SUPREME COURT OF NOVA SCOTIA
Citation: *Geophysical Services Inc.* v. *Sable Mary Seismic Inc.*, 2009 NSSC 404

Date: 20091231
Docket: Hfx No. 190408
Registry: Kentville

Between:

Geophysical Services Incorporated

Plaintiff

v.

Sable Mary Seismic Incorporated and
Matthew Kimball

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	March 2, 3, 4, 5, 9, 10, 11, 12, 13, 16, 17, 18, 19, 2009, Kentville, Nova Scotia
Counsel:	**Richard F. Southcott** and **Colin D. Piercey**, Counsel for the plaintiff, Geophysical Services Incorporated **Derrick J. Kimball**, Counsel for the defendant, Sable Mary Seismic Incorporated **Nash T. Brogan**, Counsel for the defendant, Matthew Kimball

By the Court:

A. Overview

[1] Geophysical Services Incorporated of Calgary, Alberta ("GSI") and Sable Mary Seismic Incorporated of Windsor, Nova Scotia ("SMS") entered into a contract, or more specifically a series of contracts, for the provision by SMS and its principal, Matthew Kimball, of services to GSI in respect of GSI's marine seismic activities off the East Coast of Canada between January 1998 and October 8, 2002. The services included management of GSI's seismic vessel; obtaining, managing and paying the crew; and securing provisions, supplies and other services for the operation of the vessel.

[2] After SMS resigned and GSI took direct responsibility for these services, GSI determined that it had been overcharged about $1,800,000.00 by SMS, and sued for recovery. SMS denied GSI's claim and countersued for profit or "success" sharing promised by GSI. GSI denied that a legally-enforceable agreement for profit sharing existed, or that any profit was achieved during the period of the SMS contract(s).

[3] The two principal outstanding issues are:

Issue #1: The interpretation of the words "cost plus 5%" used to describe the SMS's entitlement to compensation for the crewing portion of the contract(s). GSI says that actual crews' salaries plus statutory and non-statutory benefits plus 5% is the proper meaning of that phrase. The defendants say that the phrase means the sum of US$143,900.00 per month, or alternatively, an amount equal to the gross salaries of the crew and other personnel, plus 30% plus 6% plus 5%. The plaintiff claims recovery from the defendants of approximately 1.8 million dollars based on its interpretation. The defendants' counterclaim for crew services, based on its interpretation of the contract, is approximately $13,000.00.

Issue #2: The letter agreements between the parties state that GSI will provide a 'success-sharing plan for SMS based on profits' generated from the operations of the marine seismic activities managed by SMS, when GSI was in a profit position. No structure, formula or amount was discussed, nor written agreement concluded, between GSI and SMS as to what sharing would occur. The parties dispute whether an enforceable agreement existed; if so, what it meant; and whether GSI was ever in a profit position at the relevant time period. SMS's claim includes "success sharing" on a *quantum meruit* basis; in its closing submissions, it argues that a fair quantum was 1.3 million dollars. GSI submits that it did have and communicate an intention to share its success when it was successful but at the time relevant to this proceeding, its east coast operation was not profitable nor in a cash flow position to conclude or complete a success-sharing or bonus plan, and furthermore that the intentions communicated did not amount to an enforceable agreement. It did in fact initiate investigations into a bonus plan during their business relationship, and implemented a plan after SMS had terminated the agreements.

[4] The terms of the contractual relationship are evidenced:

a) in part by written, signed letter agreements;

b) in part by written (facsimile and e-mail) communications between the parties; and,

c) in part by oral communications between Davey Einarsson, the principal and operating mind of GSI, and Matthew Kimball, the principal and operating mind of SMS. Some of the contents of the oral communications are in dispute.

[5] It is not disputed that the terms of their contractual relationship changed from the beginning (December 1997) to the end (October 8, 2002). For the purposes of analysis, I divide the time frame into five semi-distinct periods:

1. The period of the first joint venture between GSI and Rieber Shipping, during which period GSI chartered from Rieber Shipping the vessel "Polar Duke" under a profit-sharing joint venture agreement that extended from January 1998 to August 1999 (called "JV 98-99").

2. A period when no seismic surveying occurred, from the end of JV 98-99 to the commencement of the second joint venture between GSI and Rieber - September 1999 to April 2000.

3. The period of the second GSI-Rieber joint venture, May 2000 to mid-December 2000 (called "JV 2000").

4. A period between the end of JV 2000, about which time GSI acquired and commenced seismic surveying with its own vessel "GSI Admiral" and February 28, 2002, when SMS ceased to provide crewing payroll services to GSI.

5. The period from March 1, 2002, (when GSI was the direct employer and payer of the crew on its own vessel and another leased seismic vessel) and October 8, 2002, when the defendants terminated their contractual relationship with the plaintiff.

[6] During the first four periods, the seismic crews on the vessel (during the fourth period the entire crew on GSI's vessel and the seismic crews on the leased Russian vessels) were employees of SMS. SMS paid their salaries including statutory and non-statutory benefits, from monies advanced by GSI to SMS in accord with the invoices sent by SMS to GSI bi-monthly about ten days before the crew was due to be paid.

[7] Throughout all five periods Matthew Kimball personally managed under the title of Vice President of Marine Operations all of the on-site operations for GSI in respect of GSI's activities off the east coast of Canada. This included not just hiring, firing and payroll services for the seismic crew, but, also:

a) arranging the crews' transportation to and from the vessel;

b) arranging the necessary permits, approvals and reporting to various government agencies, including the Nova Scotia and Newfoundland Offshore Resources Petroleum Boards;

c) arranging supplies for and maintenance of the vessels;

d) mobilization and demobilization; and,

e) all of the on-site services required to keep the vessels and crew operating.

These duties and functions required Matthew Kimball to be on call 24-hours a day and to be in almost daily communication with Davey Einarsson in Houston.

[8] It is not disputed that the agreement between SMS and GSI involved five types of invoices being submitted and paid:

1. monthly invoices by SMS for the services described in ¶ 7 (called "consulting fee"),

2. invoices on a periodic basis for Matthew Kimball's personal out-of-pocket expenses (travel, lodging, etc.),

3. monthly invoices (sometimes combined with the invoice for consulting fees) to subsidize the office in the amount of $500.00 per month and for local transportation in the amount of $1,080.00 per month (the fixed office and vehicle figure changed in 2001 to a fixed sum to cover office, vehicle and office staff),

4. bi-monthly invoices for the crew (the invoices in dispute in this litigation), submitted and paid about ten days before SMS was obligated to pay crew expenses, and

5. invoices on a periodic basis for out-of-pocket expenses associated with SMS's services to GSI not covered above (for example, transportation for the crew between their home and the vessel during crew changes, and telephone bills).

