COURT OF APPEAL FOR ONTARIO

CITATION: Solar Power Network Inc. v. ClearFlow Energy Finance Corp., 2018 ONCA 727
DATE: 20180904
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Sharpe, Brown and Trotter JJ.A.

BETWEEN

Solar Power Network Inc., Solar Power Network 005 Inc., SPN LP 3, SPN LP 10, SPN LP 12, SPN LP 14, SPN LP 15, SPN LP 16 and SPN LP 17

Respondents/Appellants by Cross-Appeal
(Applicants)

and

ClearFlow Energy Finance Corp.

Appellant/Respondent by Cross-Appeal
(Respondent)

Barry H. Bresner and Graham Splawski, for the appellant/respondent by cross-appeal

Simon Bieber and Nathaniel Read-Ellis, for the respondents/appellants by cross-appeal

Patricia D.S. Jackson and David Outerbridge, for the intervener, The Canadian Bankers' Association

Heard: June 20, 2018

On appeal from the judgment of Justice Thomas McEwen of the Superior Court of Justice, dated January 10, 2018, with reasons reported at 2018 ONSC 7286, 56 C.B.R. (6th) 37.

Sharpe J.A.:

INTRODUCTION

[1] This appeal concerns complex commercial agreements between two sophisticated parties. The appellant, ClearFlow Energy Finance Corp. ("ClearFlow") made a number of loans to the respondent, Solar Power Network Inc. and its affiliate companies ("Solar Power"). The loans were risky given the nature of Solar Power's renewable energy projects that ClearFlow was financing. Solar Power defaulted on the loans and disputed the amount of interest owing.

[2] At the core of the dispute is a term in the loan agreements requiring Solar Power to pay a "discount fee" of .003 percent of the outstanding loans on the repayment date and for every day thereafter while the loan remains outstanding. Solar Power contends that the discount fee fails to comply with the *Interest Act*, R.S.C. 1985 c. I-15, s. 4, which requires that any written agreement for the payment of interest at a rate or percentage per day, week, month or any period less than one year contain "an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent." Section 4 provides that where an agreement fails to comply with this requirement, "no interest exceeding the rate or percentage of five per cent per annum shall be chargeable".

[3] The application judge accepted Solar Power's arguments and held that ClearFlow was entitled only to interest at the rate of 5% per annum in total

despite the fact that the loan agreements provided for interest to accrue at 12% per annum before maturity, and 24% thereafter in addition to the .003% discount fee.

[4] ClearFlow appeals to this court, arguing that:

a) the “discount fee” is not interest;
b) in any event, the loan agreements contain an annualizing formula that satisfies s. 4;
c) Solar Power entered forbearance agreements acknowledging its indebtedness, and cannot now dispute the interest owing; and
d) in the alternative, the appropriate remedy is to limit the application of s. 4 to the discount fee rather than reduce the interest payable on the entire agreement to 5%.

[5] Solar Power cross-appeals the application judge’s finding that certain “administration fees” provided for in the loan agreements do not constitute interest within the meaning of the *Interest Act*, s. 4.

[6] For the following reasons, I conclude that the application judge did not err as to whether the administrative fees and the discount fee are interest. He did, however, err by finding that the discount fee contravenes the *Interest Act*, and by

holding that all interest payable under the loan agreements should be limited to 5%.

FACTS

[7] Beginning in 2015, ClearFlow, a project-finance company, made a series of loans to Solar Power to finance the development and construction of renewable energy projects. Renewable energy projects are complex, high cost, and difficult to finance. After ClearFlow made two initial loans to Solar Power, the parties signed a Loan Agreement that provided for two types of loans: Construction Loans for up to 90 days and Warehouse Loans with terms of up to 180 days while Solar Power arranged long-term financing. The parties also negotiated a number of additional loans by way of Promissory Notes.

[8] All of the loans have three components material to this appeal.

[9] First is a base rate of interest, typically 12% per annum compounded and calculated monthly, and 24% per annum in the event of default.

[10] Second is an administrative fee of either 1.81% or 3.55%, charged when the loan was advanced and, if not paid off, each time the loan is renewed (*i.e.* not paid by the expiry of the term).

[11] Third is the discount fee of 0.003% of the principal amount of the loan payable on the due date of the loan and every day thereafter until the loan is repaid.

