IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chandi v. Atwell,*
2013 BCSC 830

Date: 20130513
Docket: M055601
Registry: Vancouver

Between:

Arshdeep Chandi, by his father and guardian ad litem, Jaswinder Chandi

Plaintiff

And

Ebenezer Garvey Atwell, Harjinder Dhanju, Harjit Kaur Chandi, Mandy Hoi Man Chung and Chun Hang Wu

Defendants

- And -

Docket: M90170
Registry: New Westminster

Between:

Robert E. MacKenzie

Plaintiff

And

John J. Rogalasky

Defendant

Before: The Honourable Mr. Justice Savage

On appeal from: Supreme Court Judgments dated November 4, 2011 and January 17, 2012 (2011 BCSC 1498, M055601; 2012 BCSC 156, M90170)

Corrected Judgment: The text of the judgment was corrected on the second page on May 16, 2013.

Reasons for Judgment

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Place and Date of Trial/Hearing:	Vancouver, B.C. April 17 and 18, 2013
Place and Date of Judgment:	Vancouver, B.C. May 13, 2013

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I. Introduction

[1] In this matter, two appeals from decisions of registrars were heard together by agreement. Both cases involve the issue of whether interest charges incurred by a litigant in the course of litigation can be recovered as disbursements at a taxation of costs.

[2] In *Chandi v. Atwell*, 2011 BCSC 1498, District Registrar Cameron held that "disbursement interest" was recoverable, based on a consent order that allowed "taxable costs and disbursements." The learned registrar found himself bound to allow disbursement interest by *Milne v. Clarke*, 2010 BCSC 317, 7 B.C.L.R. (5th) 382, but restricted recovery to an amount based on prevailing rates under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*], known as the "registrar's rate". Counsel for the defendant in *Chandi* conceded before District Registrar Cameron that *Milne* applied to that case.

[3] In *MacKenzie v. Rogalasky*, 2012 BCSC 156, at a taxation following trial, Registrar Sainty considered the same authorities as District Registrar Cameron but held that the statements in *Milne* by which Registrar Cameron and counsel in *Chandi* felt bound were *obiter dicta*. Further, Registrar Sainty found that the court in *Milne* did not consider the impact of the *COIA*. In the result, the learned registrar declined to follow the previous decision of this court in *Milne*, and disallowed interest incurred on a loan to fund disbursements.

[4] In *Chandi,* the plaintiff appeals the amount of interest allowed, saying that an assessment of the amount of interest that is recoverable should at least start by considering the interest rate actually paid by the litigant. The defendant, with leave, argues that the legal concession made before District Registrar Cameron was wrongly made, and that no disbursement interest should have been allowed at all.

[5] In *MacKenzie,* the plaintiff appeals saying that disbursement interest should have been allowed at the rate actually paid by the plaintiff. The plaintiff says that this court is bound by comity and the principles enunciated in *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590 (B.C.S.C.), to follow the previous decision of this court in *Milne*.

The defendant says the decision of the registrar in *Mackenzie* is in accord with legal principles of considerable antiquity, and accords with a proper interpretation of the *COIA*. In the defendant's view, the registrar properly distinguished *Milne*.

II. Background Facts

A. *Chandi v. Atwell*

[6] In *Chandi,* the five-year-old infant plaintiff was injured in a motor vehicle accident that occurred on July 10, 2004. He was a lap-belted passenger in a motor vehicle that was broad-sided by another vehicle while in the midst of a left turn.

[7] The infant plaintiff lived in his grandparents' home with his parents and brother and sister, and was going to start elementary school in the fall. The grandparents were elderly and had long been retired.

[8] The infant plaintiff's parents were both passengers in the motor vehicle and were also injured in the accident. The infant plaintiff's father, an immigrant from India, was a taxi driver. He had lost an arm prior to the accident. He had to be cut out of the vehicle with the "Jaws of Life" and was hospitalized for seven days. Prior to the accident, he was able to use a myoelectric prosthesis as well as cosmetic hand prosthesis. Since the accident, he has not been able to return to work and is on CPP disability.

[9] Prior to the accident, the infant plaintiff's mother had worked inside and outside the home. At the time of the accident she was a line cook. She was injured in the accident and was off work for seven to eight months. Her income from 2001 to 2006 ranged from between $6,000 to $13,000 before taxes.

[10] Given the injuries to the other occupants of the vehicle, policy limits were engaged.

[11] The infant plaintiff's main symptoms were psychological, behavioral and cognitive. He was diagnosed with post-traumatic stress disorder and major

depression. There was conflicting evidence over whether the infant plaintiff suffered brain injury.

[12] The treating psychiatrist and head of the Department of Psychiatry at BC Children's Hospital recommended weekly psychotherapy provided by a psychiatrist, child psychologist or mental health team. The trial was set for 15 days but settled after mediation on April 20, 2010, for $900,000 new money, plus taxable costs and disbursements. An advance in the amount of $10,000 was negotiated at the mediation for immediate treatment purposes.

[13] As an infant, the settlement had to be approved by this court. The Public Guardian and Trustee approved the settlement on September 27, 2010. The British Columbia Supreme Court approved the settlement by an order made after application on February 8, 2011. A copy of the order is attached as Schedule "A". The order says:

> 1. The infant Arshdeep Chandi's settlement of his claim be approved for the sum of $900,000 new money, plus $23,801.09 old money, taxable costs and disbursements.

