COMPOUNDED DECISIONS ON CLAIMING COMPOUND INTEREST IN LITIGATION

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When Lilly sued Apotex for infringement of eight of its patents related to the production of the antibiotic cefaclor in 1997, it likely anticipated the litigation would be hard fought. It likely didn't anticipate that it would still be litigating aspects of the case some 24 years later.

In an earlier bulletin[1] we discussed a decision[2] of Justice Zinn of the Federal Court awarding Lilly compound interest on the damages awarded for infringement. This made a significant difference to the total award. On damages of approximately $31 million, the prejudgment interest calculated by compounding annually came to approximately $75 million, making the total award some $106 million. The validity of that award returned to the Federal Court of Appeal in 2021.

The 2018 Appeal of The Interest Award

Apotex appealed Justice Zinn's decision. It paid the amount of the judgment[3] as there is no automatic stay of judgment pending an appeal in the Federal Courts.[4] It appears from an examination of the recorded entries for appeal A-64-15 that Apotex did not seek a stay of the judgment pending its appeal.[5]

In its appeal, Apotex challenged many of the findings of Justice Zinn on the calculation of Lilly's damages, as well as several aspects of the award of compound interest. The Court of Appeal upheld the trial judgment on every basis but one.

In his decision, Justice Zinn began by stating that, in order to establish Lilly's right to compound interest, it was not required to prove exactly what use it would have made of the profits lost as a result of the infringer's actions.[6] But after adopting a passage from S.M. Waddams in The Law of Damages, 3rd ed. (Aurora, Ont.: Canada Law Book, 1997, as cited at paragraph 37 of *Bank of America*[7]), which indicated that there is no reason why, in principle, compound interest should not be awarded, Justice Zinn went on to say: "I would go further and say that in today's world, there is a presumption that a plaintiff would have generated compound interest on the funds otherwise owed to it, and also that the defendant did so during the period in which it withheld the funds."

The Court of Appeal held that this was an error of law, as a party must prove a loss of interest in the same way as any other form of loss or damage.[8] The Court of Appeal also noted that Justice Zinn's reasons did not fully explain the basis on which he had arrived at the rate of interest that he used, nor had he fully explained the basis for not taking income tax effects into account.[9]

Consequently, the Court of Appeal dismissed the appeal, except with respect to the portion of the award dealing with damages in the form of interest which it remitted to Justice Zinn for reconsideration of that issue only.[10] The Court of Appeal noted that following reconsideration of the amount of interest to which Lilly was entitled, should the new award be less than the last one, the Federal Court would need to determine the rate of interest applicable to the amount to be reimbursed by Lilly.

The Rehearing of the Interest Issue

The re-hearing on the interest issue took place in September 2019.[11] Based on the decision of the Court of Appeal, Justice Zinn proposed to proceed by answering four questions:

1. In addition to the Lost Profits, has Lilly proved a lost opportunity to use those funds?
2. If so, and if those damages for lost opportunity are calculated as interest on the Lost Profits, what applicable rate of interest should be applied to reflect the lost opportunity, and why?
3. If not, and Lilly is required to disgorge some of the funds paid to it following the Damages Judgment, what is the amount to be disgorged and what rate of interest should it carry?
4. What, if any weight is to be given in calculating the interest on the lost opportunity to the tax consequences to Lilly when the sums would have been received by Lilly?[12]

In addressing the first question, Justice Zinn noted that he was required to deal with a hypothetical situation, in that he was required to assess the use that Lilly would have made of profits that it had not actually earned as a result of Apotex's infringement. Consequently, the calculation could not be exact.[13] In order to establish its entitlement to compound interest as a means of determining the lost opportunity to invest the profits of which it had been deprived by reason of the infringement of its patents by Apotex, Lilly could show either (1) that it lost the general opportunity to use the foregone funds while awaiting judgment and payment, or (2) that it lost a specific opportunity to use the foregone funds.[14]

In proving the use it might have made of the extra profit, it was necessary that Lilly show that it could have and would have invested the funds in a way that they would have earned the requested rate of interest.[15]

The two components of "could" and "would" are independent. To show that it "could" have earned the claimed rate, Lilly had to establish that there was no impediment to its ability to invest the funds at that rate. In answering the "could" component, Justice Zinn rejected the approach of the Apotex expert who treated the

lost profits as a separate fund to be invested after all other investments had been made. He preferred the evidence of Lilly's US Director of Finance who testified that funds received would have been pooled with all other funds as they were received and then invested. On the evidence he had, Justice Zinn found that there was no reason that would have made it impossible for Lilly to invest the lost profits.

To show that it "would" have earned that rate, Lilly had to establish what it would have done with the lost profits had they been received when they ought to have been. In answering the "would" component, Justice Zinn considered that if the extra amount invested was a small proportion of Lilly's total investments, it was likely that Lilly would have invested them in the same way. He used an example of a worker who receives a small pay increase. Such a person is unlikely to alter her pattern of saving and spending. On the other hand, if that worker were to win a lottery, she might well do something different with the funds, such as paying down a mortgage or taking a vacation. He found that amount of lost profits represented a very slight increase in Lilly's profits per year, and thus the past was a sound predictor of what Lilly would have done with the funds.