[12] These three terms are reflected in art. 2.2 of the Loan Agreement:

> Each Borrower agrees to pay interest in arrears on the outstanding principal amount of each Loan advanced to such Borrower at the rate of 12% per annum, compounded and calculated monthly, both before and after maturity, default and judgement…Following the occurrence of an Event of Default which is continuing, interest shall continue to accrue on the outstanding principal amount at the rate of 24% per annum until paid. Each Borrower further agrees to pay to the Lender: (i) on the date of advance of each Loan advanced to such Borrower under the Construction Loan Facility, an administration fee of 1.81% of the amount of such Loan; (ii) on the date of advance of each Loan advanced to such Borrower under the Warehouse Loan Facility, an administration fee of 1.81% of the amount of such Loan; and (iii) on the date of repayment of such Loan (as set out in Section 2.4 or 2.5, as applicable), a discount fee of 0.003% of the outstanding balance of such Loan for every day such Loan remains outstanding until such Loan is repaid in full.

[13] Solar Power borrowed over $40 million from ClearFlow between 2015 and 2017 pursuant to the loan documents. In 2016, Solar Power began to encounter financial difficulties and defaulted on many of the loans. The parties entered Forbearance Agreements in July, October, and November 2016, as well as April 2017. Solar Power acknowledged its indebtedness, and ClearFlow agreed to forbear on Solar Power's default and to provide further financing.

[14] The total amount of accrued interest is approximately $10 million. Solar Power has now secured replacement financing, and funds sufficient to cover the amount in dispute are being held in trust pending resolution of this appeal.

[15] As I have already indicated, the central issues on the application and on this appeal are whether the Loan Agreement complied with the *Interest Act*, s. 4 and the appropriate remedy if it is non-compliant. Section 4 provides as follows:

> Except as to mortgages on real property or hypothecs on immovables, whenever any interest is, by the terms of any 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.

REASONS OF THE APPLICATION JUDGE

[16] Before the application judge, Solar Power took the position that the administration fees and the discount fee amounted to interest within the meaning of the *Interest Act*, s. 4. As the Loan Agreement and the Promissory Notes did not state an equivalent annual percentage or rate of interest, Solar Power argued that the interest payable should be capped at 5%.

(a) Administration fees

[17] The application judge found that the administration fees did not constitute interest within the meaning of s. 4. He accepted ClearFlow's evidence that the administration fees were compensation for administrative work in setting up and administering the loans, rather than a return on the money lent. Negotiating the loans involved the preparation of thousands of documents. At para. 32, the application judge found that "it is commercially reasonable to accept the

proposition that the administration fee was intended to compensate ClearFlow for the work it did in entering into and administering the various loan documents". The application judge noted that the administration fee did not accrue on a day-to-day basis during the term of each loan but was charged on a one-time-only basis and was only charged again if the loan was not repaid as specified. He concluded, at para. 39, that the administrative fee "was not simply compensation for ClearFlow not having the use of the money".

(b) Discount fee

[18] The application judge found that the discount fee was interest. He rejected ClearFlow's contention that it simply provided additional compensation for daily administration of the loans. The discount fee was not linked to the creation of a new loan or a renewal, it was the same for all types of loans, and it was calculated on a daily fixed rate. These factors suggested interest rather than a fee, as did the concession of ClearFlow's affiant that the fees "incentivized [Solar Power] to make earlier payout of the Loans". The discount fee had the three essential elements of interest. First, it was compensation for the use or retention of money; second, it related to the principal amount owing; third, it accrued over time.

(c) The Annualizing Formula

[19] The Loan Agreement (but not the Promissory Notes) contains a formula to calculate the annual rate for both the administration fee and the discount fee:

> 1.2 Interest and Fee Calculations, Maximum Interest Rate
>
> a. Unless otherwise stated, in this Agreement if reference is made to a rate of interest, discount rate, fee or other amount "per annum" or a similar expression is used, such interest, fee or other amount shall be calculated on the basis of a year of 365 or 366 days, as the case may be. If the amount of any interest, fee or other amount is determined or expressed on the basis of a period of less than one year of 365 or 366 days, as the case may be, the equivalent yearly rate is equal to the rate so determined or expressed, divided by the number of days in the said period, and multiplied by the actual number of days in that calendar year.

[20] ClearFlow's position before the application judge and before this court is that the annualizing formula provides a simple and adequate method to determine the annualized interest and thereby brings the Loan Agreement into compliance with the *Interest Act*, s. 4.

[21] The application judge rejected ClearFlow's argument for two reasons.

[22] First, he found, at para. 53, that a formula could not satisfy the purpose of the statutory requirement for an express, annualized statement of interest, because "[f]ormulas can be confusing and even misleading". He noted that confusion has arisen in this case about the amount of interest owing and suggested that this was the very mischief at which s. 4 was aimed.

[23] Second, he found that the annualizing formula did not provide the information required by s. 4 because it did not take into account compounding of

interest. The annualizing formula would produce an annualized rate of 1.095% (0.003% x 365 days) but the actual interest rate would depend on a number of compound periods of interest as the discount fee was compounded each time the loan rolled over.

