit-based hunting concession, rather than pay the defendant.

Kiselbach

[12] Kiselbach submits that the award of pre-judgment and post-judgment interest is governed by ss. 35 and 36 of the *Act,* and that, pursuant to those sections, I have a wide discretion to award a rate of interest that is fair and equitable based on all the relevant circumstances of a case. Kiselbach also submits that the retainer agreement does not constitute a limit to the exercise of the Court's broad discretion; and that the Court retains the power under s. 35(7) of the *Act* to award pre-judgment interest at the rate and for the length of time it considers appropriate.

[13] Kiselbach submits that the appropriate rate to apply for pre-judgment interest in this case is the prime rate in effect at the relevant times (2.45%), as set out in ss. 35(1) and (2) of the *Act* considering (i) the particular circumstances of this case and the nature of the dispute; (ii) the steps taken by Boughton Law, or lack thereof, to advance its claim; and (iii) the length of the proceeding. More specifically, Kiselbach submits that the following are relevant:

- Boughton Law chose not to proceed with any taxation of its accounts in the Supreme Court of Yukon;
- Boughton Law's counterclaim for its legal fees was not filed until October 7, 2021, even though the plaintiffs' statement of claim was filed on May 24, 2017;
- judgment was issued on March 14, 2024, almost seven years after the statement of claim was filed;
- in its counterclaim, Boughton Law specifically mentions an award of interest under the *Act* as an alternative relief with respect to interest;
- the trial of the counterclaim took very little time as Kiselbach was contesting the right of Boughton Law to bill him for legal work after September 2, 2016, not the amount of their claim save for the British Columbia Provincial Sales Tax; and
- the Court found that the defendant DeFilippi breached his duty to advise Kiselbach that he could accept the late acceptance of the offer to settle in the matter opposing him to his former business partner. But for this breach, there would not have been any lawsuit brought by Kiselbach.

[14] As for post-judgment interest, Kiselbach submits that there is no reason to vary from s. 36(2) of the *Act* and the judgment amount should bear interest at the applicable statutory rate of 7.2%.

ISSUES

[15] The parties' respective positions raise the following questions:

1) What is the legal basis for an award of pre-judgment and post-judgment interest in this case?

2) When should pre-judgment interest start accruing and at what rate?

3) What rate of post-judgment interest should be awarded?

ANALYSIS

[16] Sections 35 and 36 of the *Act* set out the statutory scheme for pre-judgment and post-judgment interest. Both sections set out that the "prime rate" of interest, as provided by the *Act*, is the presumptive rate of interest applicable to an award of pre-judgment and post-judgment interest under the *Act*. Prime rate is defined as the lowest rate of interest quoted by chartered banks, as published by the Bank of Canada. The *Act* confers upon the court discretion to disallow pre-judgment interest under s. 35, whereas post-judgment interest applies by operation of law from the day the judgment is pronounced pursuant to s. 36. The *Act* also confers upon the court a "wide discretion" to depart from the presumptive interest rate and to grant pre-judgment and post-judgment interest under the *Act* for a period other than that provided in the *Act* (see *Kareway Homes Ltd v 37889 Yukon Inc,* 2014 YKSC 35 ("*Kareway*"), and *Trans North Turbo Air v North 60 Petro Ltd,* 2003 YKSC 26 ("*Trans North*")). In addition, ss. 35(6)(b) and 36(8)(b) specifically provide that pre-judgment and post-judgment interest under ss. 35 and 36 shall not be awarded "if interest is payable by a right other than under this section".

[17] Sections 35 and 36 of the *Act* read as follows:

> **35 Pre-judgment interest**
>
> (1) In this section, “prime rate” means the lowest rate of interest quoted by chartered banks to the most creditworthy borrowers for prime business loans, as determined and published by the Bank of Canada.
>
> (2) For the purpose of establishing the prime rate, the periodic publication entitled the Bank of Canada Review purporting to be published by the Bank of Canada is admissible in evidence as conclusive proof of the prime rate as set out therein, without further proof of the authenticity of the publication.
>
> (3) Subject to subsection (7), a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon at the prime rate existing for the month preceding the month in which the action was commenced calculated from the date the cause of action arose to the date of judgment.
>
> (4) If the judgment includes an amount for special damages, the interest calculated under subsection (3) shall be calculated on the balance of special damages incurred as totalled at the end of each six month period following the date the cause of action arose and at the date of the judgment.
>
> (5) Interest under this section shall not be awarded
>
> (a) on exemplary or punitive damages;
>
> (b) on interest accruing under this section;
>
> (c) on an award of costs in the action; or
>
> (d) on that part of the judgment that represents pecuniary loss arising after the date of the judgment and that is identified by a finding of the court.
>
> (6) Interest under this section shall not be awarded
>
> (a) except by consent of the judgment debtor when the judgment is given on consent; or