In addressing the second question concerning the rate of interest to be used, Justice Zinn found that the rate he selected represented the minimum average profit rate of Lilly, and represented the average return for Lilly Canada over the period in question, and was the appropriate rate.[16]

In addressing the third question concerning the rate of interest to be used to compensate Apotex for any overpayment, Justice Zinn found that the question did not arise as he had concluded that his original award must stand.[17]

In addressing the fourth question of the appropriate adjustment for income tax, Justice Zinn noted that Lilly has already been exposed to tax liability on the damages it recovered in the litigation. There is no way of knowing what that liability would have been had the interest component been adjusted for tax prior to the Judgment being issued. What is known is that the cause of the amounts not being received by Lilly at the time was solely because of the actions of Apotex. He observed that the burden of proof usually lies with the party who raises the issue requiring proof. Consequently, he held that Apotex, which had raised the issue, bore the burden but had failed to meet it. Thus, no adjustment for income tax was required.[18]

The Second Appeal of the Interest Award

Apotex appealed. The Court of Appeal released its decision on July 23, 2021.[19] The Court of Appeal reviewed each Apotex objection in turn, and held that Justice Zinn was entitled to make the findings he had made. Consequently, the appeal was dismissed. Whether this is the end of the story remains to be seen, as Apotex has until the end of September 2021 to file an application for leave to appeal to the Supreme Court of Canada.[20]

Conclusion

An award of compound interest in cases of protracted litigation serves to ensure that the plaintiff is not undercompensated and that defendants do not have an incentive to delay. As Justice Hughes put it, "A party should not be encouraged not to pay a Judgment simply because it is cheaper to let the interest accumulate."[21] The same might be said of conduct designed to postpone the date of reckoning. As the Supreme Court of Canada noted in Bank of America Canada, an award of compound interest serves to prevent a party in breach from profiting by its breach at the expense of the other party.[22]

Whether it is possible to recover compound interest as damages will depend upon the basis of the claim, and the applicable legislation concerning interest awards in judgments. A claim for compound interest is certainly something that should be considered for inclusion in any claim for relief made in the originating document used to start a proceeding, particularly when the matter is unlikely to be resolved quickly.

Thank you to Peter E.J. Wells, who has previously authored on this issue prior to his retirement from McMillan LLP and was involved in authorship of this piece.

[1][ps2id id='1' target='/] Playing for Time, or Paying for Time? – The Danger of Delay in Litigation – McMillan Intellectual Property Bulletin March 2015
[2][ps2id id='2' target='/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. Apotex Inc. 2014 FC 1254.
[3][ps2id id='3' target='/] *Apotex Inc. v. Eli Lilly and Company and Eli Lilly Canada Inc.* 2018 FCA 217 at ¶162.
[4][ps2id id='4' target='/] Section 50 *Federal Courts Act*, RSC 1985 c. F-7. The situation is similar in Alberta [Rules 14.48 and 14.68 *Alberta Rules of Court Alta* Reg 124/2010] and British Columbia [Section 18, *Court of Appeal Act*, RSBC 1996 c. 77]. In Ontario an appeal automatically stays until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order [Rule 63.01 *Rules of Civil Procedure*, RRO 1990, Reg. 194]. In Québec, a properly initiated appeal stays execution of the judgment, except if provisional execution has been ordered or is provided for by law [Section 355 *Code of Civil Procedure*, CQLR c C-25.01].
[5][ps2id id='5' target='/] The fact that interest was accumulating at the rate of $23,463 per day after December 31, 2014 may have influenced this decision – see *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2014 FC 1254 at ¶136.
[6][ps2id id='6' target='/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2014 FC 1254 at ¶118
[7][ps2id id='7' target='/] *Bank of America Canada* v. *Mutual Trust Co.*, [2002] SCR 601.
[8][ps2id id='8' target='/] *Apotex Inc.* v. *Eli Lilly and Company and Eli Lilly Canada Inc.* 2018 FCA 217 at ¶158.
[9][ps2id id='9' target='/] *Apotex Inc.* v. *Eli Lilly and Company and Eli Lilly Canada Inc.* 2018 FCA 217 at ¶162-163.
[10][ps2id id='10' target='/] Apotex Inc. v. *Eli Lilly and Company and Eli Lilly Canada Inc.* 2018 FCA 217 at ¶164.
[11][ps2id id='11' target='/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463.
[12][ps2id id='12' target='/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶18.

[13][ps2id id='13' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶48.
[14][ps2id id='13' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶15.
[15][ps2id id='15' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶43-69.
[16][ps2id id='16' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶70-72.
[17][ps2id id='17' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶73.
[18][ps2id id='18' target="/] *Eli Lilly and Company and Eli Lilly Canada Inc.* v. *Apotex Inc.* 2019 FC 1463 at ¶77-79.
[19][ps2id id='19' target="/] *Apotex Inc. v. Eli Lilly and Company and Eli Lilly Canada Inc.* 2021 FCA 149.
[20][ps2id id='20' target="/] *Supreme Court Act*, RSC 1985 c. S-26, s. 58.
[21][ps2id id='21' target="/] *AstraZeneca Canada Inc. and AstraZeneca Aktiebolag* v. *Apotex Inc. and The Minister of Health* 2011 FC 663 at ¶5.
[22][ps2id id='22' target="/] *Bank of America Canada* v. *Mutual Trust Co.*, [2002] SCR 601 at ¶61.

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A Cautionary Note