[9] Besides SMS, Matthew Kimball owned a construction company, Abbott Contracting Limited ("Abbott"), which entered into an agreement with GSI to provide navigation services for the offshore seismic vessels. A short written letter agreement was signed March 18, 1998, (the day after GSI signed the first joint venture "JV 98-99" with Rieber Shipping) whereby Abbott would supply the navigation equipment and personnel for the vessel for a fixed monthly fee of $70,000.00. This contract was a charge to the joint venture (unlike the services invoiced by SMS to GSI, navigation costs were the responsibility of the joint venture before division of revenues). These navigation services were invoiced monthly, whenever the vessel was in operation from June 1998 to September 2001. In January 2002 GSI purchased from Abbott the navigation equipment for US$90,000.00, and as with the seismic crew began paying the navigation crew costs directly. It was not disputed that

between June 1998 and September 2001 the navigation crew on the seismic vessels was paid by SMS and invoiced to GSI as part of the crew invoices.

B. Evidence

[10] The evidence is summarized under three headings: (1) oral evidence by witnesses; (2) an expert report of Mary Jane Andrews, a forensic accountant with KPMG, admitted by agreement without direct or cross examination; and (3) documents introduced through witnesses or otherwise admitted by agreement as to source and authenticity.

B.1 Witnesses

I Davey Einarsson

[11] Davey Einarsson is the 77-year-old founder and principal of GSI Houston (incorporated in the United States in 1993) and the plaintiff GSI (incorporated in Canada in 1994). He resides near Houston, Texas, and has spent all of his working life in the geophysical industry. Before incorporating his own businesses (GSI Houston and GSI), he had worked, from graduation in 1956, as a geophysical engineer and executive with a geophysical services company by the name of "Geophysical Services Inc." (called "Old GSI" in this decision), owned at one time by Texas Instruments and later by Halliburton.

[12] In or about 1993, Davey Einarsson purchased the database of seismic records of Old GSI from Halliburton, together with the business name - initially with partners, whom he bought out within two years. On that foundation he resurrected the business activities of the Old GSI as a geophysical service provider for the oil industry: collecting, recording and processing data on land and at sea, both on a contract basis (proprietary data) and for GSI's own account (speculative data); leasing seismic equipment to others; and first leasing through a joint venture, and eventually acquiring, a vessel to conduct marine seismic surveys. He and the defendant Matthew Kimball had worked together for many years at Old GSI.

II. Merle Carr

[13] Merle Carr of Calgary, Alberta, was an accountant with Old GSI. She was hired by Davey Einarsson as the controller for GSI in 1994. She was GSI's controller until 2000 when her role changed to that of a consultant responsible for the accounting activities of the east coast marine operation. She resigned on December 5, 2002, the day that GSI caused the defendants' premises in Nova Scotia to be searched pursuant to an Anton Pillar order.

III. Wayne Lam

[14] Wayne Lam of Calgary, Alberta, was a chartered accountant employed by GSI in the Calgary office as chief financial officer from 2001 until 2004.

IV. **Paul Einarsson**

[15] Paul Einarsson, son of Davey Einarsson and a 44-year-old MBA graduate, had worked for ten years in the banking and insurance industry before joining GSI as a vice president and director. He became president in 1999; chairman in 2002 and chief operating officer in 2003. He and Davey Einarsson are the sole owners of the plaintiff.

V. **Matthew Kimball**

[16] Matthew Kimball, about 58 years old, was the founder and principal of SMS. He had worked in the geophysical industry from 1972, mostly for Old GSI, as a supervisor or manager on both the land and the marine operations. He is a native of Nova Scotia who is presently employed as a manager of a shipbuilding business in Phuket, Thailand.

VI. **Patrick Wilson**

[17] Patrick Wilson of Bedford, Nova Scotia, is a principal of Blue Water Agencies which carries on a traditional ship chandler's business from Halifax, Nova Scotia. He testified as to his business dealings with GSI from 1998 until 2008, when GSI terminated his services on the basis that he was overcharging for his services. His evidence was admitted as similar fact evidence.

VII. **Gary MacKenzie**

[18] Gary MacKenzie is an accountant with no professional designation. He has been Matthew Kimball's accountant since the early 1980s and SMS's accountant since its incorporation. He provided the defendants with bookkeeping services, most of their payroll services, and prepared their financial statements. He was qualified to give opinion evidence in respect of a report prepared by him for this proceeding which opines that SMS would have lost about $300,000.00, during the three operating periods that SMS provided crewing services to GSI between 1998 and 2002, if the Court interpreted the phrase "cost plus 5%" as argued by the plaintiff.

VIII. **Karen Kluska**

[19] Karen Kluska is a chartered accountant in Canada, and CPA in the United States, with degrees in engineering and an MBA. From 1984 to 2003 she practised as a forensic accountant, first with Arthur Anderson, then Coopers & Lybrand and eventually on her own - in California until 1999 and in Nova Scotia until 2003. She now carries on a general accounting practice in Nova Scotia.

[20] She was qualified and gave opinion evidence in respect of a report she prepared for the defendants. The report attempted to find, itemize and calculate, from the records disclosed in this

proceeding by the plaintiff, the plaintiff's net income before income tax and related-party expenses and other non-expense transactions, as well as the plaintiff's net income before income tax and after related-party expenses and other transactions, for the fiscal periods 1998 to 2006. She did not attempt to determine whether any of the related party expenses or transactions were made for or without valuable consideration (it was not a valuation report). Nor did she attempt to determine the net income of GSI from the east coast marine operations in which SMS and Matthew Kimball were involved. Her report shows that GSI's net income before tax and after disclosed related-party expenses between 1998 and 2006 was $2,606,764.00, and, for the same period, net income, before related-party expenses and transactions that she could identify, was $28,449,125.00. Her report covers to 2006, four years after the defendants terminated their relationship, because, they argue, sales of data from surveys conducted until 2002 provided revenues subsequent to 2002. Ms. Kluska's report shows that between 1998 and 2002 GSI lost $1,514,766, before taxes and after related-party expenses and transactions. The vast majority of the related-party expenses and transactions, which included legitimate wages and benefits to the Einarssons, legitimate management fees to GSI Houston, amounts paid as dividends out to the Einarssons and immediately lent back to GSI as well as the interest on those loans.

B.2 KPMG/Andrews Report

[21] The plaintiff tendered a report from Mary Jane Andrews, CA, a forensic accountant with KPMG. The defendants agreed to the admission of her expert report and six volumes of supplementary supporting materials without her being called to testify.