[24] The application judge added that, in any event, there was no annualizing formula in the Promissory Notes to save them from being caught by s. 4.

(d) The Forbearance Agreements

[25] The application judge rejected ClearFlow's submission that Solar Power was precluded from challenging the amount of interest owing by virtue of the Forbearance Agreements. The first Forbearance Agreement and the Second Amended and Restated Forbearance Agreement provided that the indebtedness, including interest, was "unconditionally owing… without offset, defence or counterclaim of any kind, nature or description whatsoever". However, the Third Amended and Restated Forbearance Agreement, which amends and replaces the earlier agreements, added to those words "except as may otherwise be required by applicable laws". The application judge found that the added language permitted Solar Power to challenge the rate of interest.

(e) Remedy

[26] The application judge found that the appropriate remedy was to reduce all interest, including the base rate of interest of 12% or 24%, to 5%.

[27] In his view, this remedy was required by the language of s. 4 that states that no interest shall be charged above the rate of 5% on any part of the principal money if any interest is not expressed on an annual basis. Any other interpretation would allow lenders to obscure the interest rate by charging a series of non-annualized rates individually lower than 5%. The *Interest Act*, s. 4 is consumer protection legislation and he rejected the contention that courts should interpret the provision differently for sophisticated borrowers and lenders. While he acknowledged that the result was “harsh” and “draconian”, he found that meeting the objectives of the legislation required it.

ISSUES

[28] The following issues arise on this appeal and cross-appeal.

1. Did the application judge err in finding that the administration fees are not interest?
2. Did the application judge err in finding that the discount fee is interest?
3. Did the application judge err by concluding that the discount fee failed to satisfy the requirements of the *Interest Act*, s. 4?
4. Did the application judge err by concluding that the appropriate remedy is to limit all interest payable to 5%?
5. Did the application judge err in finding that the forbearance agreements do not preclude Solar Power from challenging the interest payable?

ANALYSIS

(1) Did the application judge err in finding that the administration fees are not interest?

[29] In its cross-appeal, Solar Power argues that the application judge erred in finding that the administrative fees are not interest within the meaning of the *Interest Act*, s. 4.

[30] First, Solar Power submits that while the primary effect of the administrative fee may be to compensate for administrative work, the application judge failed to consider that it had a secondary effect of incentivizing repayment. Solar Power maintains that incentivizing repayment is a hallmark of compensation for the use of money.

[31] Second, Solar Power argues that as the administrative fee recurs when the loan is renewed, it does accrue over time and therefore qualifies as interest.

[32] I do not find either submission persuasive.

[33] Solar Power does not challenge the legal test used by the application judge, at para. 20:

> 1. Interest is the return or consideration or compensation for the use or retention of money that is owed to another person;
>
> 2. interest must relate to a principal amount or an obligation to pay money; and,
>
> 3. interest must accrue over time: *Saskatchewan (Attorney General) v. Canada (Attorney General*), 1947

> CanLII 32 (SCC), 1947 S.C.R. 394 at para. 47; *Ontario (Attorney General) v. Barfried Enterprises Inc.*, 1963 CanLII 15 (SCC), [1963] S.C.R. 570, 42 D.L.R. (2d) 137 at para. 5.

[34] The application judge's findings on this issue were firmly rooted in the evidence about the nature and purpose of the administrative fees and the work that ClearFlow had to perform to set up and administer the loans. As mixed findings of fact and law on a point of contractual interpretation, they attract deference on appeal: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633.

[35] While the administrative fees were charged each time the loan was renewed, the incentive effect on repayment was negligible. The administrative fees were paid at the start of the term of each loan and only recurred if the loans were not repaid at term. They did not, therefore, recur during the term of the loan. The application judge was entitled to find that they did not amount to "compensation for the use or retention of money that is owed to another person".

[36] As Solar Power has failed to identify any extricable error of law or palpable and overriding error of fact, I would not interfere with the application judge's findings on this issue.

(2) Did the application judge err in finding that the discount fee is interest?

[37] ClearFlow appeals the application judge's finding that the discount fee is interest within the meaning of the *Interest Act*, s. 4.

[38] ClearFlow argues that the application judge erred by refusing to accept evidence tending to show that the discount fee was intended to provide additional compensation for daily loan administration. It submits that the evidence shows that the effect of the discount fee was to discount the upfront administrative fee over the term of the loan, making further administrative costs payable only so long as the loan remained outstanding.

[39] I disagree.

