

SUPREME COURT OF NOVA SCOTIA

Citation: *Jeffrie v. Hendriksen*, 2017 NSSC 87

Date: 20170328

Docket: Hfx. No. 346079

Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

Anthony Hendriksen, Inland Marine Services Limited
and Three Ports Fisheries Limited

Respondents

LIBRARY HEADING

Judge: The Honourable Justice Michael J. Wood

Heard: March 14, 2017, in Halifax, Nova Scotia

Written Decision: March 28, 2017

Subject: Specific Performance – Equitable Damages

Summary: Court ordered specific performance of an agreement to purchase shares in Three Ports Fisheries Ltd. Original transaction should have been completed in 2010. Jeffrie sought damages for delay in closing the transaction including lost profit on business ventures which he would have pursued with purchase price.

Issues: Should Jeffrie receive equitable damages for delay and, if so, in what amount?

Result:

Equitable damages awarded for delay based on revenue from crab allocation that should have been transferred as part of consideration. Lost profit from other forgone business opportunities not proven on evidence. Interest at 5% provides adequate compensation for loss of use of money.

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Counsel: Roderick Jeffrie, Applicant (Self-Represented)
Michael P. Scott and Sarah J.S. Emery, for the Respondents

By the Court:

[1] In the fall of 2010 Roderick Jeffrie thought he had a deal with his business partner, Anthony Hendriksen, to sell his shares in Three Ports Fisheries Limited. Mr. Hendriksen disagreed and litigation ensued which resulted in the Nova Scotia Court of Appeal confirming that Mr. Jeffrie had a binding agreement with Mr. Hendriksen for the sale of his shares (see 2015 NSCA 49).

[2] In January 2016, Mr. Jeffrie succeeded in getting an order of specific performance for the agreement requiring Mr. Hendriksen to complete the transaction on or before June 21, 2016. This has yet to take place primarily because Mr. Hendriksen has not paid the required purchase price.

[3] The most recent court hearing was on March 14, 2017. The purpose was to deal with Mr. Jeffrie's motion for further compensation as a result of the delay in completing the transaction. Mr. Jeffrie also wanted the court to quantify the amount of costs he should receive and to revise the order for specific performance so the obligation to pay the purchase price would be extended to include the two corporate respondents, Inland Marine Services Limited and Three Ports Fisheries Limited.

Background

[4] The introduction to the Court of Appeal decision provides an overview of the circumstances leading to the 2010 agreement. It states:

1 Roderick Jeffrie and Anthony Hendriksen are equal shareholders in Three Ports Fisheries Limited. Three Ports operates as a broker which purchased crab, lobster and other fish products and then sold these to processors. Three Ports was incorporated in 2004 and included a third shareholder who was bought out in 2007. Mr. Jeffrie and Mr. Hendriksen are the sole officers, directors and shareholders of Three Ports.

2 Relations between the two principals deteriorated. They were unable to work together, particularly after Mr. Jeffrie suffered a serious illness which kept him away from the business for some time. In 2010 Mr. Jeffrie and Mr. Hendriksen entered into a series of negotiations, as a result of which Mr. Jeffrie agreed to sell his interest in Three Ports to Mr. Hendriksen. Mr. Hendriksen did not go through with the agreement. Mr. Jeffrie sued him, alleging breach of the agreement as well as oppressive conduct, in accordance with s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81.

3 The application judge concluded that an agreement was reached on September 16, 2010 whereby Mr. Jeffrie would sell his shares to Mr. Hendriksen for \$500,000, transfer of a crab allocation worth \$100,000, and a Hummer motor vehicle valued at \$25,000.

[5] In my decision granting specific performance (2016 NSSC 27) the agreement was described as follows:

6 I need not review the extensive history of the dealings between the parties as this is outlined in the above noted court decisions. What is relevant for this decision are the terms of the agreement reached in September 2010 in which Mr. Hendriksen agreed to buy all of Mr. Jeffrie's shares in Three Ports in exchange for the following:

1. Immediate payment of \$400,000.00.
2. Two payments of \$50,000.00 in April 2011 and April 2012 secured by the assignment of a crab allocation license for Area 23.
3. Transfer of another crab allocation license for Area 23.
4. Transfer of a Hummer motor vehicle.