[22] Her report used three methodologies to calculate SMS's actual wage costs (that is, gross salaries, statutory benefits and non-statutory benefits) for the seismic crews on the various vessels during the three periods of seismic activities: (1) JV 98-99 between March 16, 1998, and August 15, 1999; (2) JV 2000 between May 1, 2000, and December 15, 2000; (3) when GSI operated the "Admiral" and chartered a Russian vessel, "Polshkov" between March 1, 2001 and February 28, 2002. She compared the results of this calculation with the amounts invoiced by SMS and paid by GSI. The three methodologies were: a) payroll records, prepared in part by Gary MacKenzie and in part by a payroll company, Ceridian; b) T4 documents; and, c) SMS's financial statements and supporting documents, prepared by Gary MacKenzie. She concluded that the amount invoiced by SMS and paid by GSI for the three periods totalled $6,557,348.42. Gary MacKenzie reviewed the KPMG report; he testified that his total for invoices differed by about $32,000.00.

[23] The KPMG report shows that, based on the plaintiff's interpretation of "cost plus 5%", crew costs, calculated over billing as follows: method one (payroll records) by $1,884,247.00; method two (T4 documents) by $1,891,058.00; method three (Gary MacKenzie's financial statement) by $1,764,251.00.

[24] The plaintiff claims that the defendants owe it the amount shown in the KPMG report, except to the extent that the evidence during trial deviated from any factual assumption relied upon by Ms. Andrews. For the purposes of verifying those assumptions, and the documents relied upon by Ms.

Andrews for her report, the plaintiff requested that the defendants admit as facts the compilation by Ms. Andrews of the records obtained from the defendants by a Notice to Admit dated July 18, 2008. During the trial the defendants admitted all of the facts set out in Schedule "A", and each of the documents set out in Schedule "B" in the Notice to Admit, with one exception. It was not admitted as fact that the SMS income statements for the fiscal years ending January 31, 1999, 2000, 2001, 2002 and 2003, represented the amount paid by SMS for wages and statutory benefits and, where applicable, non-statutory benefits for its employees during those fiscal years. Gary MacKenzie was cross-examined with regards to this exception.

B.3 Exhibits

[25] Fifty-seven exhibits were introduced through witnesses, or by agreement as to their source and authenticity. They included:

a) three volumes tendered by the plaintiff (pages not numbered, 49 tabs);
b) the seven volume KPMG report;
c) eighteen volumes tendered by the defendants (totalling 4,278 pages); and
d) thirty-five other individually marked exhibits including the reports of Gary MacKenzie and Karen Kluska.

Only those documents or groups of documents that were referred to during the trial by counsel or by witnesses are before the Court as evidence.

C. Chronology

[26] GSI is in the business of seismic exploration. It uses "geophysics" and the principles of seismic reflection to map the subsurface structure of the earth (on land and at sea) for rock formations that might contain hydrocarbon deposits. It acquires, maps, records and interprets the data for the oil industry. The data it collects is of two kinds: proprietary and speculative.

[27] Proprietary data is produced by seismic activity carried out for a client at the client's expense and direction. The data is owned solely by the client. GSI acts as an independent contractor and is paid by the client regardless of the usefulness of the data.

[28] Speculative data results from seismic activity carried out by GSI without a firm client. GSI defines the areas of interest and explores, maps, records, and sometimes interprets the data, on its own nickel. GSI owns the data, which it markets to purchasers. GSI retains the rights to and ownership of the data; a purchaser simply acquires a nonexclusive license to use it.

[29] The rights to (or ownership of) the data purchased by GSI from Old GSI constituted speculative data. It was licensed by GSI to as many different purchasers as could be convinced that the data contained useful information. The older the data, the less marketable it became.

[30] Acquiring speculative data is a high risk business. It is expensive to carry out the geophysical exploration activity. It requires the geophysical service provider to incur large expenditures, make good choices on where to survey, and possess good marketing skills and credible connections with a limited number of oil companies that are the market for the data.

[31] While in charge of Old GSI's Canadian operations, Davey Einarsson had overseen speculative seismic activity in Western Canada, in the Arctic (Beaufort Sea) and, between about 1973 and 1980, in the Atlantic Ocean off Canada's East Coast. In the 1990's, GSI acquired several "Vibroseis" seismic sources. It was leasing them to others and using them to conduct the seismic surveys in Western Canada.

[32] In 1996, GSI was funded by five oil companies to conduct a small (two or three days with a leased seismic vessel) 3D explorative survey in the area of the Grand Banks off Newfoundland. This was its first marine survey.

[33] In the summer of 1997, Davey Einarsson met Sven Rong, president of a Norwegian company, Rieber Shipping, the owner of a vessel capable of being converted to a marine seismic survey vessel. Mr. Einarsson and Mr. Rong discussed the possibility of a joint venture to conduct speculative seismic surveys off the East Coast of Canada. Rieber was to supply the vessel, crew and heavy equipment; GSI was to supply the seismic gear, seismic crew, and its marketing connections and expertise.

[34] At about the same time, Matthew Kimball wrote GSI about his intention to establish an Eastern Canada-based seismic service company. Mr. Einarsson and Gary A. Bartlett, Vice President of GSI, who also had worked with Mr. Kimball at Old GSI, contacted Mr. Kimball about the possibility of working together. Mr. Kimball was on his way to China for a two-month consulting job and visited GSI's office in Calgary on his way to China.

[35] In or about October 1997, Davey Einarsson met Sven Rong at a Dallas industry convention. They had further discussions about a joint venture. An exchange of proposals by correspondence ensued that lead to a meeting between GSI and Rieber at GSI Houston's office in Houston during the first week of January 1998.

[36] Upon his return from China in November/December 1997, Matthew Kimball met in Calgary with Mr. Einarsson and Mr. Bartlett to discuss his possible involvement in GSI's proposed joint venture with Rieber Shipping. The discussions between Matthew Kimball and Davey Einarsson resulted in a "Letter Agreement" of December 5, 1997, a document relied upon by both Davey Einarsson and Matthew Kimball as one of the key documents evidencing their contractual relationship. It reads:

> December 5, 1997
> **LETTER AGREEMENT**
>
> Sable Mary Seismic (SMS) located and registered in the province of Nova Scotia and GSI Geophysical Service Incorporated (GSI) registered in Canada and located in Calgary Alberta.

Whereas, GSI intends to enter into an agreement to acquire a seismic vessel to conduct surveys in Atlantic Canada, commencing in May/June 1998 and GSI requires the seismic crew to operate this vessel and to help mobilize this vessel commencing on January 1, 1997[*sic* 1998] and whereas SMS wishes to provide these personnel and some services and facilities in the area.

SMS will be responsible for all people, related benefits and insurance required, and GSI will be responsible to pay the monthly fee.

SMS, initially, will provide one person, Matt Kimball, to mobilize and acquire the crew, all permits and registration etc. to facilitate the timely commencement of operations. This includes establishing an office, communication services such as phone, fax, and E-Mail, as well as ground transportation in the area. As the time nears to commence operations, SMS will be responsible to add personnel to complete the mobilization and conduct the operations in an efficient and cost effective manner.