(b) if interest is payable by a right other than under this section.

(7) The judge may, if considered just to do so in all the circumstances, in respect of the whole or any part of the amount for which judgment is given,

(a) disallow interest under this section;

(b) set a rate of interest higher or lower than the prime rate; or

(c) allow interest under this section for a period other than that provided.

36 Post-judgment interest

(1) In this section, “prime rate” has the same meaning as in section 35.

(2) A judgment for the payment of money shall bear interest at the prime rate from the day the judgment is pronounced or the date money is payable under the judgment.

(3) During the first six months of a year interest shall be calculated at the prime rate as at January 1 and during the last six months interest shall be calculated at the prime rate as at July 1.

(4) Despite subsection (2), interest in respect of a judgment pronounced before the coming into force of this section shall be calculated from the later of the date this section comes into force or the date money is payable under the judgment.

(5) If the court considers it appropriate, it may, on the application of the person affected by, or interested in a judgment, vary the rate of interest applicable under this section or set a different date from which the interest shall be calculated.

(6) Interest under this section shall be deemed to be included in the judgment for enforcement purposes.

(7) A partial payment of a judgment shall be applied first to outstanding interest owed on the judgment.

(8) Interest under this section shall not be awarded

> (a) except by consent of the judgment debtor when the judgment is given on consent; or
>
> (b) if interest is payable by right other than under this section.
>
> (9) This section comes into force on the date that sections 11 to 14 of the Interest Act (Canada) cease to have effect in the Yukon Territory.

[18] When I requested further submissions on the issue of pre-judgment and post-judgment interest, I referred the parties to two Yukon cases: *Trans North* and *Kareway*.

[19] In *Trans North*, Veale J. described the statutory scheme as giving the court a wide discretion in awarding pre-judgment and post-judgment interest. However, as noted by counsel for Boughton Law, the issue before the court in that case did not involve a contractual rate of interest expressly agreed to by the parties. *Trans North* concerned a claim for damages in negligence arising from a fire at an aircraft facility. In that case, the plaintiff's right to interest arose from the *Act*, and the issue before the court was solely whether the 7.5% applicable prime rate should be awarded or whether the court should exercise its discretion under s. 35(7) to apply a lower interest rate.

[20] *Kareway* was a dispute between the owner and the builder of a condominium development. In that case, Gower J. exercised his discretion under s. 35(7) to award to the owner pre-judgment and post-judgment interest at the 12% interest rate set out in the parties' development agreement. In *Kareway*, the parties did not argue at trial whether the contractual rate of interest should be used as the pre-judgment interest rate, and, it is in that context that Gower J. stated, at para. 7, that the Court of Appeal of Yukon[2] had directed him, when returning the determination of certain issues to him, as

[2] *Kareway Homes Ltd v 37889 Yukon Inc*, 2013 YKCA 4 – on appeal of 2012 YKSC 10

the trial judge, to award pre-judgment interest pursuant to the *Act*. Gower J. determined that the broad discretion conferred upon the court under s. 35(7) allowed him to consider the appropriateness of granting the contractual interest rate provided in the development agreement. *Kareway* was a case where the contract between the parties did not clearly or expressly set out that interest at a specific rate applied to the amounts at issue before the court. It is in that context that Gower J. applied the statutory scheme under ss. 35 and 36 and exercised the court's broad discretion under the scheme to award pre-judgment and post-judgment interest at 12% rather than at the presumptive prime rate because it reflected the parties' past dealings and course of conduct. *Kareway* did not deal with a situation, such as here, where the contract expressly set out a specific interest rate that applies to the amounts at issue before the Court.

