NOVA SCOTIA COURT OF APPEAL
Citation: *Jeffrie v. Hendriksen*, 2018 NSCA 77

Date: 20180920
Docket: CA 462453
Registry: Halifax

Between:

Roderick Jeffrie

Appellant
Respondent on Cross-Appeal

v.

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

Respondents
Appellants on Cross-Appeal

Judges:	MacDonald, C.J.N.S.; Farrar and Derrick, JJ.A.
Appeal Heard:	September 10, 2018, in Halifax, Nova Scotia
Held:	Appeal dismissed; cross-appeal allowed, in part, without costs to any party per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Derrick, J.A. concurring.
Counsel:	Appellant/Respondent on Cross-Appeal by Written Brief only Sarah Emery and Katie Shipp (articled clerk), for the respondents/Appellants on Cross-Appeal

Reasons for judgment:

Background

[1] Three Ports Fisheries Limited was established in 2004 by Roderick Jeffrie, Anthony Hendriksen and John Simec. It operated as a brokerage business, purchasing lobster, crab and other fish products which it sold to processors. Mr. Simec left the business in 2007. Since that time, Messrs. Jeffrie and Hendriksen have been the sole officers, directors and shareholders.

[2] In 2009 Mr. Jeffrie alleged that he had entered into a binding agreement with Mr. Hendriksen for the sale of his shares in Three Ports. Mr. Hendriksen disagreed that an agreement had been reached.

[3] Mr. Jeffrie commenced an application in court seeking to enforce the share purchase agreement. In a decision dated February 26, 2013 Justice Michael J. Wood dismissed the application finding that, although the parties had agreed on the essential terms of the purchase of the shares, it was not reduced to writing and therefore was not a legally enforceable contract (reported 2013 NSSC 50).

[4] Mr. Jeffrie appealed that decision. In a decision dated May 20, 2015, this Court overturned the judge's decision and found there was a legally binding agreement between the parties. The matter was returned to Justice Wood who heard the initial application for an assessment of damages (reported 2015 NSCA 49).

[5] The damage assessment was heard on January 14 and 15, 2016. In a decision dated January 20, 2016 (reported 2016 NSSC 27) and order dated June 24, 2016, the judge ordered specific performance of the share purchase agreement:

- Mr. Jeffrie would endorse his share certificates in Three Ports to Mr. Hendriksen;
- Mr. Hendriksen was to pay Mr. Jeffrie a cash payment of $500,000;
- A crab allocation would be transferred to Mr. Jeffrie;
- The vehicle registration on a Hummer motor vehicle would be transferred to Mr. Jeffrie; and
- The closing date would be no later than 90 days from the date of June 21, 2016.

[6] The closing did not happen as ordered. The parties were back before the judge on March 14, 2017 as a result of a motion by Mr. Jeffrie seeking compensation for delay in completing the share purchase agreement. He also sought to have the defendants, Inland Marine and Three Ports, to be jointly and severally liable for the amounts owed to him for the purchase of his shares.

[7] The judge refused to make the other defendants jointly and severally liable. In a decision dated March 28, 2017 (reported 2017 NSSC 87) and order dated May 26, 2017, he awarded Mr. Jeffrie:

- Pre-judgment interest at a rate of 5% per annum on $500,000 in the amount of $143,749.99 payable by Mr. Hendriksen from September 16, 2010 to June 21, 2016 with interest accruing at 5% per annum on the $143,749.99 amount until it was paid;
- $129,000 payable by Three Ports Fisheries Limited plus interest in the amount of $6,750 with interest accruing on that amount at 5% from June 21, 2016 until paid;
- Costs in the amount of $65,750 plus disbursements payable jointly by Anthony Hendriksen, Inland Marine Services Limited and Three Ports Fisheries Limited; and
- Return of $8,476.65 seized by the respondents pursuant to an Execution Order issued to enforce the original costs award (which was set aside by this Court) with interest at the rate of 5% until paid.

[8] Mr. Jeffrie appeals from this decision, the respondents cross-appeal.

[9] This appeal was originally scheduled to be heard on Tuesday, February 6, 2018 for a full day. Mr. Jeffrie requested, and was granted, an adjournment of that date to Thursday, March 15, 2018.

[10] On March 15, 2018, Mr. Jeffrie attended in court and requested another adjournment. His request was based on his perception that the documentation necessary for the hearing of the appeal was not before the Court and he wanted to file additional documentation.

[11] Mr. Jeffrie's request for an adjournment was granted and a new hearing date was set for June 18, 2018.

[12] A case management conference was held immediately following the conclusion of the court proceedings on March 15, 2018. At that time, Mr. Jeffrie

was directed that he was to file, before May 9, 2018, a list of all of the documents which he would like to have before the Court for the hearing of his appeal. A follow-up case management telephone conference was scheduled for May 9, 2018 at noon.