It is understood that SMS personnel will be required to travel both domestically and internationally from time to time and GSI will reimburse the associated travel expenses.

Duration:
This agreement will be in effect from January 1, 1998 until October 31, 1998. After this initial period the agreement will continue indefinitely from month to month until one month written notice is given one to the other.

It is understood that a satisfactory agreement is not complete between the vessel owner and GSI, therefore, this agreement could be canceled at any time prior to the duration of the agreement if GSI fails to acquire the vessel.

Compensation:
Initially, GSI will pay SMS a monthly fee of $6,000.00 US equivalent in Canadian dollars determined by the exchange rate at the National Bank of Canada on the day of payment. Should these operations expand to other parts of the world, GSI will pay in US Dollars. It is understood, this fee will change as SMS adds more personnel, with notification and approval from GSI, of this occurrence and change in fee.

Matt Kimball will act as the GSI representative for government issues, vendors and clients in the area and will become a Vice-President of GSI with the title of:

Vice President - Marine Division
Geophysical Service Incorporated

This will make him to eligible to participate in the company's incentive stock plan.

Success Sharing Plan:
SMS will be primarily responsible for the operations of this vessel and therefore GSI will provide at a later date a success sharing plan for SMS based on profits generated there from. When this plan is completed it will be attached to this agreement as appendix 'A'.

Miscellaneous
It will be SMS's responsibility to develop good relationships with government authorities, with the business community in general, cooperating with the vessel owner, as well as protecting GSI's interests at all times. Also, if during the period from January 1, 1998 until the vessel mobilization work commences there may be times that there are no duties to perform, it is then SMS's obligation to notify GIS and and reduce the monthly fee should this occur.

Agreed by:	Agreed by:
"Signed by Matthew Kimball"	"Signed by T D Einarsson"
SABLE MARY SEISMIC	GEOPHYSICAL SERVICES INCORPORATED
"December 4, 1997"	"December 4, 1997"
Date	Date

[37] Matthew Kimball participated with Gary Bartlett and Davey Einarsson on behalf of GSI during the week-long negotiation between GSI and Rieber in January 1998. Sven Rong represented Rieber. Several draft financial projections of capital and operating costs and revenues were prepared and exchanged as part of the negotiations.

[38] Kimball was a key player for GSI in the preparation of the estimates. For the purposes of estimating the seismic crew costs, GSI estimated the number of crew members needed and their wages, then added to that number 30% to cover the expected costs of statutory payments (such as workers compensation), insurances, and other employee benefits and costs. This calculation or formula was used by Old GSI when budgeting its total wage costs for job bidding without regard to the geographic location (jurisdiction/ land/marine) or nature of the project. This formula was used by GSI in negotiating revenue split with Rieber. It is part of the factual context in the interpretation of the term "cost" in the agreements between SMS and GSI. It was relied upon by the defendants as context for the interpretation of the Letter Agreements between the plaintiff and the defendants. Also relevant, as context, is the provision in Addendum No. 1 to the JV 98-99 Agreement that the parties agreed to compare operational costs experienced by each party to November 30, 1998, and based on changes from the estimates contained in Appendix B, the revenue split would be renegotiated.

[39] The January 1998 negotiations lead to the execution of a Time Charter Partnership and Joint Venture Agreement (referred to as "JV 98-99 Agreement") between GSI and Rieber Shipping on March 17, 1998.

[40] The joint venture agreement provided that from gross revenue some specified mobilization and operating costs were to be paid off the top, and the remaining revenues were to be split between GSI and Rieber equally. The January 1998 negotiation resulted in an "appendix B", showing intended breakdown of expenses - shared (off the top), Rieber, and GSI. The shared "off the top" operating costs originally included fuel, lube oil, victuals (commissary), navigation (the Abbott contract), and bird rental (depth control devices on the seismic cables). In the Time Charter (joint venture) Agreement of March 17, 1998, additional shared costs included harbour costs, customs duties, data processing of speculative data, and where revenue from sales exceeded the data processing costs a sales commission to GSI. From GSI's 50% share, it was responsible for paying, among other things, the costs of the seismic crew (wages, statutory costs and non-statutory benefits).

[41] The provision of the seismic crew was subcontracted by GSI to SMS.

[42] In a February 20, 1998, letter, Mr. Kimball proposed that Abbott Contracting, a company owned by Matthew Kimball, contract with GSI for the provision of navigation services. On March 18, 1998, Mr. Einarsson for GSI entered into a Letter Agreement with Abbott Contracting Limited for the provision of navigation services to GSI for the Joint Venture (JV 98-99). This was a shared cost by JV 98-99 Agreement. The contract reads:

Abbott Contracting Ltd.
P.O.Box 109.
Curry's Corner, Nova Scotia.

To: Davey Einarsson
GSI
Calgary, Alberta.

March 18, 1998

Abbott Contracting is pleased to provide the following:

Quote for Navigation Services:

Mob Fee	$5,000.00
Demob Fee	$3,000.00
Monthly Rate	$70,000.00

Any travel costs to GSI will be a direct cost, with no handling fee.

We provide a Trimble based Skyfix Differential Global Positioning System, with Racal's Winfrog Navigation software for line and shot control.

Price includes:	-Personnel	-One senior and one junior Navigator.
	-Winfrog	-dual hardware systems with 2 dongles
	-Skyfix	-Dual receivers, Mini-domes and Inmarsat Converter. - Differential signals - 2 Trimble receivers
	- Tracs	-Tailbuoy Tracking -Vessel, Tailbuoy and one spare.

Agreement dated March 18, 1998.

"Signed T D Einarsson"
T.D. Einarsson
President

Geophysical Services Incorporated
Calgary, Alberta.

"Signed Mary Claire O'Hara"
Mary Claire O'Hara
Secretary

Abbott Contracting Limited
Curry's Corner, N.S.

[43] From all the evidence, I concluded that Matthew Kimball wished that SMS was, and intended that SMS would become, an equity partner in the joint venture with Rieber Shipping and GSI. That did not occur. The joint venture was a two-party agreement, in which Matthew Kimball's involvement was through SMS's agreements with GSI. It did however affect his approach to GSI. He continually lobbied Davey Einarsson to make him an equity partner in GSI's activities, and explored the option of acquiring a seismic survey vessel on his own and in partnership with others. His intentions are reflected in various written business plans, such as those dated November 1, 1997 and November 20, 1998, and discussion papers and correspondence of January, May, and August 1999, and May and July 2000, some of which is found in Exhibit 5, pp. 238 to 334. His view that SMS should be an equity partner with GSI affected his/SMS's approach to invoicing GSI for SMS's services.