[40] As I have already indicated, the application judge applied the correct legal test for interest in the context of the contractual language and the evidence of the dealings between the parties. Absent an extricable error of law or a palpable and overriding error of fact, his findings are entitled to deference.

[41] I see no reason to interfere with the application judge's finding that the discount fee is interest. The application judge did not make a "processing error", as ClearFlow argued. He considered and rejected ClearFlow's evidence that the fee was intended to cover administrative costs. He found that the discount fee was not linked to the creation or renewal of a loan, the amount of the fee did not vary according to the administrative work required by the loan as in the case of the administrative fee, and the fee was charged at a daily fixed rate unrelated to any ongoing or specific events. He characterized ClearFlow's submission that the discount fee was additional compensation for administrative work as "contrived", and concluded that "[t]he layering of an additional charge, accruing day-to-day

without any demonstrable link to the actual management of the Loan, cannot reasonably be described as a fee".

[42] It was open to the application judge to conclude that the discount fee bore all the hallmarks of the test for interest: it was consideration or compensation for the use of money, it related to the principal amount, and it accrued over time. I see no reason to interfere with his finding on this issue.

(3) Did the application judge err by concluding that the discount fee failed to satisfy the requirements of the *Interest Act*, s. 4?

[43] There are two aspects to this issue.

[44] First is the adequacy of the annualizing formula to satisfy the requirement in s. 4 that the written loan agreement provide "an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent". The application judge held that it was not adequate.

[45] Second is the question of compound interest. The application judge held that as the loans could be rolled-over or renewed after 90 or 180 days, the discount fee was compounded and that written agreement failed to disclose the actual or "effective" rate of interest.

(a) The annualizing formula

[46] The annualizing formula provides a relatively simple arithmetic method to calculate the yearly rate to which the daily rate is equivalent: multiply 0.003% by 365 days to produce a yearly rate of 1.095%.

[47] ClearFlow, supported by the intervener, The Canadian Bankers' Association, submits that formulas of this nature are regularly used in complex commercial loan agreements and that the case law supports their validity as a means to provide borrowers with the kind of information required by s. 4. Solar Power supports the application judge's conclusion that unless the agreement explicitly provides the yearly interest, s. 4 is not satisfied. Significantly, however, Solar Power does not take the position that an annualizing formula can never satisfy the requirements of s. 4, stating in its factum, "[t]hat question is for another day".

[48] This is an issue of statutory interpretation for which a standard of correctness applies: *Mazur v. Elias Estate* (2005), 75 O.R. (3d) 299 (C.A.)

[49] I turn first to the actual language of s. 4. It requires "an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent" (emphasis added). By requiring an equivalent "rate or percentage" (emphasis added) instead of just employing the word "percentage", Parliament has used language indicating that the effective annual interest need not be expressed as a numerical percentage. This is consistent with the interpretive presumption that Parliament "does not speak in vain" and includes every word in a statute for a purpose: see *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87. In my view, the mathematical formula provided in the Loan Agreement provides a "rate" for the purpose of s. 4.

[50] The application judge referred to the consumer protection purpose of s. 4 and found, at para. 51, that "[f]ormulas can be confusing and even misleading". In my respectful view, that statement is difficult to reconcile with the case law accepting the use of formulas, many of which are more complex and yield less certain information than the one at issue in this case.

[51] For example, formulas are regularly used to determine variable rates of interest based upon some standard external to the agreement such as the prime bank rate. Such an agreement makes it impossible for the borrower to determine in advance the actual amount of interest the borrower would have to pay. Yet there seems to be no question that formulas of this nature comply with s. 4: see *e.g. Continental Bank of Canada v. Poyser* (1983), 45 A.R. 305 at para. 23 (Q.B.); *Bank of Montreal v. Mangold* (1988), 86 A.R. 215 at para. 35 (Q.B.); *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, 2008 CarswellOnt 5635 (S.C.), at paras. 281, 285-286, rev'd on other grounds, 2010 ONCA 467, 101 O.R. (3d) 81. I do not agree with the application judge, at paras. 50-52, that *Eastern Power* can be distinguished from this case on the basis that part of the formula in *Eastern Power* was annualized. The trial judge in *Eastern Power* based his ruling on the fact that the rate was easily calculable: para. 286.