[13] Mr. Jeffrie did not provide a list of documents he wanted to submit before the May 9, 2018 deadline.

[14] On May 9, 2018, the telephone conference proceeded as scheduled. Mr. Jeffrie was satisfied, at that time, to have the court proceed with the documentation it already had.

[15] On June 18, 2018, Mr. Jeffrie attended at court and again requested an adjournment to allow him to submit additional documentation. With considerable reluctance, the Court granted the adjournment but advised Mr. Jeffrie that there would be no further adjournments and further, any documentation which he wished to have considered by the Court was to be filed by August 1, 2018.

[16] Mr. Jeffrie did not file any documentation by August 1, 2018.

[17] On the date scheduled for the appeal, September 10, 2018, Mr. Jeffrie did not appear in court. Counsel for the respondents/cross-appellants was present.

[18] The court contacted Mr. Jeffrie who indicated that he had mistakenly thought the appeal was scheduled for September 19, 2018. He asked, through Court staff, if the matter could be adjourned and heard at a different time. After considering the request, the panel determined that no further adjournments would be granted and that it would proceed with the appeal based on Mr. Jeffrie's written submissions, the record, and oral submissions on behalf of the respondents/cross-appellants.

[19] At the conclusion of the oral submissions the decision was reserved.

[20] For the reasons that follow, I would dismiss the appeal. I would allow the cross-appeal, in part, finding the judge erred in determining that Inland Marine was jointly liable with Mr. Hendriksen and Three Ports for the costs awarded to Mr. Jeffrie. I would also reduce the amount of costs for which Three Ports is jointly and severally liable to $6,000.00. I would not award costs on appeal to any party.

Issues

[21] Mr. Jeffrie's grounds of appeal are summarized in his factum as follows:

1. Did the judge err in the assessment of damages by:
   (a) finding that the appellant did not provide adequate evidence to permit a calculation of further losses due to delay;
   (b) by not considering all relevant evidence to calculate the damage due to delay;
   (c) by not calculating the appropriate amount of damages including but not limited to the sale of the appellant's property and assets to pursue the respondents?
2. Did the judge err by not amending the order issued on June 24, 2016;
3. Did the judge err by not permitting the appellant further opportunity and direction on the issue of loss of business opportunity?

[22] The issues raised in the cross-appeal may be summarized as follows (I will number them sequentially with the issues on appeal for ease of reference):

4. Did the judge err by awarding more than nominal damages for the delay in transferring the crab allocation?
5. Did the judge err by placing a burden of proof on the cross-appellants to disprove the evidence of Mr. Jeffrie respecting the quantification of damages for the delay in transferring the Area 23 crab license?
6. Did the judge err by finding that he could consider the costs submissions of Mr. Jeffrie when the submissions were submitted beyond the date set by the judge?
7. Did the judge err by holding Inland Marine and Three Ports jointly liable with Anthony Hendriksen for costs awarded to Mr. Jeffrie?
8. Did the judge err by providing Mr. Jeffrie with a further opportunity to make submissions on disbursements relating to the July 2012 Supreme Court proceedings?
9. Did the judge err by finding that he had jurisdiction to order the return of any monies previously seized from Mr. Jeffrie?
10. Did the judge err by finding that an award of pre-judgment interest was appropriate in these circumstances?

[23] I will set out the standard of review when addressing the individual grounds of appeal.

Mr. Jeffrie's Appeal

1. Did the judge err in the assessment of damages by:
   (a) finding that the appellant did not provide adequate evidence to permit a calculation of further losses due to delay;
   (b) by not considering all relevant evidence to calculate the damage due to delay;
   (c) by not calculating the appropriate amount of damages including but not limited to the sale of the appellant's property and assets to pursue the respondents?

Standard of Review

[24] This ground of appeal challenges the judge's findings with respect to damages. As set out in *Morash v. Purdy*, 2011 NSCA 123, we will not interfere unless there was no evidence to support the judge's award or the judge proceeded on a mistaken or wrong principle of law or the award is inordinately high or low as to be erroneous (¶13).

Analysis

[25] To address Mr. Jeffrie's complaints, further context is required.

[26] Mr. Jeffrie commenced the most recent proceeding by way of Notice of Motion. In his Notice of Motion he says:

> Roderick Jeffrie, the Applicant in this proceeding, moves for an order awarding him damages, financial losses, pre-judgment interest and costs resulting from the decision of this Honourable Court contained in its Order respecting this proceeding dated 24 June 2016, together with costs for this application. He also seeks seizure of assets of the Respondents such as to satisfy his claims.

[27] On September 29, 2016, Mr. Jeffrie swore an affidavit in support of his motion. In the affidavit he sets out a number of claims for damages, including damages for the failure of Mr. Hendriksen to pay him the $500,000. He says that he would have used the money to make investments in a variety of fishery business-related activities. In the affidavit he summarized his losses as follows:

> 29. In summary form these losses are expressed as follows:
>
> 2010

Crab Quota - $75,000.00

2011

Crab Quota - $75,000.00

2012

Crab Quota - $75,000.00
Lost lobster revenue - $156,000.00
Lost lobster revenue from sale of license: $90,000.