[44] Abbott - navigation services. June 14, 1998, is the date of the first invoice from Abbott for navigation services and of a letter from Matthew Kimball on behalf of Abbott to GSI. The letter states that due to the switch of the software program from Ensoco to Racal, the monthly cost of navigation services to GSI was going to be $10,000.00 per month more than previously stated, or

in the amount of $70,000.00 per month. This letter suggests that the March 18 contract was amended. I have some difficulty with this, since the invoices and cheques for navigation services during "JV 98-99" appears to follow the March 18, 1998, contract exactly; that is, a fixed price of $5,000 for mobilization, $3,000.00 for demobilization and $70,000.00 per month for the people and equipment described in the March 18 contract.

[45] During the second GSI-Rieber joint venture (JV 2000) of June to December 2000, the invoices were a fixed monthly fee of $65,000.00 (prorated for June and December) plus a fixed mobilization and demobilization fees. This is in accord with a written quotation from Abbott dated May 5, 2000, signed by Davey Einarsson with a handwritten addition that the agreement was to commence on June 10, 2000.

[46] For those months in 2001 in which marine seismic surveys were carried out, Abbott invoices were prorated at the rate of $48,000.00 per month.

[47] In 2002, GSI purchased from Abbott its navigation equipment for US$90,000.00 paid in nine monthly instalments from January to September 2002. GSI paid the navigation crew directly.

[48] One of the issues between GSI and SMS is GSI's claim that before 2002 SMS invoiced GSI for some or all of the navigation crews that were or should have been included in the navigation contract with Abbott. In effect, GSI paid twice for some navigation crew costs.

[49] Matthew Kimball consulting fee, office space and vehicle uses. Beginning January 1, 1998, SMS invoiced GSI for the services of Matthew Kimball (so-called consulting fees) and for a contribution for the use of his office and a vehicle. Sometimes these three items were invoiced on one monthly invoice and at other times on two separate monthly invoices (that is, consulting fees separately from office and vehicle). The amounts invoiced for the services of Matthew Kimball, as well as office and vehicle, and paid by GSI, varied between January 1998 and September 2002.

[50] From January 1998 and throughout JV 98-99, SMS was paid US$6,000.00 for Matthew Kimball's services; initially SMS was also paid $1,000.00 for use of SMS's vehicle and $500.00 for office space. Between JV98-99 and JV 2000 (between October 1999 and April 2000), when no marine survey was ongoing, the consulting fee was reduced to Cdn$6,000.00, and no vehicle/office contribution was made. When JV 2000 commenced in May 2000, the fee was increased to US$9,000.00 per month and the vehicle/office contribution was reinstated. From February 2001 when GSI operated its own vessel and leased a Russian vessel, SMS invoiced and was paid US$12,000.00 per month, for the consulting fee, office space, office staff and vehicle. In March 2002 (when SMS ceased acting as the crewing company), the consulting fee was changed to US$10,000.00 per month, including the office expense, but excluding use of a vehicle. Between June and September 2002, when two vessels were conducting marine seismic surveys, the consulting fee was increased to US$14,000.00 per month plus $1,000.00 for office and $1,000.00 for vehicles.

[51] SMS invoices for the seismic crew. Between March 1998 and August 2001, SMS invoiced GSI, on a twice monthly basis, for crew wages and related benefits. The invoices were forwarded

to GSI ten days before the date that wages and benefits were due to be paid by SMS; that is, effectively GSI advanced to SMS the monies necessary to pay the seismic crew and related benefits. The invoices were single page invoices with a single amount due, described as 'crew costs' for either the first half or the second half of the month; each invoice listed the last name of the crew members being paid by the invoice. An example of an invoice for crew costs is that of August 20, 1998:

Qty	Description	Unit Price	TOTAL
1	Crew cost for August16-31 st. Oxner, Nicol, Knee, Allen, Roherty, Pham, Trend, Gaulton, Riggs Chad Parsons, Butler, Sheppard, Chaisson, Larry Parsons, Porter, Herritt, O'Keefe, Murphy, Burgess, Bond, Robbie, Dacey, Crawford, Justin Herritt, Gary Michael	$95,445.00	$95,445.00
		Subtotal	$95,445.00
		Shipping & Handling	
	Taxes	HST	$14,316.75
		TOTAL	$109,781.75

[52] All invoices were faxed to Merle Carr at Calgary. She received backup for all invoices except the crewing invoices. A copy of all invoices was forwarded to Davey Einarsson for approval before payment. Ms. Carr only faxed him backup when he asked for it. When Merle Carr received the first crewing invoice, Davey Einarsson was at the Calgary office. She asked him if he wanted further backup; he replied with words to the effect: 'Not at this time . . . maybe at a later date we will need backup.' Davey Einarsson stated that he did not request backup that day was in a hurry; he expected that Ms. Carr was receiving backup for the crewing invoices from SMS. GSI did not request, and SMS never provided, backup or a breakdown of the crewing cost invoices, until Wayne Lam requested the worksheets in September 2002. In September 2000, Matt Kimball provided Ms. Carr with a detailed schedule for accumulated time off ("ATO") claims, from which she prepared her own analysis for Davey Einarsson's approval. Ms. Carr could not recall if she ever saw a written contract between GSI and SMS, and was never told that the contract was for "cost plus 5%". She was familiar with the Old GSI budgeting formula of 30% for benefits and related costs, but was never told by Einarsson or Kimball that such was the formula for the crewing invoices.

[53] Additional disbursements by SMS for GSI. SMS submitted separate periodic invoices for actual disbursements and expenses incurred by it on behalf of GSI. The particulars or backups for the claims were provided by SMS and all were paid by GSI. In this litigation there was no dispute in respect to these invoices.

[54] About six months into JV 98-99, on October 16, 1998, SMS and GSI executed the following "Letter Agreement" (referred to as "Agreement #2"):

October 16th, 1998

Letter Agreement

Between

Sable Mary Seismic (SMS) located and registered in the province of Nova Scotia and Geophysical Service Incorporated (GSI) registered in Canada and located in Calgary Alberta.

Whereas GSI has a seismic vessel conducting surveys in Atlantic Canada and GSI requires a seismic crew to operate this vessel and SMS wishes to continue to supply these people and some services and facilities in this area.

SMS will be responsible for all people, related benefits and insurance required, and GSI will be responsible to pay the monthly fee.

SMS will continue to supply Matt Kimball, to manage the operation of this vessel. This includes the office, communications as well as ground transportation in the area. SMS will also continue to hire additional personnel required to run the operations in an efficient and cost efficient manner.

It is understood that SMS personnel will be required to travel both domestically and internationally from time to time and GSI will reimburse the associated travel expenses.

Duration:

This agreement will continue from this date until October 16, 1999, although our intent is to run continuously for the next 24 months. We will continue with this agreement until 3 months notice is given one to the other.

