

Upon review of the file it appears that about \$80,000 was at stake for Hybrid Petroleum, the costs representing 2 new tanks. The security over the chassis of the truck and the personal guarantee by George Yates were \$25,000 was in respect of the product (oil) delivery agreement with North Atlantic which was in good standing.

It is not necessary to make a finding as to the exact amounts involved. The amounts were important to the Respondent. Loss of the five year contractual renewal was possible. Expensive litigation was in prospect. The parties concurred that this was a “bet the company” situation.

The Respondent relied for accounting and business advice on David Hood C.A., who suggested that a legal opinion be sought. On the evidence of Mr. Yates, Mr. Hood recommended that this would be “money well spent if you spend a couple or three thousand dollars” for the legal opinion. The Respondent concurred, and Mr. Hood initiated contact with Mr. Benson of Benson, Myles on the morning of April 21, 2009. By that afternoon, George Yates and his spouse were meeting with Mr. Benson and a support team at his firm. The parties were new to each other and had no prior relationship.

On the afternoon of April 21, the business problems were unfolded and the scope of the retainer defined. Mr. Benson provided Mr. Yates with a document on his firm letterhead entitled “Schedule of Hourly Rates and Engagement Terms, January 1 - December 31, 2009”. Mr. Benson stated that he did not ask Mr. Yates to approve the engagement terms at the meeting. Rather, he telephoned Mr. Yates on the following day, April 22, to determine whether the client agreed with the terms. There followed a short period of intensive activity on the part of the Benson, Myles legal team, concluding in a research memorandum dated April 30, 2009, and a statement of account promptly rendered dated May 1, 2009. In view of the approach I take to the question of interest, I need not resolve the issue of when the statement of account was received.

The total amount of the bill, including fees, disbursements and HST, was \$9,368.66. This was two or three times the amount that Mr. Yates had expected. Unfortunately, he did not make his expectation known to Mr. Benson. Neither did Mr. Benson give an estimate of what he thought

the cost of the engagement would likely be. Had either party to this taxation addressed expectations, this controversy over fees likely would have been avoided. It could be argued that the lawyer should bear the risk of failure to shape expectations, and failure to give an estimate is a factor in assessing the reasonableness of an account. Yet in witness of the often hurly burly nature of legal life and the urgent nature of this client interaction, I would not count this omission as a factor weighing against the account. Good lawyers strive for best practice but this is never an attained state. Further, the client was a small businessman with experience in retaining fee-for-service professionals including lawyers, and best practice for him was to establish the likely cost of the retainer with his lawyer. This he did not do.

Mr. Benson is a Queen's Counsel and lawyer of over 30 years standing who deposed that he has never before brought a solicitor-and-client bill to taxation. He had no note on the file to verify his evidence that in the April 22 telephone call with Mr. Yates, Mr. Yates stated that the terms of the engagement document were approved. In fact, Mr. Benson candidly admitted that he also has no recollection of the call. But he did testify to the effect that it was and is his habitual practice to verify the client's agreement with the terms of engagement before embarking on the engagement. As Taxing Master I accept this evidence as inherently probable and find that oral agreement over the telephone, at least to the major issue of rates, was granted by Mr. Yates. Mr. Yates testified that he had no recollection of the call or of signifying his agreement to the engagement terms. My finding is not a discourtesy to Mr. Yates. I merely find that on the inherent probabilities, the evidence of habitual practice from Mr. Benson is more reliable than the absence of recollection of Mr. Yates.

The document provided to Mr. Yates set out for J. P. Benson, Q.C. a current hourly rate of \$350. Lesser rates were set out in relation to others involved in the legal team. I find that Mr. Benson's rate is within the range of reasonable rates for senior counsel in this jurisdiction, and the rates set out for the other members of the team are also reasonable. The statement of account sets out the hours recorded for various team members and summarizes:

OUR FEE	\$8,752.00
Less Courtesy Discount	\$875.00
FEE	\$7,877.00

As to the courtesy discount, Mr. Benson explained at the hearing that he knew this was a large bill. In the exercise of his skill and judgment he discounted it by 10%. Many authorities counsel that a reasonable legal bill is not determined merely by multiplication of rates and hours, and I accept that before propounding the account, Mr. Benson applied his years of experience in billing matters, and exercised professional judgment as to reasonableness. Despite the presence of self interest, this exercise of judgment as to reasonableness by a lawyer of Mr. Benson's standing and reputation is entitled to a measure of respect.

Mr. Benson provided helpful materials prior to the hearing, including several decisions of D. Mark Pike, Q.C., Taxing Master (now Chief Judge of the Provincial Court) and I have listed these at the end of this decision. I will not restate the variety of factors which the Rules, ethical guidelines and decisional law of various jurisdictions have directed be considered in evaluating the reasonableness of an account. I have considered them all. The factors that deserve particular weight in this matter are urgency and importance to the client. Ms. van Driel was successor counsel on the client matter and stated at the hearing that the work product of the applicant was useful and saved her from doing the same research. Happily, litigation was avoided and the negotiation was concluded in July. Benson, Myles' urgently requested legal effort made a valuable contribution to the outcome, and I approve the fee of \$7,877 as a reasonable fee.

