SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd., v. 37889 Yukon Inc.,* 2014 YKSC 35

Date: 20140626
S.C. No. 09-A0095
Registry: Whitehorse

Between:

KAREWAY HOMES LTD.

Plaintiff

And

37889 YUKON INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Graham E.C. Lang — Counsel for the Plaintiff
Michael D. Tatchell — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a post-trial application by the defendant, 37889 Yukon Inc., for an order pursuant to s. 35(7) of the *Judicature Act*, R.S.Y. 2002, c. 128, (the "*Act*") that the rate of pre-judgment interest be set at 12%, instead of the applicable prime rate of interest, which is 2.25% per annum. The defendant similarly seeks an order pursuant to s. 36(5) of the same *Act* that the rate of post-judgment interest be set at 12%, instead of the applicable prime rate of 3% per annum.

[2] At the hearing, I understood the defendant's counsel to effectively abandon item #2 in the defendant's Notice of Application, which sought 12% interest on a $600,000

payment made into court by the defendant on February 22, 2010. The payment was made as security for the discharge of a builders lien. Rather, the defendant's counsel argued that this payment should be taken into account as part of the overall circumstances in considering whether to exercise my discretion under ss. 35(7) and 36(5) of the *Judicature Act*.

BACKGROUND

[3] The dispute between the parties arose from the construction of a condominium complex in Whitehorse over the period from 2006 to 2009 ("the project"). Wayne Cunningham is the principle of Kareway Homes Ltd., the builder, and Alex Shaman is the principal of the defendant, which was the owner of the condominium complex. The relationship between the parties was governed by a Development Agreement dated February 27, 2007. The dispute was about the owner's complaints of cost overruns and delay by the builder. By September 2007, after having invested approximately $1.9 million of its own money into the project, the owner had to turn to its bank to continue financing the project. The project was originally supposed to be completed by the end of December 2007, but in fact substantial completion did not occur until late 2009. As a result of the disagreement between the parties about the cost overrun, the builder ceased working on the project on September 28, 2009, and gave notice to the owner that it was terminating the contract and suing for damages.

[4] On November 23, 2009, the builder filed a lien under the *Builders Lien Act*, R.S.Y. 2002, c. 18, against the lands on which the project was situated. On November 25, 2009, the builder commenced an action against the owner seeking enforcement of the lien and payment of alleged monies due for its work on the project. The builder

claimed the project was governed by a cost-plus contract. The owner subsequently filed a statement of defence and counterclaimed for overpayment under the Development Agreement, which it argued was a fixed-price contract.

[5] On February 22, 2010, pursuant to s. 25(7) of the *Builders Lien Act*, the owner paid into court the sum of $600,000 to have the lien discharged from the title to the property, so that the condominium units could be sold.

[6] Following the trial, on February 17, 2012, I found that the Development Agreement was a fixed-price contract and that the owner had overpaid the builder by $533,148.34. I also found that there was no profit on the project. The issue of pre-judgment interest was not contested at the trial. Accordingly, I simply granted pre-judgment interest to the owner on the counterclaim to "be calculated pursuant to the *Judicature Act*".

[7] The builder appealed to the Court of Appeal. On March 12, 2013, the Court of Appeal allowed the appeal to the limited extent of finding that there was a profit on the project, but upheld my finding that it was governed by a fixed-price contract. The Court also increased the amount of the owner's overpayment to $915,597.28, subject to a further accounting following an equal division of the profit from the project. Two matters relating to the profit (the New Home Owner's Rebates and the net value of an unsold condo unit) were referred back to me for determination. The order arising from the Court of Appeal judgment, approved by counsel from both parties, also directed this Court to award pre-judgment interest pursuant to the *Judicature Act*.