Compensation:

GSI will continue to pay SMS a monthly fee of $6,000.00 US, for the service of Matt Kimball. GSI will continue to pay for the personnel supplied by SMS at cost plus 5%. It is understood that office support staff are included in this. Should SMS growth affect the office operation, any office support staff will be prorated to all projects.
GSI will continue to supplement the cost of office at $500.00 Cdn and vehicle at $1080.00 Cdn per month.
Matt Kimball will continue to work for and report directly to Davey Einarsson in all matters relating to this agreement, for its duration.
Matt Kimball will continue as the GSI representative for government issues, vendors and clients in the area and will continue to hold the title of:

Vice-President - Marine Division
Geophysical Service Incorporated.

This will continue to make him eligible to participate in the company's incentive stock plan.

Success Sharing Plan:

It was and continues to be GSI's intent to provide a success-sharing plan for SMS. This will be announced when we are in a profit situation and will be attached to this agreement as appendix "A".

Miscellaneous:

It will continue to be SMS's responsibility to develop good relationship with government authorities, with the business community in general, cooperating with the vessel owners, as well as protecting GSI's interests at all times. It is also SMS's responsibility to reduce costs and overhead if an when necessary during any slow period, to minimize GSI costs. These reductions will be discussed directly with Davey Einarsson, prior to implementing, also guaranteeing that any reduction in people will not adversely affect the ramp up of the operation.

Agreed by:	Agreed by:
"Signed by M Kimball"	"Signed by T D Einarsson"
SABLE MARY SEISMIC	GEOPHYSICAL SERVICE INCORPORATED
"Oct 16/98"	"Oct 16/98"

[55] Agreement #2 was intended to reflect the services being provided by SMS to GSI for JV 98-99, as contemplated by the Letter Agreement of December 5, 1997, which agreement was made before the first GSI-Rieber joint venture. Agreement #2 follows closely the wording in the first letter agreement. The significant changes are respecting duration, and SMS's compensation with respect to the seismic crew, office space and vehicle use. While the parties do not dispute that SMS's personnel costs were to include office support staff in addition to the seismic crew, they vigorously dispute the meaning of the sentence: "GSI will continue to pay for personnel supplied by SMS at cost plus 5%."

[56] On May 3, 2000, GSI and Rieber agreed to a new joint venture (JV 2000) on the same terms as the JV 98-99, except that the split of revenues was changed to 60% for GSI and 40% for Rieber. JV 2000 was intended to run from June to November 2000. The formal "Novation Agreement" was executed by Rieber on June 16, 2000, and by GSI on or after June 20, 2000.

[57] SMS supplied the same services to GSI for JV 2000 as JV 98-99. On October 12, 2000, Matthew Kimball and Davey Einarsson renewed the October 16, 1998, Letter Agreement by executing a handwritten addition (called "Agreement #3"), which reads as follows:

GSI wishes to renew this agreement with SMS for six months commencing 15th May 2000. After six month this agreement will be automatically renewed month to month until notice is given one to another with one months notice to cancel this agreement.

Signed	Signed
"T D Einarsson	"M Kimball"
GSI Chairman	SMS President
October 12, 2000	date "Oct 12/2000"

[58] From the beginning, Matthew Kimball, through SMS, intended to own and operate his own seismic survey vessel. He had prepared a business plan to effect this purpose in November 1997. He was sidetracked in this plan by his involvement through GSI in JV 98-99, and because of lack of financing, both capital (4.5 million dollars) and operating (9.5 million dollars per year), necessary to implement his business plan.

[59] He never gave up on his plan. In November 1998, he prepared a second business plan to carry out his intention to create a Canadian marine seismic company. He used similar projections regarding capital costs, revenues and costs, as in his November 1997 plan. He approached the Province of Nova Scotia for a loan guarantee of approximately 5.7 million dollars to implement his plan. He was unsuccessful in getting financing.

[60] At the end of JV 98-99 (September 30, 1999), Matthew Kimball advised Davey Einarsson in writing of his intention to suspend their business relationship. Mr. Einarsson advised that cash was tight and Mr. Kimball was interested in pursuing his own business plan. It was about this time that Davey Einarsson's son Paul Einarsson became president of GSI and appears to have inserted himself into the marine seismic operations.

[61] By the year 2000, GSI was looking to acquire a vessel to replace the Rieber joint venture. Matthew Kimball had been looking for a vessel for SMS. He became involved in the search for a vessel with GSI. The evidence clearly shows that he anticipated that SMS would own the vessel with GSI. As of August 10, 2000, (Exhibit 42) it was clear that GSI intended to own any vessel acquired in its own name, and not jointly with SMS. Thereafter Davey Einarsson and Matthew Kimball had a couple of "heart-to-heart conversations". Matthew Kimball resigned himself to going along with GSI's plan to purchase a vessel in its own name. Near the end of 2000, the vessel that eventually became the "Admiral" was found in Aberdeen, Scotland. It was purchased by GSI in the spring of 2001.

[62] As the purchase of the Admiral was being finalized, a "Letter Agreement" dated January 26, 2001, was prepared setting out a new proposed agreement between SMS and GSI. It was never signed. It is not clear who prepared the Letter Agreement. The Letter Agreement was very similar in format and content to the October 1998 Agreement. The one obvious amendment was the provision for the consulting fee, office space and support staff, and local transportation. It was implemented as evidenced by the invoices sent by SMS to GSI and paid by GSI. It read:

> GSI will pay SMS a monthly fee of $12,000.00 USD. This includes the services of Matt Kimball, the local transportation and office. It is understood that the office support staff are included in this.

[63] A short time later, Paul Einarsson caused lawyers in Calgary to prepare a Services Agreement and Employment Agreement between GSI, SMS and Matthew Kimball. It was clear from an April 26, 2001, e-mail that Matthew Kimball did not agree with the contents of the proposed contract, and wrote:

> Until resolved, we continue as per original agreement on a month to month.

[64] The only change in the business relationship between SMS and GSI after GSI acquired the "Admiral" was the increase in the consulting fee paid to SMS for Matthew Kimball's services in accordance with the unsigned Letter Agreement of January 26, 2001.

[65] In the fall of 2001, GSI's controller Wayne Lam was expressing concerns about GSI's serious cashflow problems (he called it a "crisis"), that stemmed from the large capital expenditures on the East Coast marine operation, and operating expenses (that he believed were higher than necessary), coupled with the uncertain revenue stream from speculative data collection. Conservation of cash had led to a shutdown in marine operations in August 2001. Paul Einarsson too asked questions about operating expenses, relying on Wayne Lam's inquiries and analyses of what SMS was costing; he was considering changes to the marine seismic operation. Matthew Kimball was aware of these inquiries. He was not as happy dealing with Paul Einarsson as with Davey Einarsson; he trusted Davey Einarsson, in the same way that Davey Einarsson obviously trusted Matthew Kimball. In response to Matthew Kimball's concerns about what was happening to GSI's marine operations, Davey Einarsson asked Matthew Kimball to outline a plan for their future business relationship. Matthew Kimball did so in an e-mail dated January 25, 2002.

