Court of King's Bench of Alberta

Citation: Egger v 1994426 Alberta Ltd., 2025 ABKB 533

Date: 20250916
Docket: 2113 00296
Registry: Fort McMurray

Between:

Ronald Egger

Plaintiff/Respondent

- and -

1994426 Alberta Ltd. and Frederick Peter Hanlon

Defendants/Appellants

Reasons for Decision
of the
Honourable Justice Maureen J. McGuire

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[1] Mr. Hanlon, through his company 1994426 Alberta Ltd., borrowed $300,000 from Mr. Egger in May 2019. The terms of repayment were set out in a promissory note dated May 15, 2019. The principal amount was due by June 1, 2020, and interest payments of $12,000 per month (4% of the principal per month) were to be paid every month until April 30, 2020.[1] The principal was never repaid by the Defendant, and the Plaintiff sued for recovery.

[2] In February 2025, the Plaintiff brought an application for summary judgment, and that application was granted with written reasons on March 11, 2025. The Applications Judge

[1] A $6,000 interest payment was stated to be due May 1, 2019, reflecting the half-month of May.

reviewed the materials, including the affidavit of Mr. Egger filed November 6, 2024, the supplementary affidavit of Mr. Egger filed January 15, 2025 and the affidavit of Mr. Hanlon filed February 27, 2025. On the basis of the materials before him, the Applications Judge found both the debt and the amount owing proven. He found no merit to the defence position and no genuine issue for trial. He therefore granted summary judgment in the amount sought by the Plaintiff, which was $588,000, plus contractual interest to the date of judgment, plus post-judgment interest pursuant to the *Judgment Interest Act*.

[3] The Defendant appeals the decision of the Applications Judge pursuant to Rule 6.14 of the *Alberta Rules of Court*. He reargues his position below and raises a new issue on this appeal. The parties agree that the standard of review on an appeal from an Application Judge's decision is correctness. The new argument, having not been raised before the Application Judge, is decided for the first time on this appeal.

The set-off argument

[4] The Defendant's primary argument before the Applications Judge was that there was a triable issue about the amount owing as a result of a later arrangement between Mr. Hanlon and Mr. Egger.

[5] Mr. Hanlon's business rented commercial property from Mr. Egger's company, and there was a rental agreement with that company. In 2020, with the onset of the COVID-19 pandemic, the federal government introduced a program (CERCA) that offered commercial landlords forgivable loans where tenants' rents were reduced. The Defendant's argument on the summary judgment application was that Mr. Hanlon and Mr. Egger had agreed to submit fraudulent documents to the government in order to obtain rent subsidy payments, and they would share the proceeds equally. The Defendant argued that the fraudulently obtained CERCA payments were kept entirely by the landlord, and therefore ought to be considered a credit against the amount owing under the 2019 promissory note.

[6] The Applications Judge rejected this argument. He noted that set-off had not been properly pled by the Defendant, but also rejected the argument on the basis that the Court would not enforce an illegal contract, and so would not permit a set-off in the amount of the purported agreement to defraud the Government of Canada, citing ***Pupiec v Dereniowski***, (1998) 39 OR (3d) 150 (CA).

[7] As the Applications Judge noted, summary judgment is not restricted to cases where the outcome is obvious, but where the material facts are proven and the presiding judge has sufficient confidence in the record to summarily resolve the dispute, summary judgment is appropriate: ***Hannam v Medicine Hat school District No. 76***, 2020 ABCA 343. In this case the debt was proven, the terms of repayment were set out in the promissory note which was in evidence, and the dates and amounts of every payment made by the Defendant were set out in Exhibit "F" of the Plaintiff's affidavit. The default was apparent from the evidence of the $300,000 cheque dated May 30, 2020 that was returned as NSF (Exhibit "D" of the Plaintiff's affidavit). With both the debt and amounts proven, and with rejection of the set-off argument as an illegal contract, there was no genuine issue for trial. Summary judgment was appropriate.

[8] On appeal, the Appellant made the same argument. He says a trial is necessary to further investigate all of the financial dealings between the parties and their corporations, and any amounts overpaid in rent to Egger Development Ltd., or his 50% share of the fraudulent

proceeds of the CERCA scheme, should be deemed to be payments toward the $300,000 principal that was owed under the promissory note.