[8] On April 28, 2014, following the sale of the remaining condo unit, the parties settled the terms of an order granting judgment in favour of the owner in the amount of

$537,353.49, effective as of the date of the trial judgment of February 17, 2012. This represented the owner's overpayment of $915,597.28, less one-half of the profit ultimately achieved on the project, $756,487.58 x1/2 = $378,243.79. Pursuant to an order I made on April 2, 2012, under Rule 39 of the Yukon *Rules of Court*, the order also specified that the owner would have "ordinary costs of the proceedings up to September 20, 2011 and double costs" thereafter. Prior to that order being granted, the parties exchanged written submissions in an effort to settle the terms of the order. In his initial submissions, the owner sought pre-judgment interest under the *Judicature Act* at the rate of 12% per annum. The builder, who was then representing himself, countered with a submission that the rate should be 3% per annum (this appears to be an error, as the prime rate in the month before the action was commenced was 2.25%). In the result, parties agreed that the order would state that the owner was awarded pre-judgment interest pursuant to the *Judicature Act* at the "provisional rate of 2.25% per annum" with "liberty to apply to Court pursuant to s. 35(7) of the *Act* to set a rate of pre-judgment interest higher than the prime rate".

[9] On May 3, 2013, the owner recovered $358,666.97 towards the outstanding amount due under its judgment. This was originally a sum posted by the builder as security in the Court of Appeal, pursuant to a ruling by that Court on an application for a stay of execution pending the appeal. The builder has not made any further payments to the owner to satisfy its indebtedness under the judgment. The owner says it is still owed at least $400,000, plus ongoing court costs.

ISSUES

[10] The builder retained new counsel prior to this hearing. As I understood him, counsel opposes the 12% rate for three reasons:

1) this Court has already determined the basis on which pre-judgment interest is payable and is now *functus officio* and without jurisdiction to award the contractual rate of interest in setting either the pre or post-judgment interest rate;
2) in exercising my discretion under ss. 35(7) and 36(5) of the *Judicature Act*, I should:
   a) give deference to the presumptive (prime) rate of interest established by the legislature; and
   b) give primary consideration to the fluctuation in the market rates of interest; and
3) granting a rate of interest of 12% per annum would be punitive towards the builder, when the purpose of pre-judgment interest is to be compensatory.

ANALYSIS

Functus Officio

[11] The builder's counsel provided no case authority in support of this argument. He submitted that the issue of whether the contractual rate of interest should be applied to pre-judgment interest should have been argued in the trial proper, and that it is too late to do so now. He further argued that when I awarded pre-judgment interest to the owner pursuant to the *Judicature Act*, I "implicitly found" that the contractual rate of interest did not apply.

[12] "*Functus officio*" is defined in *Black's Law Dictionary*, (9th ed.) as:

> "…without further authority or legal competence because the duties and functions of the original commission have been fully accomplished".

In Bryan Garner, *A Dictionary of Modern Legal Usage* (2nd ed.) (New York: OUP USA, 2001), the term is defined as:

> "…a LATINISM that literally means "having performed his or her office." In practice, the phrase denotes the idea that the specific duties and functions that an officer was legally empowered and charged to perform have now been wholly accomplished, and thus that the officer has no further authority or legal competence based on the original commission."

[13] It was never argued at trial whether the contractual rate of interest should be used as the pre-judgment interest rate.

[14] Further, I have been specifically directed by the Court of Appeal to award pre-judgment interest pursuant to the *Judicature Act*. Section 35 of the *Act* sets out the scheme for pre-judgment interest. Subsection (1) provides that the "prime rate" is the lowest rate of interest quoted by chartered banks, as determined by the Bank of Canada. Subsection (3) provides that a person entitled to pre-judgment interest may claim the prime rate existing for the month preceding the month in which the action was commenced "from the date the cause of action arose to the date of judgment." Subsection (7) is the one at issue here. It provides:

> "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…"

[15] Thus, the scheme which I have been directed to apply by the Court of Appeal includes within it the discretion to set an interest rate higher than the prime rate. There is no further statutory limit to that discretion. Indeed, in *Trans North Turbo Air Ltd. v. North 60 Petro Ltd.*, 2003 YKSC 26, (var'd on other grounds, 2004 YKCA 9) Veale J. of this Court stated, at para. 23:

> "Section 35(7) gives the trial judge a wide discretion to vary the rate of interest charged where it would be "just to do so in all the circumstances."" (my emphasis)

[16] Post-judgment interest applies by operation of law and is governed by s. 36 of the *Judicature Act*. Subsection (1) states that the "prime rate" has the same meaning as in s. 35. Subsection (2) then provides that a judgment for the payment of money "shall bear interest at the prime rate from the day the judgment is pronounced…" Finally, subsection (5), which is at issue here, states:

> "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 rate from which the interest shall be calculated."

