

Date: 20090911

Docket: T-363-85

Citation: 2009 FC 900

Ottawa, Ontario, September 11, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**ALFRED JOSEPH, CHIEF COUNCILLOR,
DORA B. WILSON, WALTER JOSEPH
and JACK SEBASTIAN,
BAND COUNCILLORS
ON THEIR OWN BEHALF
AND ON BEHALF OF ALL OTHER
MEMBERS OF THE HAGWILGET
VILLAGE, HAGWILGET VILLAGE
AND HAGWILGET VILLAGE COUNCIL**

Plaintiffs

and

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA**

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Plaintiffs for post-judgment interest. They claim to be entitled to interest by virtue of the Defendant's delay in remitting the proceeds of settlement of this action.

I. Background

[2] On April 24, 2009 the parties negotiated a settlement of this action requiring the Defendant to pay to the Plaintiffs in their representative capacity the sum of \$21.5 million and costs. Because this is a representative proceeding, Court approval under Rule 114(4) was required to give effect to the settlement. Following a hearing in Vancouver, the Court issued an Order which, with the exception of one provision concerning the establishment of a settlement trust, was in the form consented to by the parties. That Order contained the following provision concerning the payment of the proceeds of settlement:

THIS COURT ORDERS that:

1. The settlement of this action is hereby approved on the following terms, namely, that:

(a) the Defendant shall pay the sum of \$21.5 million dollars to the Plaintiffs forthwith by paying those funds to Peter Grant & Associates, In Trust; ...

[3] The evidence submitted in connection with this motion establishes that the proceeds in settlement of the above Order were paid by the Defendant to the Plaintiffs in two instalments. The first instalment of \$10,750,000 was delivered to counsel for the Plaintiffs on July 3, 2009. The final instalment in the same amount was delivered to the Plaintiffs' counsel two weeks later. The Plaintiffs contend that they are entitled to post-judgment interest because these payments were not made "forthwith" as stipulated in the Order. The Defendant counters by saying that post-judgment interest is not owed because the proceeds were payable in furtherance of a settlement. The Defendant says that it is only where monies are payable in settlement of a "pecuniary judgment" that

s. 7(2) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 and s. 31.1(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 may operate to oblige the federal Crown to pay post-judgment interest.

[4] The Defendant may be correct that a final order of the Court in furtherance of the settlement of litigation may not constitute a pecuniary judgment as that term is used in the *Court Order Interest Act*, above. Indeed, in many settlements, the final order may only recite the fact of a settlement accompanied by a bare dismissal of the proceeding. Here, however, the Court was required to assess the reasonableness of the proposed settlement under Rule 114(4). In such a situation any settlement is conditional upon Court approval and the resulting order expresses the judgment of the Court. It is, therefore, a pecuniary judgment.

[5] The Defendant relies, as well, upon s. 30(1) of the *Crown Liability and Proceedings Act*, above, and Rule 474, the joint effect of which, it says, precludes any obligation to pay interest on a judgment until that stipulated process has been completed. These provisions, it says, effectively trump ss. 31.1(1) of that Act which obliges the federal Crown to pay post-judgment interest in accordance with provincial law. I do not agree. The purpose of s. 30 is to create a process for payment of a judgment as an alternative to execution which cannot be had against the Crown. There is no evidence before me that this was the process actually followed here by the Defendant and, in any event, it would take much clearer language to avoid the Defendant's clear obligation under ss. 31.1(1) to pay post-judgment interest in accordance with the *Court Order Interest Act*, above.

[6] In a representative proceeding the parties are, subject to the Court's approval, free to deal with the terms of payment including the issue of post-judgment interest. The Order that was agreed to by the parties in this case did address the issue of payment by requiring the Defendant to pay the sum of \$21.5 million to the Plaintiffs "forthwith". What I am left to resolve is the question of whether the payments made here were compliant with that term of the Order.

[7] The parties agree that the term "forthwith" allows for the lapse of some time in the settlement of the Order but they disagree rather sharply on whether the Defendant's payments were compliant. The Plaintiffs have cited authority which indicates that "forthwith" means "immediately". Other authority suggests that it means "within a reasonable time" having regard to the circumstances and that it does not mean "instantly". Many of the cases relied upon deal with criminal or contempt proceedings and, therefore, seem somewhat inapt. In this context, I believe that the parties would have expected some delay in the settlement of my Order. Unlike a casualty insurer, the federal government is not in the usual business of settling lawsuits. Having regard to the administrative requirements for accessing public funds, I believe that the Order contemplated at least the amount of time that the Defendant took to make its first payment to the Plaintiffs' counsel. No explanation has been provided as to why it was necessary for the Defendant to fulfill its obligation in two tranches with the second payment being made two weeks after the first. In the absence of some explanation, the only reasonable inference to be drawn is that the Defendant had the capacity to fully settle the Order on July 3, 2009. In the two weeks that followed, the Defendant had the benefit of these funds and the Plaintiffs were correspondingly deprived. In the result, the

Plaintiffs are entitled to post-judgment interest in accordance with the *Court Order Interest Act*, above, on the sum of \$10,750,000 from July 3, 2009 to July 17, 2009.

[8] The costs of this motion in the amount of \$1,500.00 inclusive of disbursements shall be payable by the Defendant to the Plaintiffs.

ORDER

THIS COURT ORDERS that the Plaintiffs are entitled to post-judgment interest in accordance with the *Court Order Interest Act*, above, on the sum of \$10,750,000 from July 3, 2009 to July 17, 2009.

THIS COURT FURTHER ORDERS that costs of this motion in the amount of \$1,500.00 inclusive of disbursements shall be payable by the Defendant to the Plaintiffs.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-363-85

STYLE OF CAUSE: Joseph et al.
v.
HMTQ

MOTION BY TELECONFERENCE

DATE OF HEARING: August 4, 2009

**REASONS FOR ORDER
AND ORDER BY:** Mr. Justice Barnes

DATED: September 11, 2009

APPEARANCES:

Jeff Huberman
(Peter Grant & Associates)
604.685.1229

FOR THE PLAINTIFFS

Erin Tully
(DOJ Vancouver BC)
604.666.8530

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Peter Grant & Associates
Vancouver, BC

FOR THE PLAINTIFF

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE DEFENDANT