[14] The interest claimed by the plaintiff for funding disbursements, as set out in the bill of costs, is $2,859.71 to the law firm (the "Law Firm") and $25,668.92 to a third-party lender (the "Third-Party Lender"). The plaintiff claimed that the interest he incurred in the course of obtaining disbursements was recoverable as a "taxable cost" under the settlement agreement. In preparing for litigation, the plaintiff incurred disbursements in order to obtain necessary evidence on liability, the extent of injuries, and the quantification of damages. As the plaintiff and his family were of limited means, they required assistance in order to fund the disbursements.

[15] The contingency fee agreement with the Law Firm provided for a fee of 30%, but that was unilaterally reduced by the firm to 20%. Under the agreement, the plaintiff was responsible for disbursements and any interest on those disbursements. The Law Firm charged 10% interest on the disbursements it paid for on behalf of the

plaintiff. The Third-Party Lender charged interest of the greater of 12% or prime plus 7.5%.

[16] The plaintiff's written argument included a lengthy section on disbursement funding options. This sets out detailed information on the Law Firm, the Third-Party Lender, and the commercial and legal environment in which disbursement lending takes place.

[17] The learned registrar did not comment or review this information on disbursement funding options, in the light of his view that interest should be allowed only at the registrar's rate. Attached as Schedule "B" to the decision are paragraphs 40-62 of the plaintiff's written submissions, which set out his summary of disbursement funding options.

B. *MacKenzie v. Rogalasky*

[18] In *MacKenzie,* the plaintiff was injured when the defendant struck the plaintiff's vehicle. Mr. MacKenzie was proceeding southbound through the intersection of Burrard St. and Georgia St. in Vancouver, British Columbia, when Mr. Rogalasky, who was in the northbound lane, turned left across the southbound lane of traffic and struck Mr. MacKenzie's vehicle.

[19] Mr. MacKenzie suffered soft tissue injuries to his neck, shoulders and back as a result of the accident, and later developed chronic myofascial pain syndrome. He was unable to work for a period of time after the accident.

[20] Due to his chronic pain, Mr. MacKenzie left his position as a head chef at a restaurant in White Rock, where he earned a net income of around $45,000 per year. He eventually found less physically demanding work, but at a reduced level of pay.

[21] At trial, the defendant admitted liability but disputed causation, arguing that the accident was not the cause of Mr. MacKenzie's chronic pain. To answer this argument, Mr. MacKenzie obtained evidence from a chronic pain expert.

[22] However, due to his income loss, Mr. MacKenzie could not afford to pay for the expert reports and other trial expenses. He did not qualify for a loan from a bank or a similar institution, and his credit cards were maxed out. He had already borrowed from his family. The only source of funding available to him was a loan from Lexfund Management Inc. ("Lexfund"), a specialized disbursement lender.

[23] Mr. MacKenzie obtained the loan from Lexfund on November 26, 2009, only two months before trial. The loan was for $25,000, plus a $1,250 underwriting fee, for a total of $26,250. Under the terms of the loan, Mr. MacKenzie could only use the funds to pay disbursements incurred in the course of litigation. The interest on the loan was 2% compounded monthly, representing an effective annual rate of 26.82%. The loan was secured by any proceeds of the litigation.

[24] The trial took place between January 18 and January 26, 2010. The court reserved its decision until January 19, 2011, when it found in favour of Mr. MacKenzie, awarding damages totalling $383,910.37, plus costs. The defendant appealed that judgment, but abandoned his appeal a few months later. The defendant paid costs to the plaintiff, exclusive of the interest on the loan, on April 6, 2011, at which time Mr. MacKenzie repaid the loan, plus interest.

[25] Between the time the loan was taken out (November 26, 2009) until the time it was paid (April 6, 2011), the loan accrued $11,324.71 in interest. Mr. MacKenzie seeks to have the defendant pay this interest charge, as he claims it was a disbursement incurred in the course of litigation.

III. Discussion and Analysis

[26] The plaintiffs in both cases say that on a proper analysis and an application of the rule of comity in *Re Hansard Spruce Mills Ltd*, I should follow the decision of Burnyeat J. in *Milne*. In any event, the plaintiffs say, *Milne* was correctly decided.

[27] The defendants in both cases say that the analysis of Burnyeat J. is *obiter dicta*, and if not, it should not be followed as it is against authority and contrary to statute. In my opinion, the only authority by a judge in this court that is arguably on

point is that of Burnyeat J. The decision has an interesting history that deserves comment.

A. *Milne v. Clarke*

[28] In *Milne,* the plaintiff was injured in an automobile accident. Following the injury, the plaintiff had three M.R.I. examinations over three years. An account was rendered to the solicitor for the M.R.I. examinations, which included interest on the unpaid balances. The account was paid.

[29] The action was settled for an agreed sum, plus costs. The matter of costs was referred to the registrar, who ruled that the interest component of the M.R.I. account could not be recovered as part of a cost assessment. The appeal came to the Supreme Court as an appeal of the decision of a master sitting as a registrar of the court.

[30] Mr. Justice Burnyeat considered various decisions of registrars and masters, which were in apparent conflict. He considered: *McCreight v. Currie*, 2008 BCSC 1751 (Registrar) (imaging scans plus overdue interest); *Sovani v. Jin* (April 25, 2006), Vancouver Registry No. B981465 (S.C. (Registrar)) (interests costs charged by counsel); *Greene v. Troje* (October 31, 1991), Courtenay Registry No. 86009 (S.C. (Master)) (interest charged by a service provider); *Moore v. Dhillon*, [1992] B.C.J. No. 3055 (S.C. (Master)) (interest charged by counsel); and *Hudniuk v. Warkentin,* 2002 BCSC 1939 (oral ruling by Pitfield J. on interest as a head of damages).