Again, there are no statutory limits on the discretion available under this subsection.

[17] I conclude that I am not *functus* on the issue of the contractual rate of interest for the following reasons: (1) the matter was never argued at trial; (2) I have been specifically directed by the Court of Appeal to award pre-judgment interest under the *Judicature Act*, i.e. s. 35, including subsection 35(7); (3) I have effectively the same wide discretion under s. 36(5) of the *Act*; (4) no authority has been brought to my attention which prevents me from considering a contractual rate of interest between the parties in determining the appropriate rate of pre or post-judgment interest; and (5) on

the contrary, as I will shortly indicate, I have come upon several cases where contractual, and other, rates of interest have been considered and applied by courts when determining the appropriate rate of pre-judgment interest.

Exercising Discretion to Vary

[18] The builder's counsel submitted that this Court should be slow to vary from the presumptive (prime) rate because the legislature has effectively determined that the presumptive rate should be the default in most circumstances. In this regard, counsel referred to a passage from my earlier decision in *Alfred v. Loblaws Inc.*, 2012 YKSC 95, at para. 68, where I referred to two Ontario Court of Appeal decisions and commented that, as a general rule, they suggest the trial judges should exercise restraint before deviating from the presumptive rate. There, I quoted from *Spencer v. Rosati*, (1985), 50 O.R. (2d) 661 (C.A.), where Morden J.A. said, at para. 17:

> "… In providing for the prime rate, the Legislature must be taken to know what the credit structure in our economy is and its policy decision should not be ignored simply on the ground that the rate appears to be too high for practical realization… If there be a windfall, the policy of the legislation, which is intended to provide an incentive for early settlements were payments, must be assumed to be that it is the plaintiff and not the defendant who is to enjoy it…"

[19] Later, at para. 72 of Alfred, I quoted from *Graham v. Rourke*, (1990) 75 O.R. (2d) 622 (C.A.), at para. 18, where Doherty J.A. stated:

> "… Where the legislature, through specific legislation, has established a policy with respect to pre-judgment interest, it is not for the court to rewrite that legislation to reflect a different policy…"

However, Doherty J.A.'s concern in that case was about not moving towards a judge-made presumption in favour of "the averaged rate" between the date when notice of the

claim was given and the date of judgment. Thus, *Graham* is somewhat distinguishable from the case at bar on this point.

[20] In any event, these authorities do not stand for the proposition that a trial judge can never exercise discretion to depart from the presumptive prime rate.

[21] In *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, Major J., speaking for the Supreme Court, referred to ss. 128 to 130 of Ontario's *Courts of Justice Act*, which provisions are roughly equivalent to ss. 35 and 36 of the *Judicature Act*.

[22] Major J. considered these sections at para. 39:

> "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." (my emphasis)

This suggests that, in cases where there is such evidence, courts have discretion to consider varying from the presumptive rates.

[23] The builder's counsel also submitted here that the underlying premise of the pre-judgment provisions in the *Judicature Act* is to ensure that the 'time value' of money remains intact vis-à-vis fluctuations in the market value of money. Therefore, counsel suggested that the primary circumstance to be considered in whether to exercise the

discretion to vary from the prime rate should be whether or not there have been such fluctuations. In this case, says counsel, the prime rate has fluctuated from a high of 4.75% to a low of 2.25% over the period from September 2008 to date, with an average of 2.89%. This, submits counsel, is not a significant difference from the presumptive prime rate of 2.25% under s. 35(3) of the *Judicature Act*, and therefore I should not exercise my discretion to vary from that rate.