[21] In *Bank of America Canada v Mutual Trust Co*, 2002 SCC 43 ("*Bank of America Canada*"), the Supreme Court of Canada had to determine whether simple or compound interest should be awarded considering the statutory scheme in place in Ontario under ss. 128-130 of the *Courts of Justice Act*, RSO 1990, c C 43 ("*CJA*") for pre-judgment and post-judgment interest. I note that the Ontario statutory provisions at issue in that case were worded similarly to ss. 35 and 36 of the *Act*. In *Bank of America Canada*, the construction loan agreement provided for compound interest. While the facts of that matter differ from the facts before me, the interest issue was very similar. Should the court award interest at the rate provided by the statute or at the rate derived from the contract between the parties? The Supreme Court of Canada noted that ss. 128(4)(g) and 129(5) of the *CJA* allow a court to award interest where interest is "payable by a right other than under this section". Therefore, ss. 128(4)(g) and 129(5) provided the

court the authority to award pre-judgment and post-judgment compound interest, as per the right provided in the contract, either through the court's common law power to award damages arising from the application of contract law or the court's jurisdiction in equity. The Supreme Court of Canada held that absent "special circumstances" or "overriding policy concerns" the courts should give effect to the contractual interest rate and, in that case, granted compound interest, as per the contract. In coming to this conclusion, the court stated the following with respect to ss. 128-130 of the *CJA* as well as the expression "interest payable by another right' in those provisions. In *Bank of America Canada,* the court said:

> (5) Sections 128 to 130 of the *Courts of Justice Act*
>
> [39] Sections 128 to 130 *CJA* entitle a person with an award for damages to interest on the damages for the period between the date that the cause of action arose and the judgment ("pre-judgment interest") as well as for the period between the judgment and the time when payment is made in full ("post-judgment interest"). The legislation recognizes the unfairness of awarding a plaintiff damages, at trial, in the amount to which he or she was entitled as of the date that the cause of action arose, and no more for the period in between which is frequently years. Sections 128 and 129 *CJA*, therefore, contain interest rates and methods of calculation to serve for pre-judgment and post-judgment interest, respectively, in those cases for which there is no evidence of a more appropriate interest rate and/or method of calculation.
>
> [40] Sections 128(4)(g), 129(5) and 130 *CJA*, each of which allows the judge to award interest other than as specifically set out in ss. 128 and 129, clearly indicate that the rates and calculation methods of interest provided in ss. 128 and 129 are applicable in the absence of more appropriate rates and methods of calculation. Section 130 allows a court, where it considers it just, to vary the interest rate or the time for which interest may be awarded. Sections 128(4)(g) and 129(5) allow a court to award pre-judgment and post-judgment

interest, respectively, where interest is payable by another right.

(6) Interest Payable by Another Right

[41] Equity has been recognized as one right by which interest may be awarded other than as specifically stated in ss. 128 and 129 *CJA*, including an award of compound interest. … It is of some interest that in *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 85, approving Brock, supra, Iacobucci J. emphasized that in equity the awarding of compound interest is a discretionary matter. Simple breach of contract does not require moral sanction and is usually governed by common law, not equity.

…

[43] The common law right in contract law to be awarded expectation damages is another such other right. As noted in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] 2 All E.R. 961 (H.L.), at p. 969, the power to award compound interest was not traditionally available at common law, although it is now. This is so because, as our jurisprudence demonstrates, the common law has been able to grow and adapt to changing conditions. …

…

[46] … Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.

…

[49] With respect to the failure to repay the loan in this appeal when due, it cannot be said that the cost of such delay was not in the contemplation of both parties at the time they made the contract, particularly as both parties were in the business of lending. A loan agreement with a specified interest rate is an agreement between parties on the cost of borrowing money over a period of time. Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the

> post-breach loan. The application of a lower interest rate would be unjust to the lender.
>
> [50] This analysis applies equally to pre-judgment interest and post-judgment interest. …
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> …
>
> [52] The court's common law power to award damages flows from the application of contract law. In addition, ss. 128(4)(g) and 129(5) *CJA*, provide statutory authority to award compound pre-judgment and post-judgment interest according to this common law power. The court also has an equitable power to award compound interest, as has traditionally been done in cases of, *inter alia*, wrongful retention of funds and s. 129(5) *CJA* provides statutory authority to award compound post-judgment interest according to this equitable power. (my emphasis)