[9] The Respondent does not admit to any fraudulent agreement with Mr. Hanlon in relation to CERCA. But also argues that the CERCA payments are irrelevant in two ways. First, he points to Mr. Hanlon's evidence in questioning where Mr. Hanlon acknowledged that there was no such agreement, whether written or verbal, to repay the loan in any other way. The loan agreement could not be changed by Mr. Hanlon unilaterally and retroactively. And secondly, the rents to which any CERCA amounts related were pursuant to a contract with Egger Developments Ltd., not the plaintiff, Mr. Egger. The money owed under the promissory note was owed to Mr. Egger personally, and not the corporation.

[10] Further, the evidence shows that the application to CERCA was dated August 30, 2020, well after the Appellant had defaulted on repayment of the $300,000 principal. And the ledger showing interest payments made in September and October 2020, demonstrate acknowledgment that the promissory note clause dealing with interest payments after default was then in effect.

[11] The Appellant has failed to establish that there was any agreement to waive repayment of the principal or any interest subsequent to the default. Summary judgment was appropriate on the basis of the case presented to the Applications Judge.

The Interest Act argument

[12] The Appellant indicated in his Notice of Appeal that he would be relying on additional evidence and further written argument. Neither was filed in advance of the appeal hearing date which was set for June 5. On June 5, the Appellant filed 2 ½ pages of written submissions that simply repeat the CERCA set-off argument. The appeal was not heard that day but the following morning when counsel for the Appellant first advised he wished to argue a new issue. The new argument is that the promissory note did not include a statement of per annum rate of interest, and as a result, section 4 of the *Interest Act*, RSC 1985, c I-15 mandates that only 5% per annum is recoverable.

[13] The interest provision in the promissory note reads: "The undersigned promises to pay interest at the rate of four percent (4%) per month in advance by way of post-dated cheques on the principal amount as follows: a. $6,000.00 due on May 1st, 2019; b. $12,000 due on each month thereafter with such payments ending on April 30th, 2020" Subsequent to default the borrower agreed, "to pay interest thereon and on subsequent overdue interest at the rate aforesaid, both before and after judgment, until paid in full."

[14] The *Interest Act*, RSC 1985, c I-15, s 4 states:

> "Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of ay written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent."

[15] Section 4 of the *Interest Act* is consumer protection legislation, designed to ensure that consumers know the annual rate of interest they are paying. Interpretation of the legislation must be consistent with its purpose. An example of the mischief this legislation is aimed at protecting against is found in ***Elcano Acceptance Ltd. v Richmond, Richmond, Stambler & Mills***, (1991) 3 OR (3d) 123 (CA) ("***Elcano***"). There, promissory notes were drafted indicating a monthly interest rate of 2% per month, calculated and compounded monthly. The monthly compounding of interest meant that the true annual rate was not 24% (2% x 12 months), but 26.8%. As the Ontario Court of Appeal noted: "The very object of the provisions of s. 4 of the *Interest Act* is to make the per annum rate clear to the borrower and, in the case of promissory notes, to any holder in due course."

[16] As the Ontario Court of Appeal noted in ***Solar Power Network Inc. v ClearFlow Energy Finance Corp.***, 2018 ONCA 727, para 49, the *Interest Act* does not require that an effective annual interest rate be expressed as a numerical percentage. A mathematical formula providing a rate will satisfy section 4.

[17] The promissory note in this case does not include an express statement of the annual interest percentage. With respect to the interest rate applicable prior to any default, however, the note leaves no room for uncertainty as to the actual interest to be paid and how that interest will be calculated. The borrower was to pay $6,000 on May 1 and $12,000 on each month thereafter ending April 30, 2020. There was no compound interest. A straightforward multiplication of 4% x 12 months provides the annual interest rate of 48%, should the borrower be interested in knowing that. As Favreau JA in ***Greenspan v Van Clieaf***, 2023 ONCA 681, similarly concluded, "A stipulated rate of interest that applies for a specified period of time that is clear and ascertainable by calculation or formula complies with s. 4 of the *Interest Act* even if it is not explicitly expressed as an annual rate of interest." (para 27). The appellant's argument therefore fails to the extent that he claims that s 4 of the *Interest Act* operates to reduce all interest to 5% per annum and that the $12,000 monthly interest payments ought to be deemed early repayment of principal. None of the first twelve payments (shown on lines 1 through 13 on Exhibit F of Mr. Egger's affidavit) are anything other than payment of the agreed interest. On June 1, 2020, the full $300,000 was due.