Total - $321,000.00

2013

Crab Quota - $90,000.00
Lost Lobster revenue - $156,000.00
Lost lobster revenue from sale of license: $90,000.00
Lost crab revenue from sale of allocation $60,000.00

Total - $396,000.00

2014

Crab Quota - $90,000.00
Lost lobster revenue - $156,000.00
Area 21 - $10,500.00
Louisbourg crab - $73,500.00
Down North Group - $182,077.00
Lost lobster revenue from sale of license $90,000.00
Lost crab revenue from sale of allocation $60,000.00

Total - $662,077.00

2015

Crab Quota - $90,000.00
Lost lobster revenue $156,000.00
Area 21 - $10,500.00
Louisbourg crab - $73,500.00
Down North Group - $182,077.00
Lost lobster revenue from sale of license: $120,000.00
Lost crab revenue from sale of allocation $30,000.00

Total: - $662,077.00

2016

Crab Quota - $120,000.00
Lobster Advances - $156,000.00
Area 21 - $10,500.00
Hutt - $73,500.00
Down North Group $154,972.65
Lost lobster revenue from sale of license: $120,000.00
Lost crab revenue from sale of allocation $78,000

Total - $712,972.65

GRAND TOTAL - $2,904,126.65

[28] He further estimated in his affidavit that the consequential damages arising from the 2016 decision exceeded $7,000,000.

[29] Mr. Jeffrie was cross-examined extensively on his affidavit. He also made submissions on the issues of damages and costs before the judge.

[30] The judge reviewed the evidence and submissions and concluded he was not satisfied that Mr. Jeffrie had proven all his losses, saying:

> [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.

[Emphasis added]

[31] With respect, I see no error in the judge's analysis.

[32] Mr. Jeffrie argues that the judge erred in failing to take into consideration the losses suffered by H. Hopkins Limited were actually losses he incurred as the company was the vehicle which he used to earn income after the business relationship with Mr. Hendriksen ended.

[33] Mr. Jeffrie's submissions on this point ignores the judge's ultimate finding that regardless of whether it was Mr. Jeffrie or H. Hopkins Limited which suffered the loss, Mr. Jeffrie had not provided sufficient detail to verify the quantification and tie it to the delay in paying the purchase price.

[34] The failure to establish this link was fatal to a number of claims being made by Mr. Jeffrie. The fact that some of the losses might have been H. Hopkins Limited losses may also have been a basis for denying the claims. However, that is not the principal reason why the judge rejected it. He simply found the losses were not proven.

[35] The judge did not proceed upon a mistaken or wrong principle of law in coming to his conclusion. I would dismiss this ground of appeal.

2. Did the judge err by not amending the Order issued on June 24, 2016?

Standard of Review

[36] Mr. Jeffrie says that the judge erred by not amending the order to bind all three of the named respondents. In other words, he erred by failing to make Three Ports and Inland Marine jointly and severally liable with Mr. Hendriksen for the damages he awarded.

[37] Whether Three Ports and Inland Fisheries are jointly and severally liable is a question of law which will be reviewed on a correctness standard (*McPhee v. Gwynne-Timothy*, 2005 NSCA 80, ¶33).

Analysis

[38] Before the judge, Mr. Jeffrie relied on the wording of the January 20, 2016 decision which says:

> [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.

[39] In his decision the judge recites the provisions of the June 24, 2016 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.

[40] After referring to the order in his decision the judge found that it accurately reflected his specific performance decision and the decision of this Court in finding there was a binding agreement. It was also identical to the draft order prepared by Mr. Jeffrie:

> [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. …
>
> [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.

[Emphasis added]

[41] The agreement was between Mr. Hendriksen and Mr. Jeffrie to buy Mr. Jeffrie's shares. There was never an agreement between Mr. Jeffrie, Inland Marine or Three Ports to pay any portion of the purchase price (or to do anything). Three Ports was simply made a party to the specific performance order to facilitate the transfer of the Hummer and the crab license.

[42] There is no basis in law or in fact whereby the judge could make Three Ports and Inland jointly and severally liable for the purchase price of the shares.

[43] Mr. Jeffrie's argument on this point fails. I would dismiss this ground of appeal.

3. Did the judge err by not permitting the appellant further opportunity and direction on the issue of loss of business opportunity?

