

## Interest Clause in a Drilling Contract Not a Penalty

By: Nigel Bankes

**Case Commented On:** *Precision Drilling Canada Limited Partnership v Yangaarra Resources Ltd*, [2015 ABQB 649](#)

This decision of Master Prowse follows on from his earlier decision on the merits of the dispute between the parties: *Precision Drilling Canada Limited Partnership v Yangaarra Resources Ltd* [2015 ABQB 433](#). The case involved so-called knock-for-knock provisions in a standard form drilling contract. My post on that decision is [here](#) and I note that it has also been the subject of a comment in *The Negotiator* [here](#). This matter was back before Master Prowse because the parties could not agree on the terms of the formal judgment and in particular could not agree on two issues relating to Yangarra's liability to pay interest on the amounts found to be owing. The contract provided for the payment of interest at 18% commencing 30 days after an invoice was tendered. If that clause were applicable Yangarra would be liable for approximately \$2.4 million. Yangarra contested the validity or applicability of the interest provision on two grounds. First Yangarra argued that the clause operated as an unenforceable penalty. Second, Yangarra argued that a clause in the contract which afforded it the opportunity to contest an invoice meant that the interest clause was inapplicable so long as the invoices in question were subject to a bona fide dispute.

Master Prowse rejected both arguments. As to the penalty argument, Master Prowse took the view that Yangarra had to establish (see *H.F. Clarke Ltd. v Thermadore Corp.*, [1974 CanLII 30 \(SCC\)](#), [1976] 1 S.C.R. 319) that the clause was both “extravagant and unconscionable” and that it had failed to do so. He further reasoned as follows (at paras 23 – 25):

[23] My observation is this: an agreed upon interest rate for payments in arrears saves both litigants' time and the courts' time. Otherwise, it would be necessary for an unpaid goods or services supplier, when suing for non-payment, to adduce evidence as to things such as its average return on capital and its blended average cost of borrowing. These figures would be constantly changing.

[24] While there is no doubt that an agreed upon interest rate of 18% contains an element of 'incentive' in addition to an element of compensation, I find nothing extravagant or unconscionable about a goods or service provider charging 18% interest if they are not paid on time for goods or services provided. In my many years of experience, interest charges are typically charged in such circumstances, and it is very common for such interest charges to range from 1.5% to 2% per month.

[25] As further evidence of the widespread use of 18% interest for unpaid goods and services, I note that the provision for 18% interest in the contract between Precision and Yangarra is taken from an industry wide precedent.

Paragraph 24 of Master Prowse's reasons evidently rests on the doctrine of judicial notice. The inapplicability argument failed because it was inconsistent with the terms of the contract since the very provision which allowed a party to contest an invoice also went on to say:

Any sum not paid when due (including sums ultimately paid in respect of any dispute) shall bear interest at the rate specified in the applicable program specification sheet [in this case 18%] (emphasis added by Master Prowse).

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