[18] Unfortunately, the situation is more complicated as it relates to the interest applicable following default. The clause addressing interest following default is clear and unambiguous, but not in in wording consistent with s. 4 of the *Interest Act*. Following default of any payment the entirety of the debt and any accrued interest becomes due immediately and that amount then begins accruing 4% per month *compounded* monthly. In actuality, Mr. Egger did not ever collect or claim more than the original 4% per month on principal. The appellant, for a time, continued to pay $12,000 monthly – apparently being of the same understanding that the default did not change the nature of the interest payable. Even when those payments were made late, the amount of interest paid did not change – no payment was made in August but in September a $24,000 payment was made. The reality of what was actually paid and collected, however, cannot convert the non-compliant wording of the promissory note into an agreement that complies with the *Act*. To the extent that s. 4 of the *Interest Act* applies to this promissory note, the post-default interest clause is not compliant with the requirement for an express statement of the yearly rate or percentage of interest.

[19] The appellant argues that, as a result of the non-compliant wording of the promissory note, the result must be that he owes the respondent only the amount of principal and 5% interest

thereon, and that the quantum owed must be determined taking into account the payments made and this calculation of interest. It is not so simple. Section 4 of the *Interest Act* is consumer protection legislation. The applicability of section 4 to sophisticated non-consumer loans has been questioned. There appears to be divided authority.

[20] In ***VK Mason Construction Ltd. v Bank of Nova Scotia***, [1985] 1 SCR 271 ("***Mason***"), the appellant argued in the context of a commercial development matter that section 4 of the *Interest Act* limited the bank's interest to 5%. The appellant failed, both in the Ontario Court of Appeal and in the Supreme Court of Canada because the loan in question was a mortgage and mortgages are expressly excluded from section 4. Although the issue was decided on that basis, Wilson J in obiter commented: "Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying. A sophisticated commercial borrower like Courtot, who in this case was borrowing at a floating rate of interest, is in scant need of protection by being informed of his rate of interest at the annual, rather than the 360 day, rate."

[21] That obiter comment then became the basis for an argument raised and rejected in ***Elcano***, that "sophisticated borrowers" are precluded from raising section 4 as a defence to a claim on a promissory note. The Ontario Court of Appeal in ***Elcano*** concluded: "Once it is decided that a promissory note is a contract then the plain language of s 4 of the Act applies. We are not prepared to accept the submission of Mr. O'Brien that the reasoning in Mason should be extended to mean that whenever the s 4 defence is raised with respect to a claim under a promissory note that the court must determine whether the borrower was unsophisticated as a condition precedent to the application of the section. In our view, on the plain wording of the section it must be construed as applying to all borrowers regardless of the degree of sophistication."

[22] Alberta, however, has reached a different conclusion with respect to the SCC obiter in ***Mason***. In ***Bearcat Explorations Ltd. (Bankrupt)***, 2004 ABQB 601 ("***Bearcat***"), in the context of an appeal under s. 135(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, the court considered a loan agreement where interest was set out as 1% per month calculated and compounded monthly for the term of the loan and thereafter 2% per month calculated and compounded monthly. No annual rate or percentage equivalent was expressly stated. When the lender petitioned the corporate borrower into bankruptcy, the borrower argued that the loan agreement breached s. 4 of the *Interest Act* and as such, was unenforceable. Romaine J considered the obiter comment of Wilson J in ***Mason*** and also considered the Ontario Court of Appeal's decision in ***Elcano***. She distinguished ***Elcano*** on the basis that the case before her was one involving a sophisticated borrower and reliance on the language of s. 4 by the borrower was an attempt to escape from an otherwise valid financial transaction without taking account of the legitimate interests of the lender. She noted that despite the absence of an express statement of annual interest, "There is no question that *Bearcat* and *Stampede* were aware of the annual rate of interest under the Master Loan Agreement. The agreement itself was drafted by their solicitor, who took instructions with respect to its terms from Mr. McLeod [*the borrower*]." Romaine J took note of another decision of the Ontario Court of Appeal decided within a month of ***Elcano***, involving a sophisticated borrower and lender and an agreement to pay interest at a rate of 2% per month. In that decision, ***Niagara Air Bus Inc. v Camerman***, (1991), 3 OR (3d) 108, the Ontario Court of Appeal skirted the problem and denied the borrower's attempt to escape his obligations under the agreement by finding that upon maturity, the principal and interest due