[24] I disagree with the suggestion that fluctuation in the market interest rates should be the primary circumstance under consideration in determining whether to vary from the prime rate. Rather, in determining whether it is "just" or "appropriate" to vary under ss. 35(7) and 36(5) of the *Judicature Act*, I am of the view that all of the relevant circumstances should be taken into account. The considerations set out in paragraphs (a) to (g) of s. 130(2) of Ontario's *Courts of Justice Act* are instructive in this regard. They include:

> "(a) changes in market interest rates;
> (b) the circumstances of the case;
> (c) the fact that an advance payment was made;
> (d) the circumstances of medical disclosure by the plaintiff;
> (e) the amount claimed and the amount recovered in the proceeding;
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
> (g) any other relevant consideration…"

[25] *Graham* and *Trans North* also support the proposition that fluctuation in the market interest rates is only one of the relevant factors to be considered in determining whether to vary. In *Graham*, at para. 16, Doherty J.A. stated:

> "…Fluctuation in the rates does not, however, demand some variation from the rate provided by ss. 137 and 138. It is one factor to be considered. Its significance will depend

> in large measure on the extent of the fluctuation." (my emphasis)

In *Trans North*, at para. 26, Veale J. stated:

> "… Dramatic or massive fluctuations in the interest rate would be one example where it may be "just" to modify…." (my emphasis)

Compensatory vs. Punitive

[26] It is common ground between the parties that judgment interest is more appropriately used to compensate, rather than to punish, a party. This was expressly stated by the Supreme Court in *Bank of America Canada*, at para. 36:

> "36 In *The Law of Interest in Canada* (1992), at pp. 127-28, M. A. Waldron explained that the initial theory underpinning an award of judgment interest was that the defendant's conduct was such that he or she deserved additional punishment. The modern theory is that judgment interest is more appropriately used to compensate rather than punish. At pp. 127-28, she wrote:
>
> > Compensation is one of the chief aims of the law of damages, but a plaintiff who is successful in his action and is awarded a sum for damages assessed perhaps years before but now payable in less valuable dollars finds it quite obvious that he has been shortchanged. Equally obviously, payment of interest on his damage award from some relevant date is one way of redressing this problem.
> >
> > The overwhelming opinion today of Law Reform Commissions and the academic community is that interest on a claim prior to judgment is properly part of the compensatory process. [Citations omitted.]" (my emphasis)

[27] The builder's counsel noted that much of the submissions of the owner's counsel in this hearing focused on the builder's 'bad conduct' post-trial. In particular, he says that the owner's counsel has emphasized certain evidence given by Mr. Cunningham in

an examination in aid of execution on March 27, 2014, which is indicative of the reasons why the owner has thus far been prevented from executing and satisfying its judgment. Thus, the builder's counsel suggested that, in seeking the significantly higher interest rate of 12%, the owner is now seeking to punish the builder for this bad conduct.

[28] The owner's counsel vigorously disagreed with this suggestion. Rather, he argued that the owner is simply trying to obtain appropriate *compensation* for the fact that it has been deprived of the use of significant sums of money for a significant period of time. Further, counsel submitted that the builder has benefited from the use of the owner's money for several years now, and that the owner's loss has been the builder's gain.

[29] Specifically, the owner's counsel says that the builder has chosen to use the 'overpayment' money to invest in other construction projects in Whitehorse, for the builder's continuing profit, rather than attempting to pay down the judgment. The overpayments totalling $915,597.28 were made over the period from September 17, 2008 to March 4, 2009, and remain unpaid to the extent of approximately $400,000. In particular, the owner's counsel points to the following facts disclosed in Mr. Cunningham's examination in aid of execution:

1) Mr. Cunningham's wife incorporated 46227 Yukon Inc. on February 21, 2012, i.e. on the second business day following the date of my judgment on February 17, 2012, which company has since been used as the owner/manager of a major multi-unit condominium project in Riverdale. In connection with that project, Kareway Homes loaned the numbered company $3 million.

2) One of the reasons for incorporating the numbered company in 2012 was because “Kareway had too much profit” in that year.
3) According to a memorandum from 46227 Yukon Inc. dated May 30, 2014, the numbered company has a business loan owing to Kareway in the amount of $1,645,474.32 “for which payment is not currently due.”
4) Besides the Riverdale project, Kareway has gone on to profit from three other construction projects in Whitehorse: Porter Ridge, Takhini Ridge and Stone Ridge.
5) In the summer of 2013, Kareway paid off a loan of approximately $800,000 to the Royal Bank.
6) Since the owner obtained its judgment, Kareway has obtained loans from two individuals (Alex Seely and Ben Warnsby) which Kareway is repaying at the rate of 24% per annum.