[22] Also, in *Bank of America Canada*, the Supreme Court of Canada elaborated on the concept of time-value of money, which is an underlying consideration in an award of pre-judgment and post-judgment interest:

> (1) The Time-Value of Money
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> [21] The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.
>
> [22] The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today (G. H. Sorter, M. J. Ingberman and H. M. Maximon, Financial Accounting: An Events and Cash Flow Approach (1990), at p. 14). The time-value of money is common knowledge and

> is one of the cornerstones of all banking and financial systems.

[23] In light of the decision in *Bank of America Canada*, and considering the similarities between the relevant provisions of the *Act* and the *CJA*, I am of the view that interest, in this case, is payable by a right other than under ss. 35 and 36, that is a right arising from the express provision of the contract between the parties.

[24] First, the retainer agreement specifically sets out that an interest rate of 12% will apply to any invoices that remain unpaid starting on the 31st day after the date of the invoice and until the invoice is paid in full.

[25] Second, ss. 35 and 36 are worded generally and do not specifically mention contractual interest or agreed upon interest. Nonetheless, ss. 35(6)(b) and 36(8)(b) specifically contemplate that a party's right to interest may come from "a right other than under this section", such as a contractual interest rate, and specifically exclude an award of interest under ss. 35 and 36 in those cases. As a result, I agree that the presumptive application of the statutory prime rate and the court's wide statutory discretion under ss. 35(7) and 36(5) to depart from that rate and from the statutory period for which interest is payable do not apply where a party's right to interest comes from "a right other than under this section" such as here where a right to interest clearly or expressly arises from a contract.

[26] However, this does not mean that the court has no discretion to vary a contractual interest rate. In *Bank of America Canada*, at paras. 46 and 49, the Supreme Court of Canada stated that absent "special circumstances" or "overriding policy concerns" the courts should give effect to the contractual interest rate.

[27] Following *Bank of America Canada*, courts had to consider the type of "special circumstances" or "overriding policy concerns" that may justify setting aside a contractual interest rate in favour of the statutory rate or other appropriate rate. A case often cited, is *Citi Cards Canada Inc v Ross*, 2014 ONSC 114, where, at para. 27, Justice Wein described those circumstances as follows:

> Exceptional circumstances that would cause a court to decline to apply a contractual interest rate must be more than just financial hardship for the borrower: vague or unclear terms, overriding policy concerns such as criminal interest rate, unconscionable conduct on the part of the lender, or commercially unsophisticated parties. …

[28] Also, while not directly applicable to the issue before me because the British Columbia legislative scheme is worded differently and the matter before the court was a foreclosure proceeding, Newbury J.A. writing for the Court of Appeal of British Columbia in *Century Services Corp v LeRoy*, 2022 BCCA 239 at para. 89, instructively commented on the reluctance of courts to interfere with contractual rates of interest, especially those agreed by commercial parties:

> Notwithstanding cases such as *Magnum Leasing, supra,* most courts are reluctant to interfere with contractual interest rates, especially those agreed upon by commercial parties. While the day has passed when "Chancery mend[ed] no man's bargain" … modern courts do not regard themselves as having some free-floating discretion to ignore or vary contractual terms of which they disapprove. Equity 'follows the law' and still operates on certain principles to this day. It will not enforce penalties; it will relieve against certain mistakes; it will relieve against an unconscionable bargain or fraud. But I am not aware of any equitable principle that would permit a court to rewrite a commercial loan agreement solely by virtue of the judge's opinion that an interest rate (though legal) was excessive, or that a party's misconduct was deserving of punishment in the form of the denial of interest at the rate agreed upon. … (citations omitted)

[29] In my view, there are no special circumstances or overriding principles in this case that would justify departing from the contractual rate of interest.

[30] I appreciate the fact that awarding pre-judgment interest at a 12% rate going back to the 31st day from the date the three invoices were issued (approximately seven years ago) as per the retainer agreement will result in a significant amount of interest payable by Kiselbach. However, while much higher than the prime rate for the periods at issue, a 12% annual rate of interest is not illegal. I also note that 12% is the interest that Gower J., found appropriate to award for pre-judgment and post-judgment interest in *Kareway*.