Standard of Review

[44] Mr. Jeffrie is alleging an error on the part of the judge in not permitting him to have a further opportunity to prove his business losses. In essence, it is an assertion the judge improperly exercised his discretion. The standard of review of discretionary decisions was set out in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47:

> [151] … In matters requiring a trial judge's exercise of discretion, which would include such things as: awarding or declining to award damages; deciding costs; or making rulings intended to ensure the fair and efficient conduct of a trial, considerable deference is paid on appeal and we will not interfere unless we are convinced that the judge erred in principle or caused an obvious injustice. …

Analysis

[45] The problem with Mr. Jeffrie's submissions on this point is the timing of the motion was entirely in his hands. He filed the Notice of Motion and the affidavit in support of the motion. He did not seek an adjournment from the judge nor did the judge make a decision that he was not going to allow Mr. Jeffrie to make further submissions on damages. The judge was never asked to do so. To the contrary, Mr. Jeffrie made it clear in his submissions to the judge that he did not want any more motions. He said:

> I just want this done, I don't want no more motions, I don't want no more games, I want what's owed to me, and I guess that's it Your Honour.

[46] It was not incumbent upon the judge, on his own motion, to grant Mr. Jeffrie more time to prove his damages. Mr. Jeffrie had his opportunity to present his evidence and make his submissions. Legal proceedings are not an unending process whereby parties can keep coming back to present evidence until they get the result they think they deserve. There is nothing on this record to suggest the process was unfair or prejudicial to Mr. Jeffrie.

[47] The judge made his decision based on what was presented to him. In doing so he did not err. There was nothing more that he was required to do.

[48] I would dismiss this ground of appeal.

Cross-Appeal

4. Did the judge err by awarding more than nominal damages for the delay in transferring the crab allocation?

Standard of Review

[49] This ground of appeal challenges the judge's determination of damages. It attracts the same standard of review as set out above in *Morash v. Purdy*, *¶13*.

Analysis

[50] The cross-appellants say that the judge proceeded on a wrong principle of law when he said:

> [25] … The court has an obligation to assess damages as best it can even if the evidence does not allow precise calculation. …

[51] With respect, this is a correct statement of law.

[52] In *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, this Court explained:

> [172] The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply do its best on the evidence available: S.M. Waddams, *The Law of Damages*, 2nd ed. looseleaf (Toronto: Canada Law Book Ltd., 1991) at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[53] The judge found that Mr. Jeffrie had a claim for lost revenue from the allocation that he should have received in 2010. His damage assessment was based on Mr. Jeffrie's evidence noting that, although the evidence was fairly general in nature, Mr. Jeffrie had extensive experience in the industry including ownership of other crab allocations.

[54] His conclusion on the crab allocation damages is as follows:

> [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.

[Emphasis added]

[55] The evidence of Mr. Jeffrie provided an evidentiary basis for the judge's decision. In reaching his conclusion he did not proceed upon a mistaken or wrong principle of law. To the contrary, he properly applied the principles relating to assessment of damages in coming to his conclusion.

[56] I would dismiss this ground of the cross-appeal.

5. Did the judge err by placing a burden of proof on the cross-appellants to disprove the evidence of Mr. Jeffrie respecting the quantification of damages for the delay in transferring the Area 23 crab license?

[57] The cross-appellants say that the judge shifted the burden of proof to them to disprove Mr. Jeffrie's claim for damages for the delay in transferring the crab allocation. They refer to the following statement in the judge's decision in support of their argument:

> [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.
>
> [Emphasis added]

[58] With respect, the cross-appellants are confusing the burden of proof with the evidentiary burden. Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) explains the difference between persuasive (legal) burden and the evidentiary burden. The persuasive or legal burden of proof means that the party has the obligation to prove or disprove a fact or issue in dispute:

> §3.11 The incidence of the persuasive (legal) burden of proof means that the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil or criminal standard; otherwise that party loses on that issue. …
>
> §3.13 In civil proceedings, the persuasive (legal) burden of proof operates in a similar manner. In an action for assault and battery, the plaintiff must prove that there was an application of force to the victim, that the blow caused the injury, and the quantum of damages. However, the defendant has the persuasive burden in relation to a defence of justification and to prove that he or she used no more force than was necessary.
>
> [footnotes omitted]

[59] Later, in the same text, the authors say the following:

> §3.32 The two possible effects of satisfying an evidential burden must be underlined. When a party satisfies some evidential burdens, the trier of fact *may* make a determination favourable to that party on that issue. Where a party

> satisfies other evidencial burdens, the trier of fact *must* make a determination favourable to that party unless there is evidence to the contrary. Thus, the evidentiary effect of latter kind of evidential burden is to cast an evidential burden upon the opponent to point to evidence already on the record or to adduce some evidence or he or she will lose on that issue.

[60] To explain the distinction in this case, Mr. Jeffrie had the burden to show that he had suffered damages. He introduced evidence which satisfied the judge that he had suffered damages and the amount of those damages. The evidentiary burden then shifted to the cross-appellants to point to evidence on the record or to introduce some evidence to rebut Mr. Jeffrie's evidence. They did not do so and as a result lost on that issue.