[52] Courts have also held that formulas tied to variable rates external to the agreement satisfy provisions similar to s. 4. The *Interest Act*, s. 3 stipulates a maximum of 5% interest if "no rate is fixed by the agreement or by law." Courts

have found that formulas satisfy that provision: *Mangold*; *MacKenzie v. First Marathon Securities Ltd*., 2004 ABQB 834, 365 A.R. 259. The *Bills of Exchange Act*, R.S.C. 1985, c. B-4, s. 176(1) provides that a promissory note must specify "a sum certain in money", and again, courts have accepted formulas: *Royal Bank v. Stonehocker* (1985), 61 B.C.L.R. (2d) 265 (C.A.), at p. 271, leave to appeal refused, [1985] S.C.C.A. No. 65; *MacKenzie*, at para. 152. While these cases do not deal with the *Interest Act*, s. 4, I would apply the principle of statutory interpretation that "presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter": *R. v. Ulybel Enterprises Ltd.,* 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 52.

[53] I also agree with the submission that s. 4 must be interpreted in the light of modern commercial reality. It has become common commercial practice for some commercial loans to specify that interest is to be calculated on the basis of 12 months of thirty days or 360 days and to provide an annualizing formula stating that the yearly rate is to be calculated on the basis of the specified rate of interest, multiplied by the number of days in the year, divided by 360: Alison R. Manzer & Peter Sullivan, *Canada-U.S. Commercial Law Guide* (Toronto: Thomson Reuters, 2017) loose-leaf, at para. 6.14; Bradley Crawford, *The Law of Banking and Payment in Canada* (Toronto: Thomson Reuters, 2018) loose-leaf, at para. 22:70.20(9). An annualizing formula may not be required for such an agreement to comply with s. 4 (see *V.K. Mason Construction Ltd. v. Bank of*

Nova Scotia, [1985] 1 S.C.R. 271, at p. 287) but if it is, the type of formula detailed above appears to comply with s. 4: see Crawford, at para. 22:70.20(9); *Cadinha v. Chemar Corp*., 1995 CarswellBC 1767(S.C., in Chambers), at para. 19. To hold otherwise could cause significant mischief in international commercial arrangements.

[54] I do not accept Solar Power's submission that this argument is not available on appeal because ClearFlow did not advance it before the application judge. Both the case law and authoritative legal texts reflect the commercial practice that ClearFlow and The Canadian Bankers' Association rely upon. This is not an issue requiring evidence not led at trial or for which there is not a proper record before this court: *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 37.

(b) Compound interest

[55] The application judge concluded that the formula fails to provide an "equivalent rate or percentage of interest" because it fails to take into account the fact that the discount fee would be compounded if the loan was not paid at term and subsequently renewed. In his view, the annualizing formula would only provide a "nominal" rate of yearly interest (one that does not take compounding into account), and not an "effective" equivalent rate of yearly interest (one that does take compounding into account).

[56] The application judge relied upon the decision of this court in *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1991), 3 O.R. (3d) 123. That case involved a promissory note that called for interest at 2% per month, calculated monthly but which the parties treated as payable on the due date of the note. The trial judge felt compelled to hold that the note did not comply with s. 4. However, he wrote that this result was absurd and a miscarriage of justice as it was a simple matter to multiply 2% by 12 months to arrive at an equivalent annual interest rate of 24%. This court agreed with the trial judge that the promissory note did not comply with s. 4 but disagreed that this result was unjust, stating, at p. 126:

> To simply multiply the 2 per cent by 12 months and show 24 per cent as an annual rate would not correctly describe the true annual rate intended. The annual rate of interest when compounded monthly would be 26.8 per cent per annum. 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.

[57] In my view, there are two significant features that distinguish *Elanco* from this case. First, the note in *Elanco* contained no annualizing formula or other method to determine the equivalent annual rate. Second, as the interest was calculated monthly, interest would compound on a monthly basis during the term of the loan and it was possible to calculate an equivalent annual rate that compounding took into account when the borrower agreed to the terms of the loan.

[58] The case at bar involves short term loans for which the discount fee does not compound during the term of the loan. The discount fee is added to the principal on the due date and compounding only starts if the loan is not paid. When the Loan Agreement and Promissory Notes were made, the parties could not know whether the loan would be paid on the due date. It was therefore impossible for them to know whether interest would ever compound. In these circumstances, it was sufficient for the purposes of s. 4 to provide, through the annualizing formula, an equivalent nominal rate.

[59] The application judge noted, at para. 62, that the “Loan Agreement specifically contemplated” loan extensions, but he failed to take into account that the right to renew a loan, pursuant to art. 2.1 of the Loan Agreement, exists only if the loan is not in default. Articles 2.4 and 2.5 make clear that Solar Power has no right to extend the repayment date for the loans. The parties can only know the existence and extent of compounding of the discount fee after the due date. The compounding depends upon both whether Solar Power decides to repay or to ask ClearFlow that the due date of the loan be extended, and whether ClearFlow decides in its “absolute and sole discretion...to extend” the 90 or 180 day term.