[31] In *Milne,* the court adopted the reasons in *McCreight,* which were quoted as:

> The plaintiff really had no choice but to pay the interest given that she did not have the funds to be retaining experts and paying for their reports up front. I suppose the defendant's choice was that the defendant could have offered to pay for the report up front once it was disclosed to him, but no offer was forthcoming. Given this was the only way to finance the obtaining of a report, I find this to be a reasonable expense and I will allow it.
>
> *McCreight* at para. 51.

[32] Mr. Justice Burnyeat held as follows:

> [7] In support of the application, it is said that Mr. Milne had no means of paying for the required M.R.I. scans other than to borrow money from the provider and that, since the cost of the M.R.I. had already been agreed upon, so too should the interest on the unpaid accounts rendered by the provider of the M.R.I. images. Here, it is the provider of the M.R.I. and not counsel for Mr. Milne who is charging the interest on the invoices.
>
> [8] I find that the Learned Registrar erred in principle. The December 29, 2009 decision was clearly wrong. First, even if the Learned Registrar was not bound by the decision in *McCreight*, I am not bound by the decision reached by the Learned Registrar herein. I am satisfied that the statement set out in *McCreight* accurately represents the law in British Columbia. Second, the decision in *Hudniuk* relates to the question of whether disbursement interest is a head of damage and not to the question of whether it is recoverable as costs on an assessment.
>
> [9] The law in British Columbia is that interest charged by a provider of services where the disbursement has been paid by counsel for a party is recoverable as is the disbursement. The interest charge flows from the necessity of the litigation. If the disbursement itself can be assessed as an appropriate disbursement, so also can the interest owing as a result of the failure or inability of a party to pay for the service provided. In order to obtain the M.R.I., it was necessary to pay not only the $975.00 cost but also the interest on any unpaid balances that were not paid immediately. The cost plus interest was the cost of obtaining the M.R.I. The claim for interest should have been allowed.

[33] An appeal was taken to the Court of Appeal. Leave was granted by Frankel J.A., although his reasons were not provided to me. In *Milne v. Clarke*, 2011 BCCA 322 at para. 1, 339 D.L.R. (4th) 21, the Court of Appeal noted that leave to appeal was granted on the single issue of whether interest or carrying charges on a disbursement are a recoverable item under Rule 57(4) of the *Supreme Court Civil Rules,* which is now Rule 14-1(5). At para. 2, the Court of Appeal said:

> [2] For the reasons that follow, and having had the opportunity to explore this appeal in greater detail than did the chambers judge who gave leave, it is our view the record is not sufficiently developed to admit an answer different from that given by the judge. Further, the issue on which leave was granted is not the issue now before us. We therefore decline to interfere with the order appealed.

[34] That was because, on appeal, the appellants applied for and were granted an order to adduce fresh evidence. That evidence concerned the terms of a settlement

agreement. The settlement agreement was not before Burnyeat J. or Frankel J.A. on the leave application. The Court of Appeal said:

> [11] At the hearing of this appeal the appellants applied for and were granted an order permitting them to adduce as fresh evidence the offer to settle which established the terms of the settlement agreement. This evidence was necessary to complete the record, is relevant in the sense that it bears upon a decisive issue in the case, and could be expected to have affected the result in the Supreme Court of British Columbia.
>
> [12] The appellants raise three grounds of appeal. They contend:
>
> 1. the interest charge was contrary to the term of the settlement agreement that provided the amount paid should include court order interest;
>
> 2. the judge erred in concluding interest on a disbursement is recoverable under Rule 57(4); and
>
> 3. in the alternative, the judge erred in awarding interest in the circumstances of this case.
>
> [13] There is, as Mr. Justice Frankel observed, divergent authority on the recoverability of interest on disbursements under Rule 57(4) (now Rule 14-1(15)). There may be different answers to that question depending upon the circumstances of the charge, the time and purpose for which the charge was incurred, and the circumstances that caused counsel to pay the bill, but this must be a question for another case. It is clear from the fresh evidence that in this case the recoverability of the interest paid by counsel requires an interpretation of the settlement agreement. One question is whether the amount in issue is properly characterized as a claim for special damages rather than disbursement, and is thus captured within the agreed sum. Another question is whether, on a correct interpretation of the settlement agreement, the amount in issue is recoverable as "a necessary and reasonable disbursement". The judge, having been presented with the case as an application of Rule 57(4), did not deal with either of these issues.
>
> [14] To look at it another way, it was intended that this appeal would be concerned with the recoverability of interest as a disbursement under Rule 57(4). On the material before us, the case turns on the characterization of the charge as a disbursement or special damages, and the interpretation of several terms of the settlement agreement, on only one of which the law on Rule 57(4) might be a reference point, and even there is not directly engaged.
>
> [15] In our view this is not the right case to address the issue raised in the leave application. While that issue is of interest to the profession, its answer must await a case that directly engages the rule, in the context of a proper factual matrix rather than a hypothetical.

B. *Re Hansard Spruce Mills*

[35] In *Re Hansard Spruce Mills*, Wilson J., as he then was, was asked to give a ruling that was at direct variance with the ruling of a fellow judge of the Supreme Court. In refusing to contradict the ruling of a judge of the same court, Wilson J. said:

> The Court of Appeal, by overriding itself in *Bell v. Klein*, has settled the law. But I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.
>
> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:
>
> > (a) Subsequent decisions have affected the validity of the impugned judgment;
> >
> > (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
> >
> > (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.
>
> *Re Hansard Spruce Mills* at 592.

[36] *Re Hansard Spruce Mills* has been cited in over 460 cases (and counting). It has a lengthy history of application in British Columbia courts and has been described as the "dominant approach" to judicial comity in Canada: Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man. L.J. 135 at 160.