[6] The particulars of the specific performance order are found in para. 29 of the decision which states:

29 For the above reasons I would order specific performance of the agreement between the parties entered into in September of 2010. The terms of the transaction are as follows:

1. Mr. Jeffrie shall endorse for transfer to Mr. Hendriksen share certificates representing all of the shares which he owns in Three Ports.
2. Mr. Hendriksen shall pay to Mr. Jeffrie a cash payment of \$500,000.00. At Mr. Hendriksen's option he can make an immediate payment of \$400,000.00 with payments of \$50,000.00 six months and eighteen months after closing provided he assigns an Area 23 crab allocation to Mr. Jeffrie as security for those future payments.
3. The Area 23 crab allocation formerly owned by Mr. Whitty shall be transferred to Mr. Jeffrie.
4. The vehicle registration for the Hummer shall be transferred to Mr. Jeffrie.
5. The closing date shall be no later than 90 days from the date of this decision.

[7] There were two additional issues which required determination by the court and these were, compensation due to the delay in closing the transaction and costs. These are discussed in para. 25 and 31:

25 In addition to specific performance, Mr. Jeffrie seeks compensation for the delay in closing the transaction. Such compensation has been awarded in a number of cases including **Holmes v. Alexson** 1974 CanLII 677 (ONSC), **Law-Woman Management Corp. v. Peel (Regional Municipality)** 1991 CanLII 7383 (ONSC) and **Stefan and Lichter**, 2005 SKQB 383. If Mr. Jeffrie wishes to have a further hearing to quantify the additional compensation which he is claiming, he may do so by filing a notice of motion with supporting affidavits. Obviously, if Mr. Hendriksen believes there are adjustments which ought to be made in his favour related to Mr. Jeffrie's shares and the Hummer, he is free to raise those issues at that hearing.

...

31 I am required to deal with the assessment of costs for the initial application which I heard in 2012 as well as this hearing to determine Mr. Jeffrie's remedy. I would ask the parties to provide me with their written submissions on both of these costs questions. Mr. Jeffrie's submissions will be due 45 days from the date of this decision and Mr. Hendriksen's response, 20 days thereafter. If Mr. Jeffrie makes a motion for further compensation as a result of the delay in closing the original agreement, the costs of that step will be assessed at that time.

[8] The hearing on March 14th dealt with these issues of compensation and costs, as well as Mr. Jeffrie's request that the specific performance order be revised to include the corporate respondents, Inland Marine Services Limited and Three Ports Fisheries Limited, in the obligation to pay the purchase price for his shares. He made this request because attempts to execute against assets of Mr. Hendriksen had been unsuccessful.

Revision of the Specific Performance Order

[9] The formal specific performance order was issued by the court on June 24, 2016. For purposes of Mr. Jeffrie's motion the relevant portions are as follows:

1. There shall be specific performance of the agreement entered into between the parties hereto in September 2010, the terms being set forth in clauses two (2) to and including five (5) herein.
2. The Applicant, Roderick Jeffrie shall endorse for transfer to the Respondent, Anthony Hendriksen, all of the Applicant's share certificates in the corporation Three Ports Limited, representing the Applicant's complete ownership interest in the said corporation.

3. The Respondent, Anthony Hendriksen, shall pay the Applicant, Roderick Jeffrie, a cash payment of five hundred thousand dollars (\$500,000.00). At the option of the said respondent, Anthony Hendriksen, this payment may be made in one cash payment of \$500,000.00 or, alternatively, in an immediate cash payment of \$400,000.00 with two subsequent payments of \$50,000.00 each, the first to be made within six (6) months the closing date (see clause six (6) herein); the second within eighteen (18) months of the said closing date. In the event the Respondent, Anthony Hendriksen, exercises the second option, namely the series of three payments totalling \$500,000.00, he shall immediately upon exercising said option provide to the Applicant, Roderick Jeffrie, adequate security in the form of an "Area 23 crab allocation," such security to be in sufficient form to the satisfaction of the Applicant, Roderick Jeffrie.
4. The Respondents shall transfer to the Applicant the Area 23 crab allocation (formerly known as the "Whitty allocation.").
5. The Respondent's shall transfer to the Applicant the vehicle registration for "the Hummer" motor vehicle.

