CLAIM NO. 208199
Date: 20031113

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Merrick Holm v. Wind Driven Inc., 2003 NSSM 8

BETWEEN:

Name	Merrick Holm	Claimant
Name	Wind Driven Inc.	Respondents
-and-		
Name	Renewable Energy Services Ltd.	

D E C I S I O N

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on August 22, 2007. This decision replaces the previously distributed decision.

Appearances:

Sean Foreman, on behalf of the law firm Merrick Holm;
No one appearing on behalf of Respondents Wind Driven Inc. and Renewable Energy Services Ltd.

[1] This taxation came on before me on November 4, 2003.

[2] Mr. Foreman appeared on behalf of the law firm who sought the Certificate of Taxation. With him was Mr. Eric Twohig, who was affirmed. Up until September 5, Mr. Twohig had been president and chairman of the board of Wind Driven Inc. ("Wind Driven"). Up until September 12, 2003 he had been the president and chairman of the board of Renewable Energy Services Ltd. ("Renewable Energy"). He had held both positions since the incorporation of each company, Wind Driven in November 2000 and Renewable Energy in approximately January 2001.

[3] I was satisfied on the submissions of Mr. Foreman that the clients had had notice of the taxation date; and, indeed, the taxation had been moved from the original date of October 20 to the current date at the request of Mr. Barry O. Zwicker, an officer of Renewable Energy Services. Correspondence in the Court file dated October 10, 2003, together with correspondence dated October 10, 2003 from Mr. Rossiter of Merrick Holm to Mr. Zwicker, being Exhibit C-3, satisfy me that the clients:

a. had notice of the time and place of the hearing; and

b. had notice of the bills, together with the supporting time records, that were introduced as Exhibits C-1 and C-2 at the hearing.

The Issues

[4] The taxation raised three issues:

a. the liability of the clients to pay the various accounts;

b. whether interest was payable and, if so, on what basis; and

c. the reasonableness of the accounts.

[5] I will deal with the last issue first.

Reasonableness of the Accounts

[6] The law firm sought the certification of both the principal amount of each account; and interest thereon at the rate of 18% per year. I deal here with the principal.

[7] As set out in a table at the beginning of Exhibit C-2, the law firm seeks a Certificate with respect to seven accounts rendered between October 31, 2001 and September 12, 2003. Of these, the first (October 31, 2001) was originally for $71,253.97, but two payments on that account have been made, leaving a balance of $37,862.30.

[8] That account, together with the other six accounts, total $193,985.26. This is in addition to the total amounts already paid, being $61,415.59: see Exhibit C-1, Tab 1, last page; and the table at the beginning of Exhibit C-2.

[9] Accordingly, the total account for all services, both paid and unpaid, between the commencement of services and the last account of September 12, 2003 is $255,400.85 (excluding interest).

[10] Mr. Twohig gave evidence as to the background of the services.

[11] By way of backdrop, Wind Driven and Renewable Energy, were related start-up companies that were started in the late fall of 2000. Over the years covered by the legal accounts the services provided by the law firm included the following:

a. the incorporation and shareholder structure of the two companies, including reorganizations thereof;

b. development of documentation used in the wind resource business, including a complicated operating agreement;

c. involvement with an application to the Utility and Review Board;

d. extended and complicated negotiations with Nova Scotia Power;

e. discussions and meetings with the federal government with respect to power purchases of wind based energy;

f. preparing a request for a proposal to Nova Scotia Power; and

g. numerous other matters, all arising from the start-up and development process surrounding a company involved in developing and marketing renewable energy based on wind power.

[12] While not determinative of the reasonableness of the charges, I note that Mr. Twohig gave evidence that he had been fully satisfied with the services of the law firm. That opinion would appear to have been shared by the more recent officers and directors: see Exhibit C-5.

[13] Mr. Foreman pointed out that the firm had carried the companies for several years without pursuing the issue of payment precisely because they were start-ups; and precisely because the law firm had a good working relationship with Mr. Twohig and other principals of the companies, and had faith that the companies would eventually be successful.

[14] Taking into account that this was a start-up operation, which of necessity required the law firm to provide the many and varied services necessary to construct the

foundation and fundamental structure of the organization; and given too that the nature of the companies brought them into constant contact and negotiation with large *quasi* public utilities, as well as government bodies; it is not surprising that the accounts would be as high as they were.

[15] This is not a case of a law firm providing ongoing services to a well established company that did not require extensive documentation to be prepared, meetings to be had and negotiations to be undertaken. This is instead a case of a start-up that needed to be built from the ground up; and the legal cost of such construction was, not surprisingly, high.

[16] In these circumstances I am satisfied that the principal amounts charged for these legal services were reasonable and should be allowed.