[37] In this case, the defendants make three arguments that bear on the *Re Hansard Spruce Mills* analysis. First, they argue that the aspects of Burnyeat J.'s decision that relate to Rule 14-1(5) were *obiter dicta*. Second, they argue that the facts in *Milne* are distinguishable. Third, they argue that *Milne* was decided *per incuriam*. I will deal with these arguments *ad seriatum*.

1. Is the reasoning in Milne obiter dicta?

[38] The defendants say that Burnyeat J.'s reasons with respect to Rule 57(4) were *obiter dicta* because *Milne* should properly have been resolved with reference to the terms of a settlement agreement.

[39] In *Milne,* the terms of the settlement were not before Master Tokarek, who approached the issue as an assessment under Rule 57(4). Master Tokarek held that the interest on the unpaid MRIs was not recoverable as a disbursement. When the matter came before Burnyeat J., just as before Master Tokarek, the terms of the settlement were not in evidence. The matter was addressed only under Rule 57(4).

[40] In *MacKenzie,* the registrar held that the decision in *Milne* was *obiter dicta*. I do not see how the emergence of new evidence on appeal is capable of transforming the *ratio decidendi* in the court below to *obiter dicta*. It is clear that the Court of Appeal did not overturn Burnyeat J.'s decision. In dismissing the appeal, the Court of Appeal said that "the record is not sufficiently developed to admit an answer different from that given by the judge". The appeal was dismissed. Justice Burnyeat's impugned reasons were central to his decision, and that decision was not disturbed on appeal.

2. Are the facts in Milne distinguishable?

[41] *Milne* can arguably be distinguished from *Chandi* and *MacKenzie* in two respects. First, *Milne* was decided in the context of a settlement agreement rather than in the context of a costs order, while *MacKenzie* was decided in the context of a cost assessment after trial. Second, *Milne* featured interest charged by a service-provider, while *Chandi* and *MacKenzie* features interest charged by third-party financiers and by a solicitor.

[42] I do not see how it can be argued that Burnyeat J.'s decision was decided in the context of a settlement agreement rather than in the context of a costs order. Both Master Tokarek and Burnyeat J. decided the issues in the context of the application of Rule 57(4). That decision was upheld, not set aside.

[43] The second argument is that in the cases before me, interest was charged by third-party financiers (or solicitors) as opposed to service providers. If interest on a disbursement can be properly recoverable as a disbursement, I cannot see why it should make a difference as a matter of principle whether the interest is charged by the service provider directly, by a third-party financier, or by a solicitor.

[44] Mr. Justice Burnyeat's reasons apply with equal force whether the interest charged is paid to a financier, a service provider, or a solicitor. In all of these cases, the interest charged must have been necessarily or properly incurred in the conduct of the proceeding. The registrar may then "allow a reasonable amount for those disbursements". Provided that the interest payment is a reasonable amount, it is recoverable whether it is charged by a service-provider, a financier, or a solicitor.

3. Is the decision in Milne made per incuriam?

[45] The defendants argue that *Milne* was decided *per incuriam*. As Levine J.A. stated in *United Brotherhood of Carpenters and Joiners of America, Locals 527, 1370, 1598, 1907 and 2397 v. Labour Relations Board*, 2006 BCCA 364, 272 D.L.R. (4th) 253,

> [25] The *per incuriam* rule is another example of circumstances in which the Court may decline to follow a previous decision. The rule is described as follows in *Black's Law Dictionary*, 8th ed., *s.v.* "*per incuriam*":
>
> > "As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J.W. Harris, *Precedent in English Law* 149 (4th ed. 1991).

[46] In this case the defendants argue that in *Milne*, this court failed to consider both relevant statutory authority, binding case law, and other persuasive authority. The relevant statutory authority is the *COIA* and the binding case law concerns principles of statutory interpretation and principles relating to costs and interest.

i. Court Order Interest Act

[47] Regarding the *COIA*, the defendants argue that it is a statutory bar on the awarding of interest on costs. While Burnyeat J. did not make direct reference to the *COIA*, he did refer to the case of *Moore*. The defendant in *Moore* made an argument very similar to the one made by the defendants in this case:

> 437 In Mr. Dunn's submission, the law in this province expressly prohibits the recovery of interest on disbursements. Disbursements, he said, are included in the notion of "costs". He referred me to Section 2 (c) of the Court Order Interest Act, R.S.B.C. 1979 Chapter 76:
>
> The court shall not award interest . . . on costs."

[48] Master Wilson did not accept this argument, although he did not find it necessary to decide the case on that basis:

> 440 I am not entirely persuaded by Mr. Dunn that the provisions of the Court Order Interest Act are a complete answer to Mr. Cope's argument. It may be a matter of characterization, or semantics, but it seems to me that Section 1 of the Court Order Interest Act mandates the addition of an interest component to a pecuniary judgment granted by the court. Section 2 of the Act prohibits the addition of that interest component to, among other things, costs. But Mr. Cope is not asking me to add an interest component, (which as a matter of jurisdiction I could not do as an assessing officer in any event), to the plaintiff's costs; but rather, to allow recovery of an outlay, which he contends is an "expense", necessarily incurred in the conduct of the proceeding. They may be the same. But I prefer to rest my determination of this item on the following considerations

[49] Even if Burnyeat J. had not considered *Moore*, Master Wilson's analysis is attractive. The court is not being asked to add an interest component to a cost award by way of the *COIA*. Instead, it is being asked to consider whether the definition of "disbursements" can include interest payments incurred in the course of litigation. If the definition of "disbursements" includes interest payments, then the court would not be using the *COIA* to add an interest component to an award of costs.

