COURT FILE NO.: 01-3805
DATE: 20030424

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Royal Bank of Canada	*Richard Horodyski*, for the Plaintiff
Plaintiff	
- and -	
State Farm Fire and Casualty Company	*David Zarek*, for the Defendant
Defendant	
AND BETWEEN:	**COURT FILE NO.: 36671**
Michael Ian Beardall Alexander	*Troy H. Lehman*, for the Plaintiff
Plaintiff	
- and -	
State Farm Fire and Casualty Company	*David Zarek*, for the Defendant
Defendant	
	HEARD: April 3, 2003

Wilton-Siegel J.

[1] These reasons supplement my Reasons for Judgment dated November 1, 2001 in these actions. They deal with the following matters:

(a) the quantum of the liability of the defendant in each of the actions; and

(b) the entitlement of the plaintiffs to pre-judgment interest.

Quantum Of Liability

[2] The parties have agreed that the total liability of the defendant in these two actions is $154,050.00, which is allocated as to $72,933.30 in favour of the plaintiff Alexander and as to $82,116.70 in favour of the plaintiff Royal Bank of Canada. The plaintiffs are entitled to orders in their favour in these amounts.

Pre-Judgment Interest

[3] The defendant has argued that the court should exercise its discretion under section 130 of the *Courts of Justice Act* to disallow pre-judgment interest. In support of its position, the defendant cited three cases in which the court refused to award pre-judgment interest. These cases were the *Citicorp. Realty* case, the *Gordon* case and the *Montreal Trust* case, all of which are referred to in my main reasons. In each of these cases, the court appears to have identified the plaintiff's failure to comply with the Mortgage Clause in the relevant insurance policy as a basis for disallowing interest. The defendant argues that, because the plaintiffs would never have had to commence the legal proceedings before this Court if they had given notice under the Mortgage Clause, there is also an appropriate basis for disallowing interest in these proceedings. The defendant also says that, although the cases cited above are not strictly binding on this Court, it is desirable to follow these earlier decisions of Ontario courts.

[4] The plaintiffs argue that there are no unusual circumstances in this case to deprive the plaintiffs of the interest on the amounts to which they would otherwise be entitled. In particular, they argue that interest should not be used as either a reward or a penalty, but should reflect the value of money withheld from the plaintiffs. In support of their position, they cite *Irvington Holdings Ltd.* v. *Black* (1987), 58 O.R. (2d) 449 (C.A.). They distinguish the cases cited by the defendant on the basis that the first two pre-dated the *Irvington Holdings* case and the third, the *Montreal Trust* case, was argued before the decision in the *Irvington Holdings* case was issued.

[5] The Court’s discretion to deny or reduce pre-judgment interest is set out in section 130(2) of the *Courts of Justice Act* which also sets out certain matters which must be taken into account by the Court. In this case, there is no suggestion that the actions of the plaintiffs resulted in a delay in the commencement or prosecution of these proceedings or otherwise lengthened these proceedings. I do not believe that any of the other factors to be taken into account are present in these proceedings other than the possibility raised by the defendant that there would have been

no legal proceedings at all if the plaintiffs had given notice under the policy of the vacancy of the insured premises. The remainder of these reasons addresses the issue of whether this failure on the part of the plaintiffs to give notice is an appropriate reason to withhold pre-judgment interest.

[6] In considering this matter, I have proceeded on the basis that the purpose of pre-judgment interest is to compensate a plaintiff for the deprivation of the monies to which the plaintiff has been found to be entitled and that the exercise of the court's discretion must be related to the task of putting the plaintiff in the same position, so far as money is concerned, as he would have been if he had not suffered the loss: see Finlayson J.A. in *Irvington Holdings* at page 26. In that case Finlayson J.A. went on to state that interest should not be used as either a reward or a penalty but should reflect the value of money wrongfully withheld from the date of demand for payment to the date of determination at trial. It is also clear from that case that the onus is on the defendant to persuade the court that it is appropriate to exercise its discretion to disallow pre-judgment interest.