[30] Further, the owner’s counsel points to the $600,000 which the owner was required to pay into court to discharge the lien filed by the builder. Once again, the owner’s counsel says this was for the builder’s benefit because it preserved the right of the builder to pursue its claim of lien while the litigation ensued. However, given that the claim of lien was ultimately dismissed in the owner’s favour, the owner was deprived of this money from February 22, 2010 until the funds were returned to the owner on May 22, 2012. Finally, because the deposit of this money was governed by Rule 61(4) of the *Rules of Court*, the interest payable by the Court to the owner for the time the money was on deposit with the Court was limited to “2% below the prime lending rate”. This meant that the owner was only able to recover 0.25% interest on that money.

[31] The builder's counsel also sought to distinguish *Bank of America Canada* on its facts. I agree that the ratio of that case turned on whether a court has jurisdiction to award compound interest on an award for damages. However, the Supreme Court also made a number of general comments regarding the "time-value of money" and the nature of contract damages which are helpful and pertinent to the case at bar. At paras. 21 and 22, Major J., stated:

> "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."

[32] At para. 25 of *Bank of America Canada*, Major J. continued with his discussion of contract damages:

> "25 Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract."

[33] Finally, focusing on the nature of restitution damages, at paras. 32 and 33, Major J. stated:

> "32 However, where a sum of money is required to be paid as of a certain date, the benefit to the defendant of the money during the interval between when the money is owed and when the money is paid is, all other things being equal, exactly the same as the detriment to the plaintiff of not having that money during the same interval. This is not a Pareto optimal outcome, but, rather, a zero-sum outcome. The defendant's gain is the plaintiff's loss, the value of which, but for the defendant's breach, would have belonged to the plaintiff.
>
> 33 To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff."

[34] As I alluded to earlier, I have come across a number of cases where courts have looked to the nature of the dealings between the parties in considering whether contractual, or other, rates of interest were appropriate to serve as the pre-judgment interest rate.

[35] In *Bissett (c.o.b. D.L. Bissett Drywall) v. Doman Industries Ltd.*, (1979), 12 B.C.L.R. 189 (C.A.), the respondent, Koffski, had claimed against the appellant, Doman Industries, for work done and material supplied in the construction of some houses in Duncan, British Columbia. The trial judge found that there was evidence that it was the practice of the appellant to charge interest at 18% per annum to customers whose accounts were overdue. Accordingly, he determined that it was appropriate to use 18% as the applicable rate under the *Prejudgment Interest Act*, which came into force June 1, 1974. The Court of Appeal upheld that determination, stating at paras. 15 and16:

> "15… [I]t seems to me that the relations between the parties indicate the rate of interest to be fixed under the provisions of the *Prejudgment Interest Act*…
>
> 16 On the whole while the rate of 18% is higher than that usually imposed under the *Act* I cannot say that the judge was wrong in exercising his discretion as he did."

[36] In *No. 151 Cathedral Ventures Ltd. v. Gartrell*, 2005 BCSC 454, Koenigsberg J. had previously determined that Cathedral Ventures had a constructive trust interest in the property at issue. The question before Koenigsberg J. was whether the appropriate rate of pre-judgment interest would be the "Registrar's rate", or an increased rate. The Court was governed by the *Court Order Interest Act* (1979). Section 1(1) of the *Act* provided:

> "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."

The parties had entered into an amended share purchase agreement which specified a mortgage interest rate of 7.5% per annum. At para. 11, Koenigsberg J. accepted this as:

> "…evidence of what the parties considered to be a fair and equitable rate of interest on monies owing as between them in respect of the Property."

Accordingly, she set the pre-judgment interest rate at 7.5%.