[50] Although not cited in argument, I referred counsel to the reasoning of the Court of Appeal in *Morriss v. British Columbia*, 2007 BCCA 337, 281 D.L.R. (4th) 702. In *Morriss*, the Court of Appeal was asked to include compound interest in an award for compensation in the context of a non-statutory expropriation.

[51] The defendant argued that compound interest could not be awarded because the *COIA* prohibits the award of interest on interest (i.e., compound interest). Notably, the same section of the *COIA* that refers to compound interest also refers to interest on costs:

> 2 The court must not award interest under section 1
>
> ...
>
> (c) on interest or on costs,

[52] Mr. Justice Chiasson held that the *COIA* was not engaged because the award of compound interest formed part of the compensation for expropriation. In other words, the Court was not being asked to use the *COIA* to include an interest component to the plaintiff's compensation, but was being asked instead whether the compensation itself included compound interest:

> [22] ... in this case, on the authority of *Richland*, interest is to be included in the court's "pecuniary judgment". In this case, the *Court Order Interest Act* is not engaged in the determination of compensation, the "pecuniary judgment" of the court. There is no statutory prohibition against compound interest. The issue is whether, as a matter of law, compensation for a compulsory taking includes compound interest. To similar effect is the comment of Taylor J. in *Hougen v. British Columbia (Minister of Highways)* (1984), 58 B.C.L.R. 306 (S.C.):
>
> > . . . Such interest is not in the nature simply of pre-judgment (or pre-award) interest, but is a measure of compensation payable in respect of the loss of possession and title prior to payment of purchase money.
> >
> > . . .
> >
> > Section 2(c) of the *Court Order Interest Act* says there shall be no prejudgment interest on interest, but I do not think this is a bar to an award in the present case. Since compensation for deprivation of title and possession, even if calculated by reference to interest rates, is not in itself an award of interest, such compensation ... may properly be regarded as a principal sum which becomes due at the date of abandonment of the taking.
>
> [Emphasis added.]

[53] The same logic is apposite here. The court is not being asked to use the *COIA* to add an interest component to an award of costs. Instead, the court is being asked whether, as a matter of law, "disbursements" under the *Supreme Court Civil*

Rules can include interest payments. Thus the *COIA* is not engaged for the same reason it was not engaged in *Morriss*.

[54] In the result, with respect to the *COIA,* I am not persuaded that *Milne* was decided *per incuriam* for two reasons: Burnyeat J. would reasonably have considered that statute when he considered *Moore*, and, even if he had not, the *COIA* is not engaged in this case, so the failure to consider it makes no difference to the outcome.

ii. Principles of Statutory Interpretation

[55] The principles cited by the defendants include very broad principles of interpretation, such as the principle that a statute must be read in its entire context harmoniously with the legislative scheme, the object of the scheme, and the intention of the legislature. This is now known as the "modern principle".

[56] In 1974, Elmer Driedger described this approach in *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67 as "the only one principle or approach" to the interpretation of statutes. The modern principle has been cited and relied on in innumerable decisions, and declared to be the preferred approach by the Supreme Court of Canada: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at 41, 154 D.L.R. (4th) 193; and *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 at para 26, [2002] 2 S.C.R. 559.

[57] I do not think it open to argue that the principle of judicial comity enunciated in *Re Hansard Spruce Mills* should fall on the presumed ignorance by the court of such fundamental principles. Finding fault in failing to mention agreed-upon law would elevate the *per incuriam* exception from application in the "rarest of cases" to such a common place event as to eviscerate judicial comity, *stare decisis* or even the rule of law. In my view, the learned Justice in *Milne* can be assumed to have considered these basic legal principles, and there was no need for him to cite them expressly. In any event, there is nothing in his analysis that demonstrates such error.

[58] It is apparent that the Court in *Milne* considered the term "disbursement" to be a general term of broad signification, as all counsel agreed here. The *Supreme Court Civil Rules* require that all such disbursements be directly related to the litigation, and then only recoverable if necessary or properly incurred. The registrar may then "allow a reasonable amount for those disbursements". I see no error in that approach.

iii. Other Authority

[59] The defendants argue that Burnyeat J. failed to consider a number of cases relating to the court's jurisdiction to award interest, and that therefore his judgment was rendered *per incuriam*. Those cases, say the defendants, illustrate a general aversion of the common law towards interest in general, and towards interest on costs in particular.

[60] The cases include a number of British cases, including: *Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd. (No. 2),* [1997] UKHL 53, [1998] 1 All E.R. 305 (H.L. (E.)); *Hunt v. R. M. Douglas (Roofing) Ltd.* (1998), [1990] 1 A.C. 398 (H.L. (E.)); *Powell v. Hereforshire Health Authority*, [2002] EWCA Civ 1786, [2003] 3 All. E.R. 253; and *Fattal v. Walbrook Trustees (Jersey Ltd.)*, [2009] EWHC 1674, [2009] 4 Costs L.R. 591 (Ch).

[61] The defendants also cite a number of cases from Alberta, including: *Do v. Sheffer*, 2010 ABQB 422, 495 A.R. 107; *Davidson v. Patten*, 2005 ABQB 519, 381 A.R. 1; *MacCabe v. Westlock Roman Catholic Separate School District No. 110*, 1999 ABQB 666, [1999] 10 W.W.R. 461; and *321665 Alberta Ltd. v. ExxonMobil Canada Ltd.,* 2012 ABQB 76, [2012] 9 W.W.R. 348.