[10] These provisions are identical to the draft order prepared by Mr. Jeffrie and forwarded to the court on January 28, 2016. Mr. Jeffrie now says that the order is incorrect and the obligation to pay the purchase price in para. 3 should not have been limited to Mr. Hendriksen, but include the other respondents. In making this argument he relies on para. 28 of the January 2016 decision which states:

28 The agreement was negotiated between Mr. Hendriksen and Mr. Jeffrie, however Three Ports was likely required to participate in order to conclude the transaction, since they were the beneficial owner of the crab allocation and registered owner of the Hummer. For these reasons I would make them a party to this order for specific performance.

[11] I am satisfied that the order, as drafted by Mr. Jeffrie and issued by the court, accurately reflects the terms of the specific performance decision. The agreement recognized by the Court of Appeal and incorporated in the specific performance order was for Mr. Hendriksen to buy Mr. Jeffrie's shares. There was never an agreement that the corporate respondents would pay any portion of the purchase price.

[12] Para. 28 of the specific performance decision is an acknowledgement that the Hummer and crab allocation were owned by Three Ports Fisheries Limited and they were made a party to the specific performance order solely to ensure the transfer of those assets to Mr. Jeffrie.

[13] For these reasons I am not prepared to grant Mr. Jeffrie's request to revise the specific performance order.

Compensation for Delay in Closing

[14] As discussed in para. 25 of the January 2016 decision equitable damages can be awarded for delay in combination with an order of specific performance. Further authority for this proposition is found in the Ontario Court of Appeal decision in **Holmes v. Alexson**, 1976 CanLII 872 (ONCA), where the court stated:

... It is clear that in a proper case where the defendants have refused to close a real estate transaction by reason of their own default, the plaintiffs are entitled not only to an order for specific performance but for damages as well: **Fry**, Treatise on the Specific Performance of Contracts, 6th ed. (1921), p. 605; **McGregor** on Damages, 13th ed. (1972), p. 481, para. 682, and **Jones v. Gardiner**, [1902] 1 Ch. 191.

[15] An illustration of the application of these principles is found in **Van Dyk and Van Dyk v. Durno**, 2005 BCSC 691. In that case the plaintiffs were seeking specific performance of an agreement for the purchase of a condominium owned by the defendant. In addition to specific performance, the plaintiffs sought damages for rent and parking expenses from the time when they would have taken occupation to the date of the court hearing, as well as thrown away legal expenses and additional interests costs resulting from a change in mortgage rates. The defendant argued that the claim should be reduced by amounts equal to the mortgage payments, property taxes and condominium fees the plaintiffs would have incurred during their occupation.

[16] The B.C. Supreme Court awarded the damages claimed by the plaintiffs with the adjustments suggested by the defendants. Its rationale was as follows:

85 ... An award of damages is intended, to the extent possible and to the extent it can be done by money, to put the parties in the position they would have been had the contract been performed. Had the transaction been completed, the plaintiffs would have received possession of the Property on the terms contemplated in the agreement of purchase and sale, and therefore would not have incurred the expenses which form the basis of their damages claim. At the same time, however, they would have incurred those expenses which have cited by the defendants. In the interest of putting the parties in the positions they would have been had the contract been performed, it is therefore necessary to set off these expenses against one another.

[17] If the 2010 agreement had been completed as contemplated, Mr. Jeffrie would have had \$500,000, a crab allocation, and ownership of the Hummer. He has had possession and use of the Hummer throughout the period and so no compensation for that item is required.