[61] The judge did not apply a wrong principle of law, he simply noted the cross-appellants had an opportunity to satisfy their evidentiary burden which they failed to do.

[62] I would dismiss this ground of the cross-appeal.

6. Did the judge err by finding that he could consider the costs submissions of Mr. Jeffrie when the submissions were submitted beyond the date set by the judge?

Standard of Review

[63] For reasons which I will explain, I disagree with the cross-appellants that this ground of appeal raises a question of law. It was an exercise of a judge's discretion which attracts considerable deference on appeal. It attracts the standard of review referred to earlier in *National Bank Financial Ltd. v. Barthe Estate*, ¶*33*.

Analysis

[64] Again, to address this ground some further context is necessary.

[65] In his January 20, 2016 decision, the judge said the following:

> [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.

[66] Mr. Jeffrie sought an extension of time to file his submissions on costs and the Court granted an extension to June 30, 2016. However, Mr. Jeffrie did not file his submissions until September 29, 2016 when he filed the Notice of Motion and affidavit which included his costs submissions.

[67] During cross-examination at the hearing, Mr. Jeffrie explained why he did not file his submissions by June 30.

[68] Before the judge, the cross-appellants argued that Mr. Jeffrie had foregone his right to claim costs from the initial hearing because of his failure to provide submissions by the date ordered.

[69] The judge addressed the issue in his decision:

> [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.

[70] Rule 78.08 of the Nova Scotia, *Civil Procedure Rules* provides as follows:

> **Errors and extensions of time**
>
> **78.08** A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> (c) extend the time for doing something required to be done by an order that provides a deadline;
>
> (d) set a deadline for complying with an order that does not set a deadline.

[Emphasis added]

[71] The cross-appellants say that the Rule only permits an extension of time if that extension is sought prior to the original deadline expiring. I disagree. There is

nothing in Rule 78.08(c) which would preclude the judge from extending the time to do something after the deadline had expired.

[72] The cross-appellants' submissions also run contrary to Rule 1.01 which provides that the Rules are for the "just, speedy and inexpensive determination of every proceeding". In this case, the judge accepted Mr. Jeffrie's explanation for his failure to file his costs submissions within the time allowed and concluded that it would be just to accept the costs submissions made in September.

[73] In doing so, he was exercising his discretion. The judge did not err in principle and his decision did not cause an obvious injustice. I would dismiss this ground of appeal.

7. Did the judge err by holding Inland Marine and Three Ports jointly liable with Anthony Hendriksen for costs awarded to Mr. Jeffrie?

Standard of Review

[74] Whether Inland Marine and Three Ports are jointly and severally liable with Mr. Hendriksen for the costs awarded to Mr. Jeffrie is a question of law and will be reviewed on the correctness standard (*McPhee v. Gwynne-Timothy*, ¶33).

Analysis

[75] The judge awarded costs in the amount of $65,750 plus disbursements, payable jointly by Anthony Hendriksen, Inland Marine and Three Ports. The amount of costs is comprised of $59,750 plus disbursements of $12,000 for the costs of the initial hearing and $6,000 for the hearings in January 2016 and March 2017.

[76] In his January 20, 2016 decision, the judge did not find Inland Marine or Three Ports liable for any amounts owing to Mr. Jeffrie. He made Three Ports a party to the specific performance order for the purposes of transferring the crab allocation and the Hummer:

> [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.

[77] While Three Ports was at least connected to the proceeding for the purpose of giving effect to the specific performance order – no finding of liability on any issue has ever been made against Inland Marine itself. There is no explanation in the judge's decision of March 28, 2017 why he felt that Inland Marine and Three Ports should be jointly and severally liable for the costs of the initial hearing. Nor is there any reason revealed in the record why they would be responsible for those costs. To the extent that the costs relate to the initial hearing ($59,750 plus $12,000 disbursements), the judge erred in making Inland Marine and Three Ports jointly and severally liable with Mr. Hendriksen for the costs.

[78] With respect to the $6,000 costs which he awarded for the January 2016 and March 2017 hearings, there is a basis for making Three Ports jointly and severally liable for those costs. Three Ports was the beneficial owner of the crab allocation and the registered owner of the Hummer, both of which it had not yet transferred to Mr. Jeffrie. As a result, I see no error in the judge making Three Ports jointly and severally liable for that portion of the costs.

[79] However, once again, there is no basis for Inland Marine to be liable for the $6,000 costs award.

[80] I would allow this ground of appeal and vary the order below to provide that Mr. Hendriksen alone is liable for the $59,750 plus disbursements in costs for the initial hearing. Mr. Hendriksen and Three Ports are jointly and severally liable for the $6,000 in costs ordered for the hearings in 2016 and 2017. Inland Marine is not liable for any of the costs.

8. Did the judge err by providing Mr. Jeffrie with a further opportunity to make submissions on disbursements relating to the July 2012 Supreme Court proceedings.