[66] Matthew Kimball proposed that GSI assume direct responsibility for the seismic crew, setting up its own payroll in Windsor and eliminating SMS's involvement as a crewing company. The e-mail reads in part:

> 1. SMS and Matt are separate deals.
>
> 2. *SMS is a crewing company, providing GSI's people at cost plus 5%. . . .*/SMS will invoice for a monthly fee of US$15,000.00 for the term of 1 year, Jan - Dec 2002, *in lieu of the 5% of salaries it now receives*, office, vehicle and 24-hour call. In essence, I do what I do. [My emphasis]

GSI's payroll service would be carried out by GSI from SMS's Windsor office. In addition, he proposed that GSI pay him directly a salary at the rate of $6,000.00 US per month for a one-year term. This salary would not include the office staff who would be on GSI's direct payroll. He proposed that GSI purchase Abbott's navigation system for US$90,000.00, payable over nine months.

[67] In response, on February 11, 2002, Davey Einarsson faxed Matthew Kimball an analysis that Wayne Lam prepared as to what he thought Matthew Kimball/SMS had made in 2000 and

2001(Exhibit 1, Tab20). The e-mail showed SMS's compensation for 2000 and 2001 as: "Year 2000 - Consulting fees $108,557.50 - 5% Fee on Payroll $44,233.35. . . Year 2001- Consulting Fees $226,080.00 - 5% Fee on Payroll $91m,513.99". In further discussions, Einarsson suggested that Kimball was making more than him, and Kimball never took issue with Wayne Lam's description of SMS/Kimball's compensation as including "5% Fee on Payroll".

[68] Matthew Kimball revised his proposal slightly in an e-mail dated February 12, 2002. He reduced the proposed invoice from SMS from US$15,000.00 to US$12,500.00 and his personal salary from $6,000.00 US to $5,000.00 US per month.

[69] Two days later (February 14), Matthew Kimball sent a lengthy fax to Davey Einarsson exercising his option to terminate their agreement, "as per our contract which is currently running month to month", effective March 13, 2002.

[70] As a result of Kimball's termination e-mail, GSI immediately implemented two of the three proposed changes in Kimball's January 25; February 12 and February14 e-mails. First, GSI purchased Abbott's navigation equipment for US$90,000.00, payable over nine months. It also set up its own payroll service in Windsor and put the navigation crew on its payroll. Second, GSI put the seismic crew on its direct payroll effective March 1, 2002, thereby ending SMS's involvement as a "crewing company".

[71] With respect to the third part of Kimball's proposal (his employment), it appears that Davey Einarsson talked Kimball into remaining on in his prior role of running the marine operation. This is confirmed by an e-mail that Matthew Kimball sent Russell Einarsson on June 18, 2002. GSI agreed that, for March, April and May, SMS would invoice GSI, and GSI would pay SMS, US$10,000.00 as Matthew Kimball's consulting fee; this included office space, warehouse and storage, but excluded local transportation. Beginning in June, SMS invoiced and GSI paid SMS US$14,000.00 as Kimball's consulting fee for managing two vessels, local transportation, office space and storage. This continued until their business relationship ended on October 31, 2002. In the June 18 e-mail Kimball again stated that he was not prepared to remain after July 19, but in fact he did.

[72] After GSI took over the payroll function on March 1, 2002, Wayne Lam noticed that GSI's crew costs dropped quite significantly from those invoiced by SMS. He explored several possible reasons for the drop, but none explained the drop. He determined that he needed help from SMS. He called Matthew Kimball to ask his help in explaining the discrepancy between what it was costing GSI then versus SMS's earlier invoices. Mr. Lam asked Mr. Kimball to provide him with the worksheets that had been used to calculate the amount claimed on SMS's bi- monthly invoices for crew costs. I accept Mr. Lam's evidence that Mr. Kimball initially told him that he would try to locate the records and get back to him. He did not. After leaving several messages for him, Mr. Lam reached him on a Friday and Mr. Kimball promised to email him on Monday. On Monday, September 30, 2002, Matthew Kimball emailed Mr. Lam:

> Wayne, after our conversation, I had a quick look at my notes and find that all worksheets for people invoices are gone. Worksheets were precisely that, derived for the period, and adjustment done as to prior billings. GSI from the beginning did not require anything other than names and the amount. So... there is nothing remaining other than the invoices.
>
> SMS was a crewing company. It was not part of GSI in any way, shape or form. Individual salaries were not GSI's business. In fact, GSI would never know in the first person if anyone during that period had Workers Comp coverages or life insurances, or benefits or anything. They did, of course, but SMS was never required to prove any of this to GSI. Today, I am not prepared to dig into this stuff, and try to reproduce any of the past, for any invoices.
>
> What does Davey say about this?
>
> Matt

[73] The next day, Wayne Lam produced a report, that he had been working on since the summer, outlining the significant unexplainable discrepancy between crew costs invoiced by SMS and crew costs experienced by GSI since March 1, 2002.

[74] After Davey Einarsson received the report, he flew to Halifax on the evening of October 7 (he was already scheduled to attend an industry convention there), where he was met at the airport and driven to a Halifax hotel by Matthew Kimball. The next morning they met at the hotel. Their evidence of their discussions differs.

[75] Einarsson says that he described the problem outlined in Lam's report and asked for an explanation. Kimball insisted on seeing the report and Einarsson gave it to him. Kimball reacted violently, swearing and asking why he let them do this. Kimball said: 'You know I was paying for safety boots, taxis, motels . . . '. Kimball walked to the door and said he was going to speak to a lawyer. Einarsson asked him to write a reply explaining his position.

[76] Kimball says that Einarsson started to speak about the Lam report, and while Einarsson was on the phone he flipped through it. When Einarsson got off the phone, he asked what Wayne was talking about? Einarsson replied that they think he was using Matthew to milk money out of GSI. He acknowledged becoming angry and swearing. When Einarsson asked him to write an explanatory letter, Kimball asked what Einarsson wanted him to say as Einarsson already knew the answer. Kimball said he had to go for a walk. He left with a copy of the report and called his accountant. The same day, he sent a letter to Einarsson terminating the agreement (and any business relationship) effective October 31, 2002. He did not respond to the Lam report.

[77] Their business relationship ended as of October 2002.

D. **Analysis**

[78] GSI's claim involves the application of the law of contracts and the law of the torts of fraudulent or negligent misrepresentation. The defendants' counterclaim also involves the

application of the law of contracts, and the principle of unjust enrichment (restitution) and/or *quantum meruit*.