merged to become a simple debt and the court was then free to award an appropriate amount of interest on the debt as the loan agreement ended and the *Interest Act* was no longer applicable. In the result, the Court gave effect to the intention of the sophisticated borrower and lender by exercising the discretion available under s. 140 of the *Courts of Justice Act* [the equivalent of s. 2(3) of Alberta's *Judgment Interest Act*] to impose an interest rate of 24% on the debt.

[23] Having regard to the differing outcomes of the Ontario cases based upon the sophistication of the borrower, Romaine J relied upon the comments of Wilson J in ***Mason*** and found that s. 4 of the *Interest Act* did not apply to the loan agreement negotiated between sophisticated parties. "This is a case where legislation that is meant to apply to consumer loans has been relied upon by a sophisticated borrower merely to attempt to escape from an otherwise valid loan provision."

[24] In Alberta, therefore, it is not as clear as it may be elsewhere that s 4 of the *Interest Act* will be permitted to defeat clear language of a commercial agreement between sophisticated parties. And even if there should be, as ***Elcano*** suggests, no room to exclude its application from sophisticated borrowers, the remedy need not benefit the borrower who seeks to escape his negotiated agreement. There is discretion in section 2(3) of Alberta's *Judgment Interest Act*, to remedy the unfairness to the lender in the same way that the Ontario Court of Appeal applied the Ontario *Courts of Justice Act*.

Defence not pleaded

[25] Rule 13.6(3) requires that pleadings include a statement of any matter on which a party intends to rely that may take another party by surprise, including, of specific relevance in this case: (e) illegality or invalidity of a contract, including the grounds; and (r) a provision of an enactment.

[26] Section 4 of the *Interest Act* was not pleaded by the appellant, was not argued in defence of the summary judgment application, was not mentioned in the Notice of Appeal or even in the written submissions tendered at the start of the appeal hearing. The first mention of the defence came on the morning after an overnight adjournment when a longer adjournment of the appeal had been denied. The argument was heard, and the respondent presented a capable although hastily prepared response. The respondent has fought against delay throughout proceedings, and clearly did not want the lately-raised appellant's argument to further delay the matter.

[27] At trial, without proper pleading, the defence under s. 4 of the *Interest Act* could not be relied upon: ***Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd***., 2021 ABCA 385, at para 102. However, the rules provide the opportunity for a defendant to seek to amend his statement of defence with permission of the court at any time before trial. The decision whether to allow amendments to the pleadings, and on what terms if any, should be left to the trial judge rather than decided in the context of a summary judgment determination (see ***Crystalline Investments Ltd. v Domgroup Ltd.***, 2004 SCC 3).

Conclusion

[28] The Appellant has succeeded in demonstrating there is an arguable issue and that, according to the approach in ***Bearcat***, this issue will require evidence with respect to the

sophistication of the borrower and the availability of s. 4 of the *Interest Act* as a defence in the circumstances of this case.

[29] As there is no arguable issue with respect to the $300,000 principal amount, the summary judgment is set aside only as it relates to the calculation of interest subsequent to the default.

Costs

[30] The Appellant agrees to pay the costs thrown away as a result of the adjournment of the appeal from June 5 to 6, 2025.

[31] Although the Appellant was successful, in part, on his appeal, the appeal would have been entirely unnecessary had the *Interest Act* been pled in the Statement of Defence and argued before the Applications Judge. In the circumstances, the parties should bear their own costs.

Heard on the 6th day of June, 2025.
Dated at Edmonton, Alberta this 16th day of September, 2025.

Maureen J. McGuire
J.C.K.B.A.

Appearances:

Allan Vinni
for the Appellants

Clifton Jang
for the Respondent