Standard of Review

[81] This ground of appeal relates to the judge's discretion in awarding costs. It is entitled to considerable deference (*National Bank Financial Ltd. v. Barthe Estate*, ¶151).

Analysis

[82] Under this ground, the cross-appellants have two complaints. They say the judge should not have allowed Mr. Jeffrie to make submissions on disbursements following the expiration of the June 30 deadline. I have already addressed this issue above. I am satisfied that the judge had the discretion to allow Mr. Jeffrie to make submissions on both costs and disbursements following the expiration of the deadline. It is not necessary to say anything further.

[83] The cross-appellants also say Mr. Jeffrie did not provide sufficient evidence to prove that the claimed disbursements were incurred, reasonable and necessary (Rule 77.13).

[84] In his March 28, 2017 decision, the judge granted Mr. Jeffrie 30 calendar days from the date of his decision to provide written submissions on the appropriate amount of taxable disbursements (¶29).

[85] Mr. Jeffrie filed his submissions on disbursements on April 24, 2017. In his submissions he provided copies of invoices from his former law firm, Stewart McKelvey, which included disbursements as follows:

- Invoice dated November 30, 2011 showing disbursements incurred of $3,092.05;
- Invoice dated January 30, 2012 with disbursements incurred of $272.71;
- Invoice dated August 10, 2012 with disbursements incurred of $391.58;
- Invoice dated May 31, 2012 showing disbursements incurred of $10,620.94.

[86] The only invoice which breaks down the disbursements is the May 31, 2012 invoice where the amounts are broken down as follows:

DISBURSEMENT SUMMARY	
Travel – Airfare	1,209.56
Travel – Accommodations	2,757.07
Travel – General	129.00
Transcript/Discovery Charges	6,247.08
Meals	199.97
Parking	78.26

Total Disbursements	$10,620.94

[87] The total amount of disbursements incurred in all of the invoices is $14,686.71.

[88] On April 27, 2017 the cross-appellants filed a response to Mr. Jeffrie's submissions on disbursements arguing he had not shown the amounts to be reasonable, compensable or even directly related to the litigation.

[89] Also, on April 27, 2017, the judge wrote to the parties indicating:

> 2. … Mr. Jeffrie indicates that disbursements total $18,187.93. He will need to provide a breakdown of this amount showing the specific categories and amounts of the disbursements and provide supporting invoices. If he does this I am prepared to set the amount to be included in the order.

[90] Mr. Jeffrie responded on May 11, 2017:

> With respect to the disbursements that would be added to paragraph 5 of the draft Order, I enclose invoice documents from Stewart McKelvey Sterling Scales dated June 7th, 2011, November 30th, 2011, January 30th, 2012, May 31st, 2012 and August 10th, 2012. Those disbursements that are set out therein amount to $14,686.71 plus HST of $2,203.01 for a total of **$16,889.72**. I can indicate to the Court that there were additional disbursements that I incurred in relation to the services that were provided to me by the law firms of [Burchells]) and [McInnes] Cooper, but in an effort to move this matter along, I am prepared at this time to limit my disbursements to the amount named herein of **$16,889.72** and waive a claim to further disbursements beyond that amount.

[91] The judge, by letter dated May 18, 2017, determined that disbursements should be set at $12,000.00:

> With respect to disbursements, the information provided by Mr. Jeffrie confirms payment of discovery expenses of $6,247.08 which is recoverable. There are amounts for photocopies, courier, and binding, which are typically recoverable within the parameters set out in Practice Memorandum 10. There are also travel expenses with no supporting explanation.
>
> As a self-represented litigant, Mr. Jeffrie may not appreciate the information needed in order to determine reasonable and recoverable disbursements. Following the initial decision in favour of the respondents, they put forward a claim for disbursements of $21,419.07 plus HST, which included travel expenses of $4,649.22 and copying costs of slightly more than $10,000. After hearing submissions from both parties I reduced the disbursement amount to $13,409.25. I see no reason to believe that the disbursements incurred on behalf of Mr. Jeffrie

> in relation to the original hearing would be materially different to those incurred by the defendants. Despite the sparse evidentiary basis, I will fix Mr. Jeffrie's recoverable disbursements at $12,000.

[92] Although, as the judge found, the evidentiary basis was sparse for his decision, Mr. Jeffrie supplied an evidentiary basis for a finding of reasonable and necessary disbursements. The judge did the best that he could with the information he had and capped the disbursements at $12,000. In these circumstances it was reasonable for him to do so.

[93] I see no reason to interfere with the judge's decision on disbursements. I would dismiss this ground of the cross-appeal.

9. Did the judge err by finding that he had jurisdiction to order the return of any monies previously seized from Mr. Jeffrie?

Standard of Review

[94] As this ground of appeal, ostensibly, raises a question of law it will be reviewed on a correctness standard. However, as will be seen, it is more of a practical issue than a legal one.