[62] There is also case law from the federal courts: *Dillingham Corp. of Canada v. The "Shinyu Maru"*, [1980] 1 F.C. 303 (T.D.); and *Capitol Life Insurance Co. v. Canada,* 87 N.R. 153, [1988] 2 C.T.C. 101 (F.C.A).

[63] On the other hand the plaintiffs referred to other authorities, including: *Bourgoin v. Ouellette* (2009), 343 N.B.R. (2d) 58 (Q.B. (T.D.)); *Herbert v. City of*

Brantford, 2010 ONSC 6528, aff'd in part 2012 ONCA 98, 93 M.P.L.R. (4th) 178; *Basi v. Atwal* (December 6, 2010), Vancouver Registry No. M070135 (S.C. (Registrar)); and *LeBlanc v. Doucett*, 2012 NBCA 88, 394 N.B.R. (2d) 228, which is a recent decision of the New Brunswick Court of Appeal on a similar issue.

[64] Chief Justice Drapeau in *LeBlanc* was required to interpret parallel provisions in the New Brunswick *Rules of Court*. The Court found that the cost of loans was a reimbursable expense, noting that "there is every reason for satisfaction with the resulting regime, one that contributes significantly to improving access to justice for the citizens of our province": *Leblanc* at para. 6.

[65] In doing so, Chief Justice Drapeau expressly applied the "modern principle" of statutory interpretation (*Leblanc* at para. 25) and the statutory interpretative and common law interpretive aid that a statute should be construed as "always speaking," allowing a court to make orders which are "just in the specific circumstances, and in light of contemporary standards": *Leblanc* at para. 33, citing McLachlin, J., now Chief Justice of Canada, in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 814-815, 116 D.L.R. (4th) 193.

[66] Interestingly, Tysoe J., as he then was, in *Re Yewdale* (1995), 121 D.L.R. (4th) 521 at paras. 25-26, 1 B.C.L.R. (3d) 119 (S.C.), held that one of the circumstances in which he might decline to follow the reasons of a fellow judge of this court was where an appellate decision in another Canadian jurisdiction impugned the validity of the earlier judgment, although the interpretation in that case concerned a federal statute, the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. That reasoning appears to have been applied by Shaw J. in *Mason v. Mason* (1988), 31 B.C.L.R. (2d) 92 at 112-113, outside the context of the interpretation of federal legislation (gross up expected taxes in an award for the cost of future care). Of course *Leblanc* supports *Milne*.

[67] In any event, all of these cases regarding interest herald from other jurisdictions. As such, they are persuasive at best. The fact that Burnyeat J. may not have referred to every case from every jurisdiction that might bear on this issue

cannot constitute a failure to consider "binding authority in case law" sufficient to allow the court to conclude that *Milne* was decided *per incuriam*, as none of these cases was binding on him.

[68] The defendants also referred the Court to some general statements in the decision of the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38. I note that these general comments refer to advance funding of an opponent's claim, and that the statements are explicitly made "subject to post-litigation costs awards" (*Little Sisters* at paras. 82 and 103), precisely what is at issue in this case.

[69] By contrast, Burnyeat J. did consider the relevant authorities from British Columbia, none of which were binding upon him: *Moore*; *McCreight; Greene; Sovani;* and *Hudniuk*.

[70] To the extent that Burnyeat J. preferred the reasoning in *McCreight* to the reasoning in the other cases, I note that of these cases, only *Hudniuk* was from a fellow judge. *Hudniuk* is *obiter dicta* in an oral ruling delivered to counsel while considering a jury charge. When confronted by conflicting decisions from masters and registrars and *obiter dicta* from a fellow judge in an oral ruling that was at best *nisi prius*, Burnyeat J. was bound to decide the correct interpretation according to his best lights, which he did: *R. v. Pereira,* 2007 BCSC 472 at para. 48, citing *Young v. Bristol Aeroplane Co.,* [1944] 2 All E.R. 293 (C.A.).

[71] In the result, judicial comity persuades me that I should follow the decision in *Milne*. There is nothing in the interests of justice that persuades me to exercise my discretion to depart from this practice.

IV. Ancillary Matters

[72] In *Chandi,* the Court accepted that interest was recoverable, but restricted its amount to the registrar's rate. The defendants in their alternate submissions agree that if interest is recoverable as a disbursement, it should be recoverable on the registrar's rate, arguing for certainty and predictability.

[73] In my opinion, the registrar in *Chandi* fell into error. By applying the registrar's rate in all circumstances, the registrar applied a formula without considering specific circumstances. Surely the use of the terms "necessary", "properly" and "reasonable" in Rule 14-1(5) requires a weighing of circumstances as opposed to a formulaic approach. In my view, the courts and its judicial officers are singularly well-equipped to fashion remedial measures that consider the particular situation of the parties and the constellation of circumstances that may arise.

[74] The plaintiffs, on the other hand, suggest that there should be a presumption that the interest paid by a litigant is the appropriate rate. I do not think it is appropriate to saddle litigants with presumptions in this area. The rule says "a reasonable amount". In my view, a party seeking to obtain reimbursement for interest as a disbursement must establish that it falls within the rule. That said, in determining reasonableness, the registrar must consider the entire context.

[75] I do not consider this one of those exceptional cases where the court should exercise its inherent jurisdiction and set the amount: see *Buchan v. Moss Management Inc.*, 2010 BCCA 393, 9 B.C.L.R. (5th) 276 at paras. 13 and 30. In the result, in the *Chandi* matter I would refer the matter of the appropriate rate back to the registrar.

[76] In *MacKenzie,* the registrar disallowed interest altogether as an allowable disbursement. The registrar therefore made no findings on whether the interest had been necessarily or properly incurred, and therefore did not consider what would be a reasonable amount.