[17] I turn now to the question of which client or clients are reasonable for these amounts.

Liability to Pay

[18] The issue of whether one or the other or both of the companies is liable to pay the accounts rendered arises because the accounts, on their face, are not consistent in stating which company is being charged. Some of the accounts are charged to Wind Driven; others are charged to Renewable Energy; and some are charged to both. Notwithstanding those differences, the law firm wants all accounts taxed and certified against both companies jointly and severally.

[19] It is necessary to explain how this difference in the naming of the clients on the accounts came to pass.

[20] Wind Driven was the original operating company. According to Mr Twohig, all expenses (including legal accounts) were originally charged to Wind Driven and then reallocated internally between Wind Driven as the operating company and Renewable Energy as the subsidiary of Wind Driven. (Wind Driven, until recently, owned 82% of Renewable Energy.)

[21] In approximately October 2001, all of the operational responsibilities were redirected or shifted to Renewable Energy, as per the original plan, leaving Wind Driven as the holding company. There was an inter-company transfer of assets and liability, moving the costs of Wind Drive to Renewable Energy, creating a payable back to Wind Driven. From that point on the operating entity was Renewable Energy.

[22] Notwithstanding the change, the law firm appears to have continued to rendered its early accounts to Wind Driven. This did not present any problem to Mr Twohig, since (as he said) legal accounts rendered to either Wind Driven or Renewable Energy or both were accounts that in his mind (as president of both companies) were rendered to both, regardless of the name that appeared on them.

[23] However, in the spring of 2002 Revenue Canada objected to Renewable Energy's application for an HST rebate with respect to the law firm's accounts, saying that no such claim could be made with respect to accounts that were directed merely to Wind Driven. Accordingly, the companies asked the law firm to change its invoices to show both Wind Driven and Renewable Energy on them: see, for confirmation of this, Exhibit C-1, Tab 2, second page.

[24] So far as Mr. Twohig was concerned, this change was merely to satisfy Revenue Canada's requirements; it did not mark a change, in any way, in the responsibility of both companies for the legal accounts of Merrick Holm. He also recalled a conversation, in or about April 2002, with Mr. Michael Kennedy of the law firm to the effect that both companies were responsible for the accounts, having had the benefit of the services, regardless of which name or names was on the account.

[25] At the hearing, I expressed a concern with respect to my jurisdiction, given that:

a. the law firm was seeking a Certificate for the entire amount; and

b. it was seeking a Certificate for the entire amount against both companies, regardless of which company (or companies) the individual accounts were directed to.

[26] My concern arose because the jurisdiction of a small claims adjudicator, sitting as a taxing officer, is clearly limited by statute. He or she has only that jurisdiction provided him or her by the *Small Claims Court Act*; no more, and no less: *Carruth v. Singleton Murphy* (1998) 169 NSR (2d) 170 (TD); *Clive Estate v. Rizzi* [2002] NSJ No. 39 (TD).

[27] That jurisdiction is as follows:

a. so long as liability to pay is not an issue, any amount no matter how large may be assessed as to its "reasonableness" by a taxing officer: s.9A(2), *Small Claims Court Act*, RSNS 1989, c.430, as amended; but

b. if liability to pay is an issue, the officer's jurisdiction (insofar as liability is concerned) is limited to the small claims court monetary jurisdiction (which is currently $10,000): s.9(a), *Small Claims Court Act*.

[28] Mr. Foreman submitted that there was no issue as to liability, and hence no issue as to jurisdiction. He pointed out that Mr. Twohig (who is, admittedly, no longer an officer of either company) was of the view that both companies were jointly and severally liable for the accounts (and that, indeed, was Mr. Twohig's evidence). Mr. Foreman also pointed out that, following the Notice of Taxation, no objection along these lines had been filed or provided by the companies and, in that regard, he points to the transcript of a telephone message that had been left by Mr. Zwicker on Jim Rossiter's voice mail: see Exhibit C-5.

[29] Certainly on the evidence before me it would appear that that was, in fact, the case.

[30] However, I am of the view that for me to accept that a client is liable to pay an account that is not directed to him, her or it would, of necessity, require me to make a finding in respect of *a claim*, as opposed to merely an assessment of whether the amount of that claim is reasonable.

[31] For example, to order Renewable Energy to pay an account which on its face is directed to Wind Driven (or vice versa) would be to make a determination in respect of "a claim ... in respect of a matter or thing arising under a contract" (to use the wording of s.9(a) of the Act) that was in excess of $10,000; and that I cannot do.

[32] Since this is a question of jurisdiction I am of the view that neither a party's consent, nor their failure to attend, can give me, as a taxing officer or adjudicator, a power I do not have.