Analysis

[95] During the course of the hearing of March 14, 2017, the judge was informed by Mr. Jeffrie that monies had been seized from his bank account as a result of the costs award made against him in the initial hearing. The costs award was overturned by this Court. Mr. Jeffrie thought $26,000 had been seized from his account.

[96] The cross-appellants say that the judge should not have ordered a return of monies seized from Mr. Jeffrie as a result of the original costs award because Mr. Jeffrie had failed to prove the existence or the quantum of the loss. That argument lacks any merit and borders on being disingenuous.

[97] Again, context is required.

[98] After the March 28, 2017 decision, there was discussion between the parties and the judge regarding the form of order. In his decision, the judge said the following:

> 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:

…

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.

[99] In their submissions to the judge on April 27, 2017, the cross-appellants (the respondents below) acknowledge that they were required to return any monies seized in relation to the execution order. They say:

> No finding was made with regard to quantum, and no evidence was offered at the Hearing. The Respondents acknowledge that they are to return any monies seized in relation to the subject execution order, as is provided for in Your Lordship's decision.

[100] The cross-appellants did not take issue with the requirement to return any monies seized, the only issue was the quantum. In response, the judge, in his letter of April 27, 2017, said:

> I am prepared to approve the form drafted by Mr. Scott with the following qualifications:
>
> 1. Paragraph 4 does not indicate the amount of money seized from Mr. Jeffrie as a result of the original cost award. I presume this information is available through the sheriff's office. If that evidence can be obtained from that source, I agree with Mr. Jeffrie that the amount should be specified in the order. I would ask Mr. Jeffrie to do this and send the information he obtains from the sheriff's office to myself and Mr. Scott.

[101] On May 11, 2017, Mr. Jeffrie responded to the judge as follows:

> That with respect to paragraph 4, I contacted the Sheriff's office in order to obtain records in relation to the amounts that they had seized following the three Respondents obtaining an Execution Order after the first proceeding and before the Nova Scotia Court of Appeal rendered [its] decision. The Sheriff's office was unable to find the records regarding the seizures that they made. Despite this failure by the Sheriff's office, I endeavoured to obtain the records from my banking institutions directly where the money was seized.
>
> There were three accounts of mine where money was seized. One of these three accounts is closed and I am advised by a representative at the bank that it will take some time for them to obtain the bank records confirming the amount of money that was seized by the Sheriff's office pursuant to the Execution Order on that account. I enclose a fax from TD Canada Trust dated May 9th, 2017, that confirms the seizures of money on September 12th, 2013 of $13,994.07, which

> under transaction description is entitled "legal demand payment". That is in relation to account #5214641. The second seizure occurred on the 11th day of September 2013 of $6694.08. The record on account #36412769 indicates that it was a "legal demand payment". While I am sure that the bank records I am still waiting for on the closed account will establish a further amount of approximately $5,400.00, that was taken, I am prepared, if Your Lordship will permit it, to have the fixed amount of $20,688.15, confirmed in the order plus interest since the seizure of that amount totaling $3,792.88, which is evidenced by these bank documents to be inserted as the amount that is owed currently and to have an additional clause in the Order that says "*the Respondent shall return any further monies that were seized by Mr. Hendriksen as a result of the original cost award by Justice Michael J. Wood with regard to HFX No. 346079 which was set aside by the Court of Appeal together with interest from the date of seizure at a rate of 5% per annum if said additional monies are confirmed by appropriate documentation".* In this way we can move to put a fixed amount in on the Order but leave an option to have the additional monies that were seized returned once we get the additional records from the bank to confirm them.
>
> [Emphasis in original]

[102] In a letter to the judge dated May 12, 2017, the cross-appellants responded:

> Mr. Jeffrie was to contact Sheriff's Services for confirmation of amounts seized, if any, in relation to the original decision. He reports having done so and that "*The Sherriff's office was unable to find the records regarding the seizures that they made"*. It would be surprising to [us] if monies were seized and all records were simply lost. Nothing from Sheriff's Services has been offered in support of that assertion. That Sherriff's Services has <u>no record of having seized any monies in relation to the original decision</u>, would come as less of a surprise.
>
> Mr. Jeffrie now offers a quantification based on an amount he has inferred from bank statement entries marked "*legal demand payment(s)*". There is no indication of what those entries relate to, whether they relate to the order at issue or even the matter at issue.
>
> We are aware of at least two outstanding judgments issues by Justice Warner (Hfx. 354159) in relation to Mr. Jeffrie and in favour of our client, Three Ports Fisheries. What other collection efforts are being pursued against Mr. Jeffrie, is unknown. Vacating, setting-off the Parties over the years, is a task that will undoubtedly be undertaken once Your Lordship's Final Order is issued. The Parties, including Mr. Jeffrie, have been in contact with counsel for Sherriff's Services regarding same.
>
> Your Lordship has already directed that any monies seized are to be returned, the same is acknowledged and can be reasonably provided for in the Final Order. If a dispute arises as to quantification, the Parties can make an Application to resolve it, call evidence and have the issue adjudicated fairly. Until then, we would again recommend the wording proposed in our draft order.

