Interest and the Executor's Year:

Convenience is King

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Estate litigators are familiar with the "executor's year," a period during which it is expected – but often impossible – to complete the administration of an estate. The Ontario Court of Appeal recently made an instructive ruling that is of interest to lawyers advising both beneficiaries and estate trustees. The take-home lesson of *Rivard v Morris*[1] is that the executor's year is real, and the consequences of distributions made beyond it can be costly.

Facts

Alexander Rivard (the "Testator") acquired significant farm property during his lifetime. While he was alive, he gave a large tract of farmland to his son, Steven, but none to either of his two daughters, Janine and Julianne. On August 1, 2013, the Testator made a will leaving specific farmlands to each of Janine and Julianne and the residue of his estate was to be divided equally among all 3 children. He named Steven, Janine, and Julianne as joint estate trustees. Weeks later, on August 24, 2013, the Testator executed another will, this time leaving Janine and Julianne cash legacies of $530,000 each, and the residue of the estate – which consisted mostly of farmland – to Steven. Again, all 3 children were named as joint estate trustees.

The Testator died on October 24, 2013. Janine and Julianne launched a will challenge, and the litigation continued for nearly two years. Ultimately, Janine and Julianne were unsuccessful, and the August 24, 2013 Will was declared valid in August 2016. Steven paid the cash legacy to Janine and Julianne on October 24, 2016.

The Application

Janine and Julianne subsequently brought an application to remove themselves as estate trustees and sought interest on their cash legacies at the rate of 5% per year starting one year following the Testator's death. The application judge confirmed Janine and Julianne's resignation. In dealing with

[1] 2018 ONCA 181

the question of interest, he referred to Rule 65.02 of the *Rules of Civil Procedure* and the common law “rule of convenience” (although he did not specify the rule in his decision). The “rule of convenience” provides that if a specific legacy of personal property (as is the case here), or a mixed fund of land and personal property, is payable under a will but is not paid to the beneficiary by the anniversary date of the death of the testator, the beneficiary will begin to earn interest on the value of the property from that date until they have received that property. Rule 65.02 is a legislated provision to the same effect.

The application judge claimed and exercised discretion not to award interest on the basis that Janine and Julianne were estate trustees during the relevant period, and that it was their challenge that delayed the administration and distribution of the estate. Essentially, neither party should be rewarded or penalized by the passage of time.

The Appeal

The Court of Appeal considered the following 3 issues: (i) the application of Rule 62.05; (ii) discretion to deny interest; and, (iii) the rate of interest payable.

Application of Rule 62.05

The court held that because Rule 65.02 applies only in administration proceedings and where a referee has been appointed to wind up the estate, it does not govern the case at bar. The within litigation began as a will challenge, and was brought, as is appropriate for a contentious proceeding, under Rule 75.

The parallel common law “rule of convenience” does apply. The court made decisive statements about what the rule is and is not. First and foremost, the rule is not payment for damages or delayed payment. Interest is not owed because something wrong has occurred that has delayed payment. In fact, under the “rule of convenience,” which the court describes as “harsh, blunt, and intended to exact ‘rough justice,’” interest is payable:

- even if payment within the executor’s year is impractical or impossible;
- whether or not the legacy has vested;
- where payment within the first year was never expected;
- whether the assets have been productive or not; and,
- where the property is incapable of earning income during the period when interest is accumulating.

Imposing interest payment obligations at the end of the executor’s year allows specific legatees to “more fully enjoy the benefits of the gifts that were intended where distribution has been delayed beyond the executor’s year.”

Discretion

There are no relevant Canadian cases supporting the discretion to deny interest. In any event, the court found it unnecessary in this case to determine the issue of discretion because the application judge failed to apply the proper principles, and based his conclusions on irrelevant factors and factors to which he attached inappropriate weight.

Interest

The court awarded Janine and Julianne the 5% simple interest rate that the “rule of convenience” carries at common law rather than the 0.8% prejudgment interest rate provided for in s. 128 of the *Courts of Justice Act.* Its reasons were threefold: first, the prejudgment interest provisions provide for the payment of interest from the date of the cause of action, whereas the “rule of convenience” supports claims that commence with the entitlement of the receipt of property. Second, the “rule of convenience” is meant to enable the legatee to enjoy the earning potential of a property right that has arisen but is delayed, even where the delay occurred without wrongdoing. Prejudgment interest provisions are intended to encourage the settlement of claims by those who wrongfully resist claims for the payment of money. Third, the prejudgment interest provision presupposes a claim related to an order for the payment of money on which the interest is added “thereon,” and would not apply if the sole issue is the payment of interest on a legacy that is not in dispute.

Analysis

The effect of this decision can be examined through two perspectives: the legal and the practical. Legally, it remains unclear whether the court has discretion to deny interest under the “rule of convenience,” and whether the court can vary the interest rate. The court painstakingly laid out the features of the rule, defining what it is and what it is not, where it applies and where it does not, the philosophical underpinnings of the rule, and its exceptions. Although, as the court stated, discretion in applying the rule is an “interesting debate,” it declined to determine whether Canadian judges have such discretion. The court expressed the importance of certainty in practice and administration: there are fixed exceptions to the rule, but a “free floating” operation would undermine its function as a “rule of convenience.” Furthermore, there were no Canadian or English cases found to support the discretion to deny interest. The tension, though, is that the “rule of convenience” is an equitable rule, and discretion is a hallmark of equity. Arguably, courts should have the authority to adjust an equitable rule that produces unfairness.

The same uncertainty applies to the rule’s interest rate. The court seems alive to the fact that the interest rate is troubling, but maintains that this is not the case to decide whether a change should be made. For example, the court concedes that a 5% interest rate “is not grounded in a uniform or compelling legal basis,” that it is “materially out of line with the market interest rate,” and that it seems “aggressive relative to the current prime rate.”

The court goes so far as to state that this discrepancy “undermines the underlying purpose of the rule.” However, the court leaves open the possibility that a different rate should be applied, and, curiously, suggests using a periodically adjusted but fixed statutory interest rate, such as the rates provided for in the *Courts of Justice Act.* The tension between the court’s simultaneous rejection and endorsement of the *Courts of Justice Act,* and the maxim that equity considers done that which ought to be done, is puzzling to any practitioner.

Practically speaking, the rule of convenience and its 5% interest rate can have significant consequences for an estate that owes a substantial legacy, saying nothing of an estate in the same situation that is subject to lengthy litigation. The probate process alone can take 6 months in Toronto, and steps such as calling in assets, paying debts, and obtaining clearance certificates can take considerable time outside an estate trustee’s control.

An estate trustee may also be a residue beneficiary, and find themselves responsible for paying a hefty interest rate out of their share of the residue. One way to protect against this would be to invest estate assets in a high-yielding fund, but what of the estate trustee’s obligation to invest prudently?

Furthermore, the court in this case refers to estate law’s main priority which is to give effect to the testator’s intention. The will is paramount. If the testator does not consider the rule of convenience to be fair, he or she is free to draft their will accordingly, or to provide for a different interest rate. However, the court in this case was not satisfied with a power of postponement clause which authorized the executors to delay payment of cash legacies. The court held that the provision was not specific enough.

Conclusion

Clarification may be afoot, as Janice and Julianne have sought leave to the Supreme Court of Canada. In the meantime, however, lawyers advising their clients should be aware of this equitable rule and the hefty interest rate attached to it. Estate trustees would be well-advised to administer an estate as quickly as possible, particularly where there is a substantial legacy to be paid out.