[77] As I understand the submissions before me, the defendants do not take issue with the necessity or propriety of the loans and accompanying interest, but only their reasonableness, although I may be wrong on that. In any event, I would refer the matters back to the registrars to make the appropriate determination or determinations on the record before them.

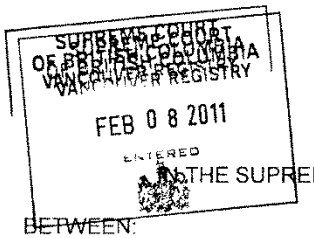
V. Orders

[78] The plaintiffs' appeals in *Chandi* and *MacKenzie* are allowed in part. The defendants' appeal in *Chandi* is dismissed.

[79] Unless there is a matter of which I am unaware, the plaintiffs in these actions shall have their costs at scale B.

"The Honourable Mr. Justice Savage"

Schedule "A"



NO. M055601
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ARSHDEEP CHANDI, by his father and guardian ad litem, JASWINDER CHANDI

PLAINTIFF

AND:

EBENEZER GARVEY ATWELL, HARJINDER DHANJU, HARJIT KAUR CHANDI, MANDY HOI MAN CHUNG and CHUN HANG WU

DEFENDANTS

ORDER MADE AFTER APPLICATION

BEFORE	THE HONOURABLE MR. JUSTICE LEASK	December 14, 2010

ON THE APPLICATION of the Plaintiff's Counsel:

[x] coming on for hearing at Vancouver, British Columbia, on December 14, 2010 and on hearing Arsen Krekovic, counsel for the Plaintiff;

[ ] without notice coming on hearing at *[specify]* on *[month, day, year]* and on hearing *[name of party/lawyer]*;

[ ] without a hearing and on reading the materials filed by *[name of party/lawyer]* and *[name of party/lawyer]*;

THIS COURT ORDERS that:

1. The infant Arshdeep Chandi's settlement of his claim be approved for the sum of $900,000.00 new money, plus $23,801.09 old money, taxable costs and disbursements.

2. That the settlement sum of $890,000, plus the remainder of $10,000 previously advanced, less agreed to and/or approved legal fees, disbursements and taxes, be paid in trust to The Canada Trust Company.

3. That until fees, disbursements and taxes are agreed to and/or approved, the settlement sum be placed in an interest-bearing trust account with Hoogbruin & Company.

4. That Arshdeep Chandi's trust fund be governed by the Arshdeep Singh Chandi Discretionary Trust Declaration, dated November 3, 2010, (the "Trust Declaration") (Affidavit #1 of Michael Hoogbruin, Exhibit 74).

5. That the fees charged for the administration of Arshdeep Chandi's trust fund follow the Canada Trust Company form of "Compensation Agreement", Schedule B to the Trust Declaration (Affidavit #1 of Michael Hoogbruin, Exhibit 80).

6. That the Honourable Justice Leask is seized of this matter.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT.

Signature of

[ ] party
[x] lawyer for the Plaintiff

Arsen Krekovic

By the Court

Registrar

Schedule "B"

40. The various potential disbursement funding options include: law firm financing, client financing, conventional bank or credit union financing, disbursement provider financing, companies specializing in funding disbursements, Coast Capital Credit Union ("Coast Capital"), or a private lender.

41. Funding disbursements through conventional banks and most credit unions is not practical given that they do not recognize personal injury files as security upon which to borrow, severely limiting the possible funds available to borrow.

42. Many law firms, including this Firm, cannot properly finance necessary disbursements on all their personal injury files. Many clients are living paycheque to paycheque prior to their injuries. After a car crash many are often so disabled as a result of their injuries that they cannot work, either for a protracted period of time or permanently. After a crash many have difficulty just making ends meet. They have difficulty making mortgage payments or rent, car payments, children's school expenses, putting food on the table, etc. The vast majority cannot afford to fund tens of thousands of dollars of disbursements. Many do not own homes and those that do own homes do not have much equity in the homes so they have limited means of borrowing to fund disbursements.

[Hoogbruin Affidavit #4, pages 2 - 8, paragraphs 3 - 27, page 20, paras. 83 -84, Exhibit 10, page 96, AR binder 2, tab 17]

43. Since funding disbursements through conventional banks and credit unions, Firm funding, and client funding are all not practical solutions, the remaining possibilities are disbursement provider financing, companies specializing in funding disbursements, Coast Capital, or a private lender.

44. In some instances a disbursement provider, such as an expert physician, may agree to examine the client, provide an expert report, render an account, and agree to wait for payment of the account until the conclusion of the case. The expert and the Firm would enter into an agreement that the expert would be entitled to interest from the date of the rendering of the account to the date of payment. The interest rate usually agreed upon is 10%. The only such disbursement providers on the Arshdeep Chandi file were Associated Economic Consultants and Lex Specialis.

45. Canadian companies specializing in lending money to lawyers or their clients to fund disbursements include: BridgePoint Financial Services Inc., Rhino Legal Finance Inc., and Seahold Investments Inc.

46. BridgePoint Financial Services Inc. has approximately 450 law firms across Canada using their financing services and Seahold Investments Inc. have over

200 law firms accessing their financing services, mostly in New Brunswick, Ontario and British Columbia.

47. BridgePoint Financial Services Inc., Rhino Legal Finance Inc., and Seahold Investments Inc. charge effective annual interest rates varying from 18.8% to 44.2%. Interest rates tend to be higher when the loan is nonrecourse and when the loan is directly to the crash victim as opposed to the law firm.