[18] Mr. Jeffrie says that if he had received the crab allocation as agreed, he would have earned income from it of \$129,000. In his affidavit he says that he was paid for the years 2011 and 2012. According to Mr. Jeffrie the income for 2013 to 2015 would have been \$30,000 per year and for 2016 it would have been \$39,000. His affidavit did not provide any back up or detailed calculation as to how these amounts were arrived at.

[19] Mr. Jeffrie says that if he had received the \$500,000 for the sale of his shares he would have pursued a number of business opportunities in the fishery, including purchasing additional crab quota and providing financial assistance to lobster fishers. His evidence is that because of the costs of litigation and resulting restriction of his finances, he was required to sell other crab allocations and a lobster licence. Not including the lost revenue from the crab allocation he should have received under the 2010 agreement, Mr. Jeffrie calculates his losses at slightly less than \$2.8 million. His affidavit lists the categories of loss but provides very little detail. Attached as exhibits are documents from H. Hopkins Limited showing losses allegedly suffered by that company.

[20] The evidence provided by Mr. Jeffrie does not satisfy me that the failure to pay the purchase price in 2010 has caused him to suffer all of the losses described in his affidavit. Some clearly result from the expense of the litigation and as such are beyond the scope of equitable compensation for delay in performing the agreement. In addition, many of the items appear to relate to losses incurred by H. Hopkins Limited and not Mr. Jeffrie. I understand that Mr. Jeffrie is a principal of that company, but it is a separate legal entity and not a party to this litigation. More importantly, Mr. Jeffrie has not provided sufficient detail to verify the quantification and tie it to the delay in paying the purchase price.

[21] Mr. Jeffrie is seeking pre-judgment interest at a rate of 5% on the \$500,000 purchase price. Such interest is intended to compensate a party for the fact that they did not have the use of the funds. *Civil Procedure Rule 70.07* makes the 5% rate applicable unless a party satisfies a judge that it should be otherwise. Mr. Scott on behalf of the respondents, argues that it should be a lower amount because of the relatively low rate for government bonds during the applicable period. He relies on

the decision of Justice Muise in **Brocke Estate v. Crowell**, 2014 NSSC 269, where a pre-judgement interest rate was set at 1.27%. I would note that this rate was based upon agreement of the parties and for that reason this case is of limited assistance.

[22] At the time of the agreement in 2010 all parties expected Mr. Jeffrie to continue in the fishing business. In the negotiations that led to the agreement there were discussions concerning non-competition agreements and supply agreements reflecting the fact that both parties would continue in the industry. Mr. Jeffrie would not have taken the funds and placed them in an interest bearing bank account or government bond, and interest based upon that type of investment would be too low. An interest rate of 5% is more appropriate in the circumstances.

[23] The respondents say that since Mr. Jeffrie did not transfer his shares in 2010 he should not receive any pre-judgement interest because he did not give anything up at that time. The evidence presented at the January 2016 hearing was that Mr. Jeffrie had received no income from his shares in Three Ports Fisheries Limited and I have no information to suggest that has changed. If there were benefits received by Mr. Jeffrie from the company they should be taken into account in assessing equitable damages, however, as mentioned in para. 25 of the January 2016 decision, it was up to the respondents to bring that evidence forward. They did not do so and so I see no basis on which to reduce the interest rate or otherwise offset Mr. Jeffrie's claim for compensation.

[24] The respondents argue that Mr. Jeffrie's evidence concerning the income which would have been earned from the crab allocation is insufficient to form the basis for compensation. I agree that it is fairly general in nature, however it is based on Mr. Jeffrie's extensive experience in the industry including ownership of other crab allocations. The respondents have had Mr. Jeffrie's affidavit setting out his claim since November 2016. Mr. Hendriksen is equally experienced in the fishing industry and if he had evidence to suggest that Mr. Jeffrie's calculation was incorrect, he had every opportunity to present this and he did not do so.