The statement of account sets out charges relating to administration and to interest, which are also in dispute. The engagement terms document addresses these items as follows:

ADMINISTRATION CHARGE

In most matters, excluding real estate transactions, and unless otherwise specifically agreed to with a client, Benson•Myles will charge an additional administration charge equal to Five percent (5%) of our invoiced fees to cover internal expenses associated with courier services, long distance telephone and facsimile

charges, photocopying, duplication, printing, and binding of materials for filing or presentation to you.

INTEREST ON OUTSTANDING ACCOUNTS

Accounts are payable on receipt, and in all cases where accounts are outstanding beyond 45 days, interest will be charged at the rate of 1½% per month (18% per annum).

The statement of account under review sets out “Administration fee, including Telephone/Fax/Photocopy/Delivery/Printing Charges \$393.85”. The statement of account also contains at the foot, the following statement:

Accounts are payable on receipt. Interest of 1.50 percent per month or 18% annually will be charged on all accounts outstanding over 30 days.

As to interest on overdue accounts, the *Code of Conduct* provides that:

4. Save where permitted by law or local practice, the lawyer should not charge interest on an overdue account except by prior agreement with the client and then only at a reasonable rate.

As to the 5% administrative charge, Orkin, *The Law of Costs*, 2nd edition, 311.12 “Overhead”, 3-70 to 3-70.1 states:

A solicitor is not entitled to make an additional charge to the client, over and above the solicitor’s normal charges for items which properly form part of the office overhead.

I would qualify the statement from Orkin to add that if the client has agreed to a set administrative charge for overhead or disbursements, then subject to reasonableness, the agreement must rule. The same approach applies to interest charges on overdue accounts – one looks first to the agreement. However as in all matters of taxation of accounts between lawyer and client, equity may override agreement and reasonableness must be the order of taxation. For example, in a low interest rate environment such as prevails today, a rate of interest on overdue accounts of 1.5% per month may or may not be thought reasonable, no matter what the

agreement. But I need not address this issue because I find that there was no agreement on the issue of administrative charges or on the issue of interest on overdue accounts.

Mr. Benson did not offer evidence that when he followed up with Mr. Yates on April 22, he would specifically have brought the engagement terms respecting administrative charges and interest on overdue accounts to the attention of Mr. Yates. Mr. Benson's objective would understandably have been to gain the client's agreement to the major items in the engagement, principally the rates. It is unlikely that the conversation touched on a comparatively minor matter such as the administrative charge, or on a contingent matter such as what would happen if the account were not timely paid. I therefore find that the Respondent did not signify its agreement on these matters.

The enforceability of the administrative charges therefore falls to be determined by reasonable law firm practice. I would not go so far as the statement from Orkin quoted above, but I do hold that when a lawyer charges high end rates, it is a legitimate client expectation that many incidental items of disbursement will be absorbed by the legal fees. In the absence of agreement as to the 5% administrative charge, I disallow it.

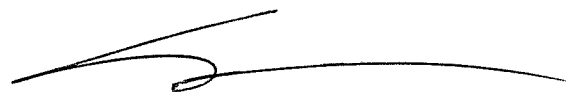
I have found that there was an absence of agreement as to payment of interest on overdue accounts. This does not mean however, that there is no other basis upon which a lawyer can charge interest on overdue accounts. A client should not expect to receive unagreed free financing from a lawyer. The issue becomes what should be the outcome when there is an absence of agreement on the payment of interest on overdue accounts.

Interest serves the justifiable function of compensating the lender for the effects of inflation and for the loss of use of the money. It is tempting to adopt a default position that in the absence of agreement either express, or implied from previous dealings, a taxed legal account should bear interest on a pre-judgment basis in accordance with the *Judgment Interest Act*, RSNL 1990, c. J-2. However the present parties have not addressed the issue in their submissions, and I can find no case authority in this jurisdiction dealing with the issue of whether there is a statutory basis

for pre-taxation interest on lawyers' accounts. The issue has been addressed in Nova Scotia in the case of *McInnes Cooper v. Canus Fisheries Ltd.*, 2006 NSSM 9 (CanLII), and a reading of the case persuades me that there are enough challenging issues of a legal technical nature that it would be unwise to make a determination without full argument. The Court of Appeal has stressed the importance of the principle of proportionality in the application of the rules of civil procedure: *Szeto v. Dwyer*, 2010 NLCA 36 (CanLII), and in the interest of keeping costs to the parties proportionate to the modest amount of interest which is at issue in this taxation, I resolve the claim for interest by finding that there was no agreement to pay it, either express or implied. Whether there are other bases upon which an overdue legal account may attract interest will have to be determined in another case.

A Certificate of Taxation in the amount of \$9,262.61 will issue against the Respondent, as itemized in the Certificate.

DATED at St. John's, Province of Newfoundland and Labrador, this 18th day of August, 2010.



CHESLEY F. CROSBIE, Q.C.
Master of the Supreme Court of
Newfoundland and Labrador

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Decisions of D. Mark Pike, Q.C., Taxing Master:

1. *Karutha Jayaram v. Gloria Dehart and Registrar of the Supreme Court*, dated April 13, 2006
2. *Roebathan McKay & Marshall v. Bonnie Rooney*, dated April 11, 2005
3. *Parsons, Ennis, Scott, Moores v. Tina Wall*, dated November 12, 2004
4. *O'Dea Earle Law Offices v. Elizabeth Boland*, dated January 18, 2007