[Hoogbruin Affidavit #4, pages 9 - 10, paragraphs 36 - 39, Exhibit 1, page 1; Exhibit 2, page 4, AR binder 2, tab 17]

48. Coast Capital Credit Savings Credit Union ["Coast Capital"] was unique among banks and credit unions in that it would lend money to lawyers giving some recognition to personal injury files as security for the loan. However, Coast Capital has recently advised they are terminating the disbursement funding program. The program is ending, in part, because it was not sufficiently profitable and tracking the loans was expensive and time-consuming. Prior to discontinuance of the program approximately 40 British Columbia law firms were accessing the program.

49. Prior to termination of the program, the Firm was provided an overall lending limit of $200,000 with a per file limit of $20,000. The Firm had to pledge its assets as security, and Michael Hoogbruin, the principal of the Firm, had to provide a personal guarantee.

50. The key terms of the Coast Capital Agreement are that the loan is recourse (ie. the Firm's assets and Michael Hoogbruin's assets secured the loan) with a maximum lending limit of $200,000 and a maximum per file loan limit of $20,000. The interest rate when the Firm first commenced borrowing from Coast Capital was 6% plus prime, or 12%, whichever was greater. Pursuant to the most recent Coast Capital Agreement the rate was changed to: " 1.08 "Loan Rate" shall mean such rate or rates as may be posted or advertised by the Credit Union from time to time as its disbursement funding program rate. The current rate Loan Rate is 8.25%."

51. The Firm tracked loans on each file to ensure that the maximum file loan limit was not exceeded. When a file was resolved, by settlement or judgment, the interest was paid to Coast Capital and the principal rolled into another file.

52. Almost immediately after the Firm starting borrowing from Coast Capital the Firm hit its lending limit, first when it was $100,000 and then when it was increased to $200,000. The loan limit proved to be woefully inadequate to fund all the disbursements incurred by the Firm on behalf of its clients. However, Coast Capital would not increase the lending limit to the Firm despite repeated requests.

[Hoogbruin Affidavit #4, pages 11 - 12, paragraphs 43 - 48, Exhibit 4, page 6, Exhibit 5, page 7, AR binder 2, tab 17; Affidavit Robert Dean #1, AR binder 2, tab 19]

53. A private lender, Sean Aylward, who knew of the Firm's desire to find a disbursement funding arrangement that was more suitable to the number of files the Firm had, offered to fund the Firm's disbursements. Initial discussions with Mr. Aylward occurred when the Coast Capital rate was 6% plus prime or 12%, whichever was greater. The original agreement and all subsequent agreements were modelled on the Coast Capital Agreement. The initial agreement between Mr. Alyward and the Firm with respect to interest on borrowed funds was as follows, compounded annually:

a) "1.09 "Loan Rate" shall mean the greater of 12% or the Prime Rate plus 7 ½%.

b) 1.10 "Prime Rate" means the annual rate of interest announced from time to time by the main branch of the Bank of Montreal in Toronto, Ontario as a reference rate then in effect for determining interest rates on Canadian dollar commercial loans in Canada."

54. Mr. Aylward required a right of first refusal on loans. In other words, because Coast Capital had a first charge on all firm assets and Mr. Hoogbruin's personal guarantee, he wanted to ensure that the Firm was not borrowing from Coast capital in priority to him. The original loan agreement was between the Firm and an estate controlled by Mr. Aylward. Subsequently the estate was replaced by 1420505 Ontario Inc., a company owned by Mr. Aylward.

55. The agreements between the entities controlled by Mr. Aylward and the Firm have been revised from time to time. At all material times until February 28, 2009, the applicable interest rate charged by Mr. Alyward's entities on the Arshdeep Chandi file was the greater of 12% or the Prime Rate plus 7 ½%, compounded annually. Since prime was relatively low throughout that time the rate was 12%. After March 1, 2011 the interest rate was increased to the greater of 13% or the Prime Rate plus 8 1/2%, compounded annually. Since prime was relatively low throughout that time the rate was 13%. The agreement provides for semi-annual compounding but Mr. Aylward has agreed on the Arshdeep Chandi case to annual compounding.

56. There is no profit component to the Firm in the interest charged by Coast Capital or 1420505 Ontario Inc. In fact, there is a significant cost to the Firm in administering the loans and in the loss of opportunity to borrow funds elsewhere because the Firm's security is pledged to Coast Capital and 1420505 Ontario Inc.

57. 1420505 Ontario Inc. required and obtained the Firm's assets as security, in addition to a personal guarantee from Mr. Hoogbruin.

58. Since borrowing from 1420505 Ontario Inc. [or its predecessor estate] and consistent with the agreements, the Firm has done virtually all of its disbursement financing through 1420505 Ontario Inc. [or its predecessor estate] and has not borrowed from Coast Capital unless on an emergency basis, for a short period of time, and always with the consent of 1420505 Ontario Inc. [or its predecessor estate]. It is for this reason that the disbursement interest charged by Coast Capital on the Arshdeep Chandi file is only $299.71.

59. Given that Mr. Hoogbruin had to provide personal guarantees and put up the Firm assets as collateral to both Coast Capital and 1420505 Ontario Inc., the rates charged by the companies could be seen as being artificially low because they are subsidized. The loans are guaranteed by the full faith and credit of the Firm and Mr. Hoogbruin. Without that collateral the Firm clients would likely be forced to borrow on terms significantly higher than being offered by Coast Capital or 1420505 Ontario Inc.

60. Of course, pledging the Firm and the personal full faith and credit of Mr. Hoogbruin to secure disbursement financing is a real cost to the Firm and to Mr. Hoogbruin in the sense that it ties up credit that might be used elsewhere.