[25] Mr. Jeffrie has a clear claim for the lost revenue from the allocation that he should have received in 2010. The fact that the evidence in support of the quantification is general in nature and not supported by specific calculations should not deprive him of a remedy. The court has an obligation to assess damages as best it can even if the evidence does not allow precise calculation. To do otherwise would deprive a plaintiff of a remedy where liability has been proven. I am satisfied that Mr. Jeffrie has established that he should receive compensation for the income which

would have been earned on the crab allocation and that \$129,000 is the appropriate total for the period up to the intended closing date, June 21, 2016. He should also receive interest on that money at a rate of 5% for each annual amount.

Costs

[26] Following the initial decision in 2013, the respondents were awarded costs in their favour payable by Mr. Jeffrie in the amount of \$59,750 plus disbursements and HST for a total of \$73,159.25. In allowing Mr. Jeffrie's appeal the Court of Appeal set aside that cost award and directed that the assessment of Mr. Jeffrie's entitlement to costs for the original hearing be done by this court.

[27] In the January 2016 decision I asked Mr. Jeffrie to provide his cost submission within 45 days. He requested an extension of that time period to June 30, 2016, which I granted. His notice of motion and affidavit which included his cost submissions, were filed on September 29, 2016.

[28] Mr. Scott on behalf of the respondents, argued that Mr. Jeffrie lost the opportunity to seek costs for the initial hearing because of failure to provide submissions by the June 30, 2016, date. I disagree. I have discretion to allow Mr. Jeffrie sufficient time to make costs submissions and I am prepared to do so in this case. In cross-examination he explained why, as a self-represented litigant, he was unable to get submissions filed as directed and I accept his explanation.

[29] In terms of quantification of costs for the initial hearing, I think it is reasonable to use the same figure arrived at when the respondents were entitled to costs and that is \$59,750 plus disbursements. Mr. Jeffrie will have 30 calendar days from the date of this decision to provide his written submissions on the appropriate amount of taxable disbursements.

[30] With respect to costs arising out of the January 2016 and March 2017 hearings, Mr. Jeffrie was the successful party on both even though he did not prove all of the delay damages which he was seeking. He is a self-represented litigant however, there are clearly costs associated with preparing documentation and attending hearings. It is clear to me that Mr. Jeffrie has had assistance with some of his written materials and may well have associated expenses. Between January 2016 and March 2017, three court days were used. In both cases the hearings resembled motions more than applications in court or trials and therefore I think Tariff C is appropriate. I would use the amount of \$2,000 per day, for a total of \$6,000. If Mr. Jeffrie is claiming disbursements for the January 2016 or March 2017 hearings he

should provide details within 30 calendar days of the date of this decision. In addition, if he is claiming any costs for the adjournment from March 7th to March 14th due to the late filing of respondents' materials, he should include this in his submissions as well.

Conclusion

[31] For the reasons noted above Mr. Jeffrie is not entitled to an order rectifying the terms of the specific performance order, however he is entitled to the following:

1. Pre-judgment interest at a rate of 5% on \$500,000 payable by Mr. Hendriksen from September 16, 2010, to June 21, 2016,
2. \$129,000 payable by Three Ports Fisheries Limited together with 5% interest on the following amounts from the following dates:
 - a. \$30,000 from December 31, 2013, to June 21, 2016;
 - b. \$30,000 from December 31, 2014, to June 21, 2016;
 - c. \$30,000 from December 31, 2015, to June 21, 2016.
3. Costs in the amount of \$65,750 plus disbursements, payable jointly by Anthony Hendriksen, Inland Marine Services Limited, and Three Ports Fisheries Limited.
4. Return of any money seized by the Respondents pursuant to the execution order issued to enforce the original cost award which was set aside by the Court of Appeal together with interest from the date of seizure at a rate of 5%. This is payable jointly by Anthony Hendriksen, Inland Marine Services Ltd and Three Ports Fisheries Limited.

[32] The compensation ordered to be paid to Mr. Jeffrie is calculated as of June 21, 2016 which is the date on which the transaction should have been completed under the specific performance order. Entitlement to compensation will continue from that date until the order is complied with. This means interest will continue at 5% on all principal sums and the compensation for lost earnings on the crab allocation will continue to accrue starting in the calendar year 2017.

Wood, J.