[60] It follows that whether the discount fee would ever compound was entirely contingent on Solar Power requesting and ClearFlow granting an extension of the loan at the end of its term. It was therefore impossible for the Loan

Agreement to state an equivalent rate or percentage of interest that took into account compounding of the discount fee.

[61] It cannot be the case that s. 4 is engaged when a lender fails to provide information that it is impossible to provide. In *Tower Paint & Laboratories Ltd. v. 126019 Enterprises Ltd. (Stainco Edmonton)* (1983), 27 Alta. L.R. (2d) 154 (Q.B.), Master Funduk stated, at p. 158:

> In many instances it is not mathematically possible to determine the effective annual rate in advance. I do not believe that Parliament intended that which might be mathematically impossible to still be done. The laws of mathematics bow to no one.

Like Winkler J. in *Smith v. Canadian Tire* (1994), 19 O.R. (3d) 610 (Gen. Div.), at p. 625, aff'd (1995), 26 O.R. (3d) 95 (C.A.), I agree with this statement.

[62] To interpret s. 4 otherwise would be contrary to common sense, commercial reality and established principles of statutory interpretation. In *Potash v. Royal Trust Co.,* [1986] 2 S.C.R. 351, at p. 368, the Supreme Court held that the *Interest Act* should, where the language of the Act permits, prefer an interpretation that "is more in keeping with common commercial practice". See also *NAV Canada v. Wilmington Trust Co*., 2006 SCC 24, [2006] 1 S.C.R. 865, at para. 60; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para 42; *V.K. Mason*.

[63] Solar Power's counsel recognized the problem of impossibility and, in his oral argument, maintained that to comply with s. 4, the Loan Agreement had to

state that the discount fee would be “compounded and payable every 90 days” or “compounded and payable every 180 days”. There are three problems with that submission. First, that formulation would not provide an equivalent yearly rate. If it is impossible to provide an equivalent yearly effective rate, the only possible conclusion is that a yearly effective rate is not required, not that an alternative formulation will suffice. Second, if an alternative formulation would suffice, the Loan Agreement already provides one. In this sophisticated arrangement, the borrower would know from the terms of the agreement that if the loan is not paid at term but renewed, the discount fee will be added to the amount owing under the loan and will attract interest thereafter. Third, as interest would be calculated by reference to a period that is variable, depending upon the extension date, specifying one period would not accurately reflect the compounding.

[64] In my view, the decision in *Smith v. Canadian Tire*, distinguished by the application judge, is applicable to this case. *Smith* dealt with credit card agreements providing for interest at the rate of 2.4% per month calculated on the previous month’s balance. The agreement stated that the equivalent yearly rate was 28.8%, a rate that did not take into account the effect of compounding if the balance was not repaid each month.

[65] Winkler J. distinguished *Elanco,* for two reasons, both of which are pertinent to this appeal.

[66] First, in *Elanco* the promissory note did not disclose an equivalent annual rate. Second, the interest on the promissory note at issue in *Elanco* was calculated monthly. The parties did not treat the interest as payable monthly and it accumulated and was only payable on the due date of the loan. These features also distinguish *Elanco* from the facts of this case. The discount fee is payable at the term date of the loan just as the amounts owing on the credit cards in *Smith* were payable monthly. As Winkler J. observed at p. 623: “in *Elanco* the effective rate could be determined with specificity while in the present case it clearly could not”, again, a feature also found in the case at bar.

[67] The application judge found *Smith* was distinguishable because the credit card agreement did provide an annual rate and because there was no expectation that the credit card holder would default in paying the monthly balance. In my respectful view, neither reason is convincing. The Loan Agreement does provide, through the annualizing formula, an equivalent annual rate and the issue, as in *Smith*, is whether that annualized rate is deficient because it fails to take into account the effect of compounding. As for the expectation of payment at term, I see no meaningful difference between this case and *Smith*. The Loan Agreement requires payment at term and only provides for renewal at the request of the borrower to be granted in the sole and absolute discretion of the lender.

[68] My conclusion that the reasoning in *Smith* applies and that *Elanco* is distinguishable is fortified by consideration of several other cases dealing with s. 4 that stand for the proposition that stating an equivalent nominal rate may be sufficient.