[37] In coming to that conclusion, Koenigsberg J. made the following observations at paras. 8 and10:

> "8 Commonly, <u>in the absence of an agreement concerning interest</u>, parties will apply the Registrar's rate to calculate the successful party's prejudgment interest award. However, the plaintiff submits that where the

> plaintiff has been wrongfully kept out of monies, goods or services by the defendant since the cause of action arose, the plaintiff will be entitled to an increased rate of interest over and above the Registrar's rate. Reliance is placed on the following authorities.
>
> *Tercon Contractors Ltd. v. British Columbia* [1994] B.C.J. No. 2878 (B.C.S.C.)
>
> *Bissett (c.o.b. D.L. Bissett Drywall) v. Doman Industries Ltd*. [1979] B.C.J. No. 1501 (B.C.C.A.)
>
> *Crown Zellerbach Limited and British Columbia Forest Products Limited v. Her Majesty the Queen* (1978), 8 B.C.L.R. 187 (B.C.S.C.); overturned on other grounds…
>
> *Air Canada v. Her Majesty the Queen*, [1978] 2 W.W.R. 694 (Man. C.A.)
>
> …
>
> 10 Given that Cathedral has been kept out of the money by the Defendants, the Court may look to the past dealings, or course of conduct, between the parties to what, in all the circumstances of the case, is appropriate pre-judgment interest.
>
> *Bissett (c.o.b. D.L. Drywall) v. Doman Industries Ltd*., *supra* at para. 15. *Tercon Contractors Ltd. v. British Columbia*, supra, at para. 8" (my emphasis)

[38] I note here that the owner's counsel ordinarily practices in British Columbia. He informed me at the hearing that the "Registrar's rate" referred to in *Cathedral Ventures* is usually equivalent to the Bank of Canada prime rate, and is most commonly used as the rate of pre-judgment interest under the British Columbia *Court Order Interest Act*. In that respect, he submitted that although s. 1(1) of the *Act* seems to give a court unlimited discretion in setting the rate, the Registrar's rates are the *de facto* presumptive rates. Thus, given the manner in which the *Act* is enforced, the legislative schemes in British Columbia and the Yukon are comparable.

[39] The builder's counsel argued that the British Columbia legislation confers a much broader discretion upon courts than the *Judicature Act* provisions in the Yukon. Accordingly, he submitted that the British Columbia authorities are of little assistance in the case at bar. I disagree. First, the scheme of the Registrar's rates in British Columbia is roughly equivalent to the presumptive prime rate in the Yukon. Second, as Veale J. held in *Trans North,* a trial judge has a "wide discretion to vary" under s. 35(7) of the Act.

[40] In *Hardwoods Specialty Products LP v. Rite Style Manufacturing Ltd.*, 2006 BCCA 139, Rite Style, a manufacturer of wood cabinets, owed money to Hardwoods for the supply of wood products. The summary trial judge determined that the amount owing for the purchases of the wood was $57,346.93. The trial judge also found that Rite Style was contractually obligated to pay interest on its account with Hardwoods at the rate of 24% per annum. Accordingly, the trial judge also set the pre-judgment interest rate at 24%. The Court of Appeal concluded that there was no evidence that Rite Style ever expressly agreed to pay interest on overdue accounts and reduced the pre-judgment interest rate from 24% per annum to 5% per annum under s. 1 of the *Court Order Interest Act* (paras. 11 and 19). Of greater importance to the case at bar are the Court's comments about the appropriateness of the Registrar's rates in commercial cases, at paras. 17 and 18:

> "17 Under s. 1 of the *Court Order Interest Act*, the appellant must pay interest at "a rate the court considers appropriate in the circumstances" from when the cause of action arose to judgment. Trial judges often order payment of pre-judgment interest at the rates determined by the Registrar from time to time under s. 3 of the statute for judgments obtained by default. However, the rates of interest fixed by the Registrar are only rates of convenience