[33] Accordingly, while I can assess the reasonableness of the accounts that are directed variously to Wind Driven, Renewable Energy or both, I cannot order one to pay an account that is directed to the other. My order and certificate will accordingly reflect this decision.

Interest

[34] The law firm also claims a total of $34,044.63 in interest on the outstanding accounts.

[35] There was no agreement dealing with interest to be charged on outstanding accounts. The only correspondence dealing with the issue of fees appears to be a

letter dated May 23, 2001 from Brian MacLellan to Mr. Twohig (Wind Driven), entered as Exhibit C-4. That document sets out the rates of various lawyers and assistants to be charged, but says nothing about interest.

[36] In addition, the accounts included in Exhibit C-1 and C-2 do not include any reference to interest being chargeable or payable in respect of outstanding accounts.

[37] Mr. Twohig was not able to shed any light on the issue. He does recall a conversation with Mr Kennedy concerning interest at some point, but he could not recall what the conversation was and, in particular, whether there was any agreement to pay interest and, if so, at what rate.

[38] The issue of interest is of some concern, given that the account has been in arrears since the fall of 2001. No payments have been made on account since that time, yet the law firm continued to provide services (and render more accounts) after the fall of 2001.

[39] Given the length of time that has gone by, and the principal amounts in issue, It is not surprising that interest at the rate claimed (18% per annum) should have amounted to $34,044.63: see Exhibit C-2, first page.

[40] However, in the absence of any express agreement to pay interest, or any indication at such express agreement that the companies had nevertheless paid interest on outstanding arrears, I cannot accept the claim for interest as part of the account.

[41] First, as I understand the law there must be an express or implied agreement to pay interest before it can be claimed. There is no express agreement. Nor can any agreement be implied, inasmuch as none of the invoices mention interest; and there was no history of the client paying interest on overdue accounts in the past.

[42] Second, precisely because these were start up companies, one could just as easily infer an agreement not to pay interest because the law firm would know that in the early years of the companies' existence cash flow would be tight and payment might be delayed.

[43] Accordingly, and given these circumstances, I am not satisfied that interest was payable on the accounts and I will not allow it at the rate charged.

[44] Mr Foreman submitted that in the event I did not accept that interest should be charged at 18%, it could be charged at 4% from the date of each invoice, pursuant to s.16 of the *Small Claims Court Forms and Procedures Regulations*, NS Reg

17/93, as amended by NS Reg 132/2003 (the "Regulations"). That section provides that an adjudicator "may award prejudgment interest at a rate of 4% per annum in the same circumstances in which prejudgment interest may be awarded by the Supreme Court."

[45] By his calculation the interest under this approach amounted to $7,732.58: see his letter of November 4, 2003.

[46] Section 41(i) of the *Judicature Act* RSNS 1989, c.240, as amended, provides that "in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal."

[47] It is to be noted that s.41(i) speaks of a "debt" or "cause of action." In my view, a legal account only becomes a "debt" when it is taxed; because it is only at that point that its amount (that is, its "reasonableness") can be said to be owing as a debt. Prior to taxation the account exists, but it is inchoate.

[48] If I am wrong in this interpretation, I still would not have allowed the claim for interest because of the fact that there does not appear to have been any agreement to pay; and because, as noted above, an inference arises on the facts of this case that interest in fact would not be looked for because the law firm understood that accounts might not be paid when rendered. (Indeed, the law firm continued to provide substantial services long after the accounts became "overdue.")

[49] Finally, and in any event, in my view the law firm, by failing to move more quickly to tax the accounts, is responsible for at least some of the "undue delay" in this matter, thereby disentitling it to claim interest even if it would otherwise have been entitled to claim interest: see s.41(k)(iii) of the *Judicature Act*.

[50] I accordingly decline to exercise my discretion to award interest in the circumstances of this case.

Conclusion

[51] For reasons set out above, I certify the following accounts of Merrick Holm:

a. Renewable Energy Services Ltd,

i. Oct 31, 2001 for $$71,253.97, less payments of $33,391.67, for a balance owing of $37,862.30;

ii. April 29, 2002 for $7,054.07;

iii. Dec 31, 2002 for $42,708.77;

iv. May 23, 2001 for $26,608.33;

b. Wind Driven Inc,

i. Dec 31, 2001 for $19,518.48;

ii. Nov 15, 2002 for $982.92;

iii. Feb 20, 2001 for $1,415.29;

c. Wind Driven Inc and Renewable Energy Services Limited, jointly and severally,

i. Dec 31, 2002 for $30,087.19;

ii. Sept 12, 2003 for $55,771.53.

Dated at Halifax, Nova Scotia this 13th day of November 2003

ADJUDICATOR
W. Augustus Richardson

Original Court File
Copy Claimant(s)
Copy Defendant(s)