[69] *Nanaimo Shipyard Ltd. v. Keith*, 2008 BCSC 1150 dealt with an agreement providing for interest on overdue accounts "at the rate of 2% per month (24% per annum compounded monthly)". The court rejected the debtor's argument that the rate was confusing and that the agreement did not comply with s. 4. The court stated, at para. 76:

> [T]he cases are not concerned for the purposes of s. 4 with confusion of terms as long as there is a nominal interest rate stated. The evidence in this case does not show there would be any compounding except in the case of default. What is required is to have the nominal interest rate, which is stated in this case. A nominal interest rate is an equivalent rate within the meaning of s. 4…

[70] *Tower Paint & Laboratories* is to the same effect. The Uniform Law Conference of Canada has also endorsed this view: see Uniform Law Conference of Canada, Civil Section, Working Group's *Interest Act – 2008 Report*, (Quebec: ULCC Civil Section, 2008), at para. 46.

[71] In my respectful opinion, the application judge erred in law in concluding that the provision for the discount fee in the Loan Agreement failed to satisfy the

requirements of the *Interest Act*, s. 4. However, as the Promissory Notes do not contain an annualizing formula, they do engage s. 4.

(4) Did the application judge err by concluding that the appropriate remedy is to limit all interest payable to 5%?

[72] ClearFlow argues that even if the discount fee runs afoul of s. 4, the appropriate remedy is not to limit all interest payable under the loan documents to 5% but rather to limit the amount of interest payable on account of the offending provision - the discount fee - to 5%. As the discount fee is less that 5%, s. 4 would have no impact on the amount of interest payable.

[73] As I have found that the Loan Agreement did not violate s. 4, it is not strictly necessary for me to deal with the issue of remedy in relation to the Loan Agreement. However, the issue of remedy does arise in relation to the Promissory Notes. Because the discount fee provision in those agreements does not contain an annualizing formula, the Promissory Notes fail to satisfy the requirements of s. 4. The issue is whether the appropriate remedy is to hold that as the discount fee contravenes s. 4, all interest payable under the Promissory Notes must be limited to 5%.

[74] The application judge acknowledged that limiting all interest payable to 5% produced a “draconian” and “harsh” result. He concluded that the language and purpose of s. 4 compelled this result. I respectfully disagree with the application judge’s interpretation. I agree that it is possible, on a strictly literal interpretation,

to read s. 4 as requiring the “draconian” result reached by the application judge. However, consideration of all relevant principles of statutory interpretation indicates that a different interpretation, more in line with modern commercial reality and the expectations of the parties, is appropriate.

[75] The Supreme Court has repeatedly held that it is necessary to consider the “entire context” before settling on what appears, at first blush, to be the plain meaning of a legislative provision: see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at paras. 29-30, *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at paras. 43-44. As Iacobucci J. stated in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, “statutory interpretation cannot be founded on the wording of the legislation alone”. An isolated plain meaning approach can lead courts to interpret statutes in a manner that produces absurd results. It is a fundamental principle of statutory interpretation that the legislature does not intend to produce such results: *Rizzo & Rizzo Shoes*, at para. 27.

[76] Courts have repeatedly departed from “plain meaning” when interpreting legislation to avoid absurd results. For instance, in *NAV Canada*, the Supreme Court had to consider whether the legal titleholders to passenger aircraft were “owners” of those aircraft under s. 55 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20. The court accepted that the plain meaning of “owner” would include the legal titleholder if s. 55 was read in

isolation. However, the court held that the plain meaning in isolation is not determinative and that the provision must be considered in context, including the commercial context indicating that a plain language interpretation would cause severe disruption to the airline industry: at paras. 44-45, 60. Likewise, in *Bristol-Myers Squibb*, the Supreme Court rejected a "plain meaning" interpretation of s. 5(1.1) of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, as this interpretation would lead to commercially absurd results that would inhibit competition in the pharmaceutical industry: paras. 66-68. Similarly, in *Stonehocker,* at p. 271, the British Columbia Court of Appeal rejected a literal interpretation of s. 176(1) of the *Bills of Exchange Act* that disregarded commercial reality.

[77] The application judge emphasized the consumer protection purpose of s. 4, expressing the concern at para. 82 that "if the 5% limit was only applied to the offending interest rates…lenders could easily obscure the total annual interest rate by using a series of non-annualized loans that are individually less than 5%." While that may be theoretically possible, it is certainly not what happened in the case at bar.

[78] In my respectful view, avoiding the possibility envisioned by the application judge does not require imposing a harsh and draconian result in the circumstances of this case where there plainly was no attempt to subvert the law. This case involved a commercial transaction between parties of equal bargaining

power who inadvertently and only marginally ran afoul of s. 4. There was no evidence of intention to break the law, of any unfairness in the agreement, or of one party taking advantage of another. To secure the funds it required, Solar Power knew that it had to pay a high rate of interest. The discount fee represents a tiny fraction of the interest that is otherwise payable and falls well below the 5% maximum interest allowed by s. 4. To limit all interest payable to 5% would, as the application judge recognized, result in a substantial windfall to Solar Power.