D.1 GSI's Contract Claim - Interpretation of the Agreement

[79] For the law respecting the interpretation of contracts, I adopt and incorporate my outline of the legal principles from *Gaetz* v *Croft*, 2009 NSSC 184 at ¶¶ 16 to 41, and *BC Rail Partnership* v *Standard Car Truck*, 2009 NSSC 240 at ¶¶ 20 to 26. In those decisions (and this decision), the Court relies on the analyses in **John Swan**, *Canadian Contract Law*, 1st Edition (Markham: LexisNexis, 2006), **G.H.L. Fridman**, *The Law of Contract in Canada*, 5th Edition (Toronto: Carswell, 2006), and **Geoff R. Hall**, *Canadian Contractual Interpretation Law*, 1st Edition (Markham: LexisNexis, 2007).

[80] The plaintiff's contractual claim centres around a series of verbal communications, confirmed by written letter agreements. This affects the analysis. This case is unlike many where the primary duty of the court is to interpret a written agreement that purports to contain the entire agreement between the parties. This affects the extent to which the parol evidence rule applies, and what extrinsic evidence is admissible. The "hard rule" laid out in *Eli Lilly & Co.* v. *Novapharm Ltd.*, [1998] 2 S.C.R. 129, ¶¶ 54, 56, does not, per se, prevent a court from hearing some types of extrinsic evidence for some purposes, with one exception in every case - evidence of the subjective intentions of the parties. It does affect whether, and what, extrinsic evidence may be considered in the interpreting agreements. A useful outline of the purposes and circumstances in which extrinsic evidence is admissible is found in *Gallen v. Nunweiler*, 1984 CarswellBC 104 (BCCA), ¶¶ 33 to 38. Useful appellate decisions, since *Eli Lilly*, on the admissibility of extrinsic evidence, include *Kentucky Fried Chicken Canada v. Scott's Food Services*, 1998 CarswellOnt 4170 (OCA) ¶¶ 24-27, *Hi-Tech Group v. Sears Canada*, 2001 CarswellOnt 9 (OCA) ¶¶ 23-25, and *Geoffery L Moore Realty v. Manitoba Motor League*, 2003 CarswellMan 229 (MCA) ¶¶ 13-26.

[81] GSI argues that the oral agreements, reduced to writing in the agreements of December 5, 1997 (Agreement #1), and October 16, 1998 (Agreement #2), and renewed on October 12, 2000 (Agreement #3), demonstrate an agreement that GSI would pay SMS a fee that varied from time-to-time; that fee was intended as SMS's compensation for services rendered to GSI as manager of GSI's East Coast marine operation, and included hiring, paying (with GSI's money) and managing the seismic crew. Their agreement respecting the crew was that GSI would advance to SMS, before the expense became payable, crew costs (the actual amount of wages and benefits), plus 5%.

[82] The theory of contract creation involves promises exchanged. Generally, such promises need not be in writing to be enforceable (unless required to be in writing by the *Statute of Fraud*s). However, the absence of a written memorandum means that interpretation, and consequently enforcement, becomes hostage to reconciling the oral evidence of the parties. **John Swan** (page 28) makes the point that judicial scepticism, which often arises in respect of claims to enforce contracts based on oral promises, is justifiable.

[83] In the case at bar, the intended commercial arrangement between the parties was conceptualized, framed and first reduced to writing on December 5, 1997 - before the subject matter of the contract, the first Joint Venture between GSI and Rieber Shipping (JV98-99), came into

existence. Agreement #2, executed ten months later (about six months after the GSI-Rieber Joint Venture Agreement was executed), implemented the arrangement conceptualized by Agreement #1 but fleshed out by oral agreements between GSI and SMS and implemented when Joint Venture 98-99 became operational in the spring of 1998. This makes the interpretation of Agreement #2 the most relevant to this litigation.

[84] While an oral agreement can, in certain circumstances, modify an earlier agreement, where an oral agreement is reduced to writing, parol evidence of the parties' understanding of the oral agreement cannot be used to contradict the wording in the subsequent written document. Said differently, evidence of an oral agreement after October 16, 1998, may be admissible to modify or amend Agreement #2, but evidence of an oral agreement before October 16, 1998, is not properly admitted to contradict the subsequent written agreement. See **G.H.L. Fridman** at page 444. Even Swan's analysis, beginning at page 509, in which he adopts, as the outline for his discussion of parol evidence, Lambert, J.A.'s non-exhaustive list of permissible bases for admission of extrinsic evidence in *Gallen v. Nunweiler*, and as support for the proposition that it is misleading to state that an ambiguity is a precondition to admission of extrinsic evidence, does not extend the interpretative principles to admission of oral evidence for the purpose of contradicting the clear words of the written agreement.

[85] I accept Swan's analysis (p 516), following generally *Gallen*, that extrinsic evidence may be taken into account as context: to show that there is no enforceable contract, and/or that there are other sources of the parties' undertakings; and to resolve ambiguities. A similar conclusion is advanced by **Geoff R. Hall**. His eighth "fundamental precept" is that the parol evidence rule is a weak rule, not applicable to the admission of extrinsic evidence for some purposes and running counter to modern themes of interpretation.

[86] In respect of resolving the ambiguity in a written agreement, it is clear that if the interpretation of the contract itself (interpretation within the four corners of the contract) still leaves two reasonable alternative interpretations, which is clearly the situation in this case, extrinsic evidence of the factual matrix and conduct of the parties before, contemporaneous with, and after the agreement was put into writing, is admissible. See **Fridman**, page 451, and *Canadian National Railway* v *Canadian Pacific Limited*, 1978 CarswellBC 525 (BCCA) at ¶ 48, affirmed by the Supreme Court of Canada [1979] 2 SCR 668.

[87] The December 5, 1997, letter agreement contains the following provisions relevant to this litigation:

1. SMS was initially to provide the services of Matt Kimball, an office, communication services and local ground transportation.

2. Matt Kimball's responsibility was to mobilize and acquire the crew and permits, to facilitate the proposed east coast marine seismic operation.

3. The crew meant the seismic crew to operate the vessel.

4. SMS was to be responsible for "all people, related benefits and insurance required".

5. GSI was to pay SMS a monthly fee for this service - initially US$6,000.00 but subject to change as SMS added more personnel.

[88] On its face, Agreement #1 contains no ambiguity. It did not address how crew and related crew benefits and costs would be handled; however, it did identify what SMS was to do, and the monthly fee GSI was to pay SMS for that service.

[89] Agreement #2, on its face, follows the format of Agreement #1. By the time it was executed, SMS had engaged the seismic crew, and the marine survey operations had begun. SMS was submitting, and GSI paying, the five types of invoices described in ¶ 