[31] In addition, Kiselbach is a business owner and he has been represented by counsel throughout this proceeding. Knowing that a 12% interest rate on unpaid invoices was expressly set out in the contract, it was open to him to pay the outstanding invoices, in whole or in part, at any time during the court process, while maintaining his legal position, to stop interest from accruing at that rate over time. I understand Boughton Law's legal invoices amount to a fairly significant sum. However, according to the evidence at trial, in or around the same time, Kiselbach was able to find and obtain the funds he needed to purchase an outfitting business. Also, in March 2017, Kiselbach settled his legal dispute with his former business partner for $250,000 payable over five years.

[32] In addition, the evidence at trial reveals that, on April 3, 2017, Boughton Law wrote to counsel for Kiselbach to inform them of their intention to request a date from the court registry in Whitehorse for a review of their outstanding accounts. However, the plaintiffs filed their statement of claim in this matter on May 24, 2017, and it appears the

review did not proceed. While Boughton Law did not file its counterclaim for its outstanding legal invoices in this matter until October 7, 2021, it did file a claim against Kiselbach in that regard in the Supreme Court of British Columbia on July 19, 2018 - according to a court document attached to Boughton Law's written submissions on the adjudication of interest. Therefore, it cannot be said that Kiselbach was kept in the dark for a significant period regarding Boughton's Law's intention to proceed with a claim for its unpaid legal invoices. Also, the plaintiff did not bring to my attention anything in the court record that would reveal that, by waiting until 2021 to file its counterclaim in this matter, Boughton Law delayed the court process in the Yukon.

[33] Finally, as previously stated, while I determined in my decision of March 14, 2024, that DeFilippi breached his duty of care to the plaintiffs, I dismissed the plaintiffs' claim of professional negligence because I found that Kiselbach knew he could settle his legal dispute with Florian in September 2016 but chose not to. Therefore, there was no reason not to grant Boughton Law's claim for the payment of its legal invoices, and DeFilippi's breach does not justify a departure from the agreed upon interest rate.

[34] As a result, I am of the view that the circumstances of this case do not warrant or justify that I depart from the 12% interest rate on unpaid legal invoices expressly set out in the retainer agreement, and it is appropriate that I award pre-judgment and post-judgment interest at that contractual rate.

CONCLUSION

[35] The defendant Boughton Law is awarded pre-judgment interest on its unpaid legal invoices at the contractual rate of 12% starting on the 31st day after the date of the invoices, as per the retainer agreement, to the date of judgment. As the unpaid fees and

disbursements relate to three invoices issued on three different dates, pre-judgment interest is awarded as follows:

(i) $14,469.59 for the invoice of November 28, 2016, in the amount of $14,469.59[3] (12% for a period of 7 years and 76 days – December 29, 2016, to March 14, 2024);

(ii) $11,783.02 for the invoice of December 12, 2016, in the amount of $13,695.05[4] (12% for a period of 7 years and 62 days – January 12, 2017, to March 14, 2024); and

(iii) $50,928.18 for the invoice of January 24, 2017, in the amount of $60,181.38[5] (12% for a period of 7 years and 19 days – February 24, 2017, to March 14, 2014).

For a total of $77,180.79 in pre-judgment interest[6].

[36] In addition, the defendant Boughton Law is awarded post-judgment interest on its unpaid legal invoices at the contractual rate of 12%.

[37] Counsel requested that the issue of costs not be addressed until after my decision on pre-judgment and post-judgment interest. As a result, the parties may provide written submissions on costs, if necessary, within a timeline to be agreed between them. A consent order shall be filed to reflect their agreement in that regard. If the parties cannot agree on a timeline, I will provide directions to that effect. The

[3] Amount net of British Columbia Provincial Sales Tax
[4] Amount net of British Columbia Provincial Sales Tax
[5] Amount net of British Columbia Provincial Sales Tax
[6] Kiselbach took no issue with the correctness of the amount of pre-judgment interest submitted by Boughton Law, if a 12% interest rate were granted by the Court.

maximum number of pages for the parties' written submissions on costs remains as set out in my Reasons for Decision of March 14, 2024.

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CAMPBELL J.