[79] The application judge inappropriately privileged the consumer protection purpose of s. 4 over the countervailing interpretative principles of fairness to the lender and the need to accommodate contemporary commercial practices. In *V.K. Mason,* Wilson J. accepted the consumer protection purpose of s. 4 but also found that the sophisticated commercial borrower in that case was in scant need of protection and that when construing s. 4, an interpretation that took into account the lender's legitimate interests was appropriate. Using the consumer protection purpose as an interpretive tool to favour a sophisticated commercial borrower that does not need the protection would not advance the policy of the law: *V.K. Mason*, at p. 287. Similarly, in *Potash*, at p. 368, the Supreme Court held that provisions of the *Interest Act,* drafted in the 1890s, should be interpreted "in keeping with common commercial practice" and "to-day's commercial reality" when their language so permits.

[80] Absent any evidence of an attempt to circumvent the protection of s. 4, I would interpret the phrase “any interest” in s. 4 to refer only to interest that is not stated as a “yearly rate or percentage.” In the circumstances of this case, that would mean that the only rate of interest to which s. 4 applies is the discount fee. As the discount fee is less than 5% per annum, the statutory limit is not exceeded and the discount fee remains payable.

[81] Reducing only the non-compliant rate to 5% takes into account, rather than defeats, the lender’s legitimate expectations. As Wilson J. stated in *V.K. Mason* at p. 287, courts must consider these legitimate expectations in interpreting s. 4. Reducing only the non-compliant rate to 5% appropriately interprets the dated text of s. 4 in accordance with contemporary commercial realities. The Hansard evidence indicates that Parliament’s concern when it enacted the predecessor provision of s. 4 in 1897 was that promissory notes were stating a daily or weekly interest rate but not a nominal annual interest rate: see Canada, Parliament, *House of Commons Debates*, 8th Parl., 2nd Sess., Vol. 2 (16 June 1897), at pp. 4252-4258. There is no evidence that Parliament turned its mind to contracts that contained multiple interest rates and intended the draconian result that the application judge felt compelled to reach. In fact, the Hansard evidence suggests that Parliament was concerned to achieve its consumer protection objective in a manner that avoided commercially absurd results: see Canada, Parliament,

Debates of the Senate, 8th Parl., 2nd Sess., Vol. 1 (3 June 1897), at pp. 460-461 (Hon. Oliver Mowat).

[82] This is analogous to the Supreme Court's interpretation of s. 10 of the *Interest Act* in *Potash*, where Wilson J. stated at p. 368 that changing commercial practices had resulted in a situation that Parliament had not envisaged in the 1890s. In that case, the Court interpreted s. 10 in a way consistent with contemporary commercial realities. Likewise, in *NAV Canada*, the Supreme Court construed narrowly a word with a broad plain meaning in part because simply applying the broad meaning would have disregarded commercial realities.

[83] This interpretation means that s. 4 has no effect on the Promissory Notes. Section 4 only prohibits charging "interest exceeding the rate or percentage of five per cent per annum" (emphasis added). In other words, s. 4 imposes a 5% annual cap on non-annualized interest but does not affect an interest rate that is already less than 5% when annualized. The discount fee's yearly rate of 1.095% is significantly less than the 5% cap. This interpretation would also prevent lenders from employing s. 4 to increase a non-compliant interest rate that is less than 5% to 5% and would correspond with s. 3 of the Act, which fixes the rate of interest at 5% per annum only when "no rate is fixed by the agreement."

[84] Accordingly, I would give effect to ClearFlow's submission that s. 4 does not limit all interest payable under the loan documents to 5%.

(5) Did the application judge err in finding that the forbearance agreements do not preclude Solar Power from challenging the interest payable?

[85] As I have found that the Loan Agreement complies with s. 4 and that s. 4 has no impact of the rate of interest charged under the Promissory Notes, it is not necessary for me to consider this issue.

DISPOSITION

[86] For these reasons, I would allow the appeal, dismiss the cross-appeal and vary the application judge's order by striking out paras. 4 and 7 (costs) and in place of para. 4, substitute a paragraph providing that all of the interest payable under the Loan Agreement, the Promissory Notes and the Forbearance Agreement dated April 30, 2017 is due and owing.

[87] I would award costs of this appeal to ClearFlow fixed in the amount of $40,000 inclusive of disbursements and taxes. If the parties are unable to agree as to the costs of the application, they may file brief written submissions within 30 days of the release of these reasons.

Released: September 04, 2018
"RJS"

"Robert J. Sharpe J.A."
"I agree David Brown J.A."
"I agree G.T. Trotter J.A."