CV 04971

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

FRANCIS G. DENSON

Plaintiff

- and -

GREAT SLAVE MEDICAL HOUSE LTD.

Defendant

RULING ON COSTS

1 As set out in Reasons for Judgment filed January 8, 1996, I dismissed the Plaintiff's claim for damages for breach of contract and the Defendant's counterclaim for expenses incurred.

2 I left it to the parties or their solicitors to account to each other for the monies which they agreed are owing each to the other for fees generated by the Plaintiff's services at the Defendant Clinic. These monies are subject to the 60%-40% split which was a term of the parties' agreement.

3 The issues on this application are (i) prejudgment interest and (ii) costs.

Prejudgment Interest

4 According to the evidence I heard at trial, the Plaintiff "locked out" computer access by the Defendant to the Plaintiff's billing information from approximately

December 1, 1993 until sometime in April, 1994. Accordingly, the Defendant was not able to determine how much it owed to the Plaintiff until April, 1994. I agree with counsel that if prejudgment interest is to be awarded, it ought not to start running at the earliest until April, 1994.

5 Based on the 60% payable to the Plaintiff and 40% payable to the Defendant arrangement, and the fact that, as set out in the Amended Agreed Statement of Facts, the Plaintiff has collected $7,627.70 and the Defendant $15,028.18 - for fees generated by the Plaintiff's work, it is clear that it is the Defendant which owes money to the Plaintiff. The Defendant has had its 40% share of the fees for some time, whereas the Plaintiff has not had his full 60% share.

6 Accordingly, I order that the Defendant pay to the Plaintiff prejudgment interest calculated pursuant to the *Judicature Act*, R.S.N.W.T. 1988, ch. J-1, on the monies still owing by the Defendant. However, the prejudgment interest will not commence to run until the date or dates of receipt by the Defendant of the monies pertaining to the Plaintiff's billings, and it will run only until December 31, 1995.

Costs

7 Costs are in the discretion of the Court: Rule 541(1). The normal rule is to award costs on a party and party basis against the unsuccessful party: *Petrogas Processing Ltd.* v. *Westcoast Transmission Co. (1990)*, 105 A.R. 384 (Q.B.).

8 The greatest portion of the time at trial in this case was spent on the

Plaintiff's claim for damages for breach of contract and his alternate claim for damages in lieu of notice. There was no dispute as to what was owing on the 60%-40% split for fees. There was an Agreed Statement of Facts and most of the factual background was admitted. The real issue was the legal result of the actions taken by the Plaintiff and the Defendant.

9 The Defendant's counterclaim was restricted to fees which it incurred for legal and accounting advice. No extra witnesses were called to substantiate the counterclaim beyond those called in defence against the Plaintiff's claim. There was no time spent in cross-examination of the Plaintiff's witnesses for purposes of the counterclaim. Only two documents were submitted in support of the counterclaim, both of which were simple and brief. I find that the counterclaim did not in any way increase the costs of the proceedings.

10 The general rule is that the costs of a counterclaim are limited to the amount by which the costs of the proceedings are increased as a result of the counterclaim: *Elias* v. *Derksen*, [1932] 1 W.W.R. 500 (Sask. C.A.); *Barrett and Barrett* v. *Metzgar and Wood*, [1950] 1 W.W.R. 1044 (Alta. S.C.).

11 Therefore, there will be no costs awarded to the Plaintiff resulting from the dismissal of the Defendant's counterclaim.

12 Counsel for the Plaintiff submits that the Plaintiff ought to be awarded costs of the proceedings (or the Defendant ought not to receive costs of the proceedings)

for the period of time up to the examinations for discovery in September, 1994. He says that the Plaintiff was unable until then to obtain an accounting of the fees owed to him from the Defendant. It was not made clear why the Plaintiff could not have obtained that information directly from the Department of Health, as the evidence at trial indicated he had done in December, 1993. In addition, as I have said, all of the circumstances lead me to conclude that the real issue in this litigation was the Plaintiff's ultimately unsuccessful damages claim. Therefore, I give no effect to this submission.

13 The Defendant will therefore have its costs of these proceedings. The question is whether I should depart from the normal party and party scale of costs.

14 Counsel for the Defendant asks that I depart from the normal scale and submits that this would be justified on the basis of certain offers of settlement made by the Defendant. These offers are set out in paragraphs 5 and 6 of Mr. Bayly's affidavit sworn and filed on February 16, 1996. They were verbal offers, with no mention of costs consequences should they not be accepted by the Plaintiff.

15 The Northwest Territories Rule of Court in existence now and at the time of the trial of this matter contain no rules regarding offers of settlement, whether verbal or written. The only relevant Rules are those relating to payment into court: Rules 173 to 190.

16 Counsel for the Defendant submitted as authority for the proposition that a verbal offer to settle may be considered by the court, the case of *Merrill Lynch Canada*

Inc. v. *Cassina* (1992), 15 C.P.C. (3d) 264 (Ont. C.J.G.D.). That case deals with an Ontario rule that provides costs relief resulting from an offer to settle. The court in that case simply applied the rule to a verbal offer to settle. There is no similar rule in the Northwest Territories and so the case in my view is not applicable.

17 Similarly, other cases cited by counsel for the Defendant dealt with Ontario and Nova Scotia rules which make specific reference to offers to settle.

18 In my view, the verbal offers to settle relied upon by the Defendant ought not to be considered. They were not made pursuant to any specific Rule of Court. They were not made with notification to the other side that they were intended to have a costs effect. Accordingly, they will have no costs effect: *Inkit Ltd.* v. *Polar Parkas Ltd.*, (unreported) December 18, 1995, S.C.N.W.T. CV 02525.

19 Counsel for the Defendant also asks me to take into consideration the fact that $2,440.39 was paid into court in late 1994 by the Defendant pursuant to Rule 173(1) and paid out again in early 1995 pursuant to Rule 175. In his Brief of Argument, counsel for the Defendant indicates that the sum paid in was based on the amount admitted to be owing to the Plaintiff for fees, less the amount already collected by the Plaintiff for fees and less the amount of the Defendant's counterclaim. Since, however, it was in reality the Plaintiff's claim for damages that was the issue in the litigation, and there appears not to have been any dispute that fees were owing to the Plaintiff, I do not consider the payment in to be of any real significance.

20 I have considered that the issues in this case were not particularly difficult or complex. As I have said, there was little dispute on the facts. The case involved the business relationship between the parties and the issues were private and of interest only to the parties, although possibly also to physicians who might also be in the Plaintiff's circumstances. Although, as I have said, most of the facts were not in dispute, the trial took four days.

21 The tariff of costs under the present Rules of Court is commonly accepted as outdated. In all the circumstances of this case, I order that the Defendant shall have its costs in Column 4 to a multiple of 1.5.

V.A. Schuler
J.S.C.

Yellowknife, Northwest Territories
March 18, 1996

Counsel for the Plaintiff: Adrian C. Wright

Counsel for the Defendant: John U. Bayly, Q.C.