[103] The responses from both of the parties were not helpful to the judge. Obviously frustrated, the judge took it upon himself to contact the courthouse in Sydney in an effort to determine how much money was seized under the original execution order in the proceeding. In a letter dated May 18, 2017, he informed the parties of the following:

> I have contacted the courthouse in Sydney in order to determine how much money was seized pursuant to the original execution order in this proceeding, attached are copies of the receipts which were provided to me which total $8,476.65. This is the amount that should be inserted in the order and repaid to Mr. Jeffrie by the respondents. Mr. Jeffrie makes reference to other money seized from him as a result of execution orders, however those were issued in other proceedings. For example, the amount of $13,994.07 was seized as a result of an order issued in court proceeding 354159.

[104] Attached to the letter are two invoices both bearing the Halifax Supreme Court Registry No. SH-346079 and the style of cause in the original proceeding:

> Roderick Jeffrie vs. Anthony Hendriksen, Inland Marine Services Limited, Three Ports Fisheries Limited

[105] Although contacting the sheriff to determine the exact amount may have been an unusual step for the judge to take, it was reasonable for him to have done so considering this was a non-contentious issue and the only concern was the amount which had been seized, and the inability of the parties, for whatever reason, to ascertain that amount. If the cross-appellants felt that the amount the judge had determined to be owing was an error, it was open for them to advise the judge before the final order was drafted. In fact, the judge left it in the hands of Mr. Scott, solicitor for the cross-appellants, to prepare the order. The final sentence of his May 18, 2017, letter says:

> I would ask Mr. Scott to prepare the final form of order to reflect my comments in this letter as well as the one of April 27th.

[106] In these circumstances I see no error in the judge taking it upon himself to determine the amount of the funds which had been seized from Mr. Jeffrie.

[107] I would dismiss this ground of the cross-appeal.

10. Did the judge err by finding that an award of pre-judgment interest was appropriate in these circumstances?

Standard of Review

[108] This ground raises an issue of mixed fact and law and will be reviewed on a palpable and overriding standard (*McPhee v. Gwynne-Timothy*, ¶33).

Analysis

[109] Section 41 of the *Judicature Act*, R.S.N.S. 1989, c. 240 governs the award of pre-judgment interest:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> …
>
> (i) 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;
>
> ...
>
> (k) the Court in its discretion may decline to award interest under clause (i) or may reduce the rate of interest or the period for which it is awarded if
>
> (i) interest is payable as of right by virtue of an agreement or otherwise by law,
>
> (ii) the claimant has not during the whole of the pre-judgment period been deprived of the use of money now being awarded, or
>
> (iii) the claimant has been responsible for undue delay in the litigation.
>
> [Emphasis added]

[110] The cross-appellants argue that because Mr. Jeffrie retained possession and use of his shares in Three Ports and did not transfer them to Mr. Hendriksen, he is not entitled to pre-judgment interest. They say Mr. Jeffrie would have had to sign over his shares before any amount became owing to him. The cross-appellants made the same argument before the judge below. He dismissed it:

> [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.
>
> [Emphasis added]

[111] The suggestion that Mr. Jeffrie would have to sign over his shares prior to receiving payment of $500,000 defies common sense. No reasonable reading of the judge's January 2016 decision could lead to such a result.

[112] The intention of the Order and the judge's decision when read in context would require the $500,000 purchase price to be paid over at the time the shares are transferred.

[113] The judge's conclusion was that Mr. Jeffrie was entitled to receive $500,000 for his shares on September 16, 2010. At the time of the March 2017 hearing he had not yet been paid and, therefore, had been deprived of the use of the money. On that basis, the judge awarded pre-judgment interest in accordance with the *Judicature Act*. Not only was it appropriate for him to do so, the *Judicature Act* mandates that he do so unless he was satisfied that there is some reason that it should be eliminated or reduced. Obviously he was not. Therefore, he did not err.

[114] I would dismiss this ground of the cross-appeal.

Conclusion

[115] The appeal is dismissed, the cross-appeal is allowed, in part, Inland Marine Services Limited is not jointly and severally liable with Mr. Hendriksen for the costs award relating to the initial hearing and the hearings in 2016 and 2017 and Three Ports is not jointly and severally liable for the costs portion of the award relating to the initial hearing ($59,750 costs plus $12,000 disbursements). Three Ports remains jointly and severally liable for the costs portion ($6,000) of the hearings in 2016 and 2017.

[116] Since success has been mixed I would decline to award costs on the appeal or the cross-appeal to any party.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Derrick, J.A.