> to trial judges who resolve disputed claims, whether or not the claims are liquidated. In a commercial case the Registrar's rates might not be appropriate. Business entities often must borrow working capital at bank rates of interest that are higher than the rates fixed by the Registrar. Other business entities often invest excess cash on hand, also at higher rates of return. Therefore, I think that the rate fixed by the Registrar at any given time should not be seen to be a default rate with respect to disputed claims.
>
> 18 During the time relevant to the present case, the Registrar's rates fluctuated from 2.25% to 3%. Although there is no evidence in the record of the respondent's working capital or cash flow situation, I consider the Registrar's rates to be somewhat low for the present case. The respondent was delayed for some time in receiving payment for the money owed to it and during that time it had to pay interest at commercial rates or it lost the opportunity to earn interest on invested cash. Counsel for the appellant drew our attention to s. 4 of the *Interest Act*, R.S., 1985, I-15. That section provides that where a rate of interest in an agreement fails because it is not expressed as an annual rate, the default rate of interest must not exceed 5%. Although that section does not apply to the present case, 5% interest appears to me to be commercially and, therefore, judicially appropriate under s. 1 of the *Court Order Interest Act*." (my emphasis)

[41] I also place considerable emphasis here on what occurred in relation to the sale of the remaining condominium from the project. That sale occurred on December 19, 2012 for a purchase price of $400,000. However, prior to the sale, the owner had incurred a number of costs relating to:

- legal fees associated with the sale;
- property taxes;
- utilities;
- fuel; and
- condominium fees.

The total of these costs was $11,816.71.

[42] At s. 3(b) of the Development Agreement, the parties agreed that the owner would be reimbursed for “Additional Costs, together with 12% on such sums calculated from the date of disbursement”. The above costs fell within the definition of “Additional Costs”.

[43] Accordingly, in its written submissions leading up to the order of April 28, 2014, the owner claimed 12% interest on these costs calculated from the date of disbursement to the date of the sale. The owner then deducted the amount of the costs as well as 12% interest (as well as the previously agreed upon per door payment of $35,000) to arrive at a net sale price of $352,356.39. In the builder’s responding written submission, dated April 10, 2014 (filed April 11, 2014), the builder accepted this amount as the correct net sale price. Thus, the builder implicitly accepted that the 12% rate of interest continued to apply to the post-trial dealings between the parties.

CONCLUSION

[44] In conclusion, I take the following circumstances into account in setting the pre and post-judgment interest rates under ss. 35(7) and 36(5) of the *Judicature Act*:

- the length of time that the owner has been “out of the money” it is legitimately entitled to;
- the fact that the owner had to pay interest on the overpayment money at commercial rates to its bank;
- the fact that the owner has been deprived of the opportunity to earn interest on the overpayment money;

- the fact that the owner was further deprived of the use of the $600,000 security deposit for over two years, receiving only paltry interest on that sum;
- the fact that the builder has continued to invest considerable funds in 46227 Yukon Inc., a company which is arguably non-arm's-length, for the purpose of a major condominium project in Riverdale;
- the fact that the builder has further pursued at least three other major construction projects in Whitehorse since the trial;
- the fact that the builder has repaid an $800,000 loan to the Royal Bank before taking any steps to satisfy the owner's judgment;
- the fact that the builder is financially able to repay loans from two individuals at the considerable rate of 24% per annum, again before taking any steps to satisfy the owner's judgment; and
- the fact that the builder implicitly accepted that the Development Agreement rate of 12% continued to apply to the benefit of the owner in post-trial dealings between the parties over the sale of the remaining condominium.

[45] I am cognizant here that the purpose of pre-judgment interest is not to redress inequities by punishing or rewarding a party. On the other hand, I am to ensure that the earning capacity of money awarded accrues to the successful party and puts that party in the position it would have been in if the award had been paid on the date the cause of action arose. In that regard, I can do no better than to repeat what was said by the Supreme Court in *Bank of America Canada*, at para. 33:

> "33 To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which

> include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff." (my emphasis)

In my view, it is this notion of 'returning of the value' acquired by the builder that keeps the award on the compensatory end of the spectrum.

[46] I conclude that the 12% rate of interest agreed to by the parties in the Development Agreement is a fair and equitable rate for both pre and post-judgment interest and reflects their past dealings and course of conduct.

[47] Counsel for the owner specifically requested at the hearing that I not address the issue of costs until making my decision on the rate of pre and post-judgment interest. Accordingly, I decline to deal with that issue now, but I will retain jurisdiction to hear further submissions on the topic, in the event that the parties are unable to agree.

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Gower J.