[7] I have concluded that there is no basis for exercising my discretion in this matter for the three reasons set out below. In view of the basis for this conclusion, it is unnecessary reach an opinion on the further issue raised by the Royal Bank of Canada that, in its case, there is no basis for asserting that it failed to comply with the notice requirements of the Mortgage Clause

[8] First, denial of interest in this case cannot be related in any way to the principle articulated in *Irvington Holdings* of putting the plaintiff in the position it would have been had there been no breach by the defendant. The defendant’s position is that there would have been no legal proceedings at all if the plaintiffs had given notice as contemplated by the Mortgage Clause of the vacancy of the insured premises. In other words, interest should be denied because of the plaintiff’s actions. However, these legal proceedings arose as a result of the defendant’s breaches and the focus of pre-judgment interest is to compensate the plaintiffs for their loss arising from the defendant’s actions. The defendant failed to pay in circumstances in which it was obligated to do so. I believe that the principles in *Irvington Holdings* require payment of pre-judgment interest to restore the plaintiffs to the position they would have been in but for the failure of the defendant to pay the plaintiffs their claims 60 days after the filing of their proofs of loss.

[9] Second, denial of pre-judgment interest in these cases would amount to a penalty imposed on the plaintiffs. The defendant is, in fact, quite honest in acknowledging this to be the case. The defendant says this penalty is warranted to prevent similar actions in the future by other parties. This is, however, contrary to the purpose of pre-judgment interest as articulated in the *Irvington Holdings* case. It is also not the only means by which the defendant can address this concern if it chooses to do so.

[10] Lastly, in my opinion the effect of exercising the court's discretion in these circumstances would be to re-write the Mortgage Clause in the contract between the parties. The Mortgage Clause did not set out any express penalty for any failure to give notice of a vacancy. Just as I do not believe that any failure of the plaintiffs to give notice gives rise to a right under the Mortgage Clause to rescind the policy, I do not believe any such failure should give rise to a

right of the insurer to resist payment of pre-judgment interest. The language of the Mortgage Clause in the contract in these cases is clear and unambiguous. There is no legal basis for re-writing the contract after a claim becomes payable under the policy.

[11] In summary, applying the principles articulated in the *Irvington Holdings* case, I find there is no basis for exercising the court's discretion to disallow pre-judgment interest. With respect to the quantum, I understand the parties are agreed that pre-judgment interest shall run from September 20, 2000, at the rate of 5.8 percent, and that this amounts to $10,060.00 in favour of the Royal Bank of Canada and $8,823.96 in favour of Alexander.

Other Matters

[12] The plaintiffs are also entitled to post-judgment interest at the rate provided for in the *Courts of Justice Act*.

[13] While the parties also made submissions as to costs, this motion is adjourned for the purpose of permitting the parties to make further written submissions. These submissions shall include, among other things, the actual time related to these motions, with supporting dockets for each lawyer involved in the matter, including Mr. Alexander, their year of call and hourly rate actually charged to their client.

[14] The schedule for submissions shall be as follows:

(a) The plaintiffs shall each deliver copies of their submissions to the defendant no later than May 2, 2003.

(b) The defendant shall deliver copies of its submissions, including any response to the plaintiffs' submissions, no later than May 16, 2003.

(c) The plaintiffs shall deliver to the Court a bound copy containing all the submissions, including any reply submissions, no later than May 30, 2003.

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Wilton-Siegel J.

Released: 20030424

COURT FILE NO.: 01-3805
DATE: 20030424

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Plaintiff

- and -

STATE FARM AND CASUALTY COMPANY

Defendant

AND BETWEEN: **Court File No. 36671**

Michael Ian Beardall Alexander

Plaintiff

- and -

State Farm Fire and Casualty Company

Defendant

REASONS FOR JUDGMENT

Wilton-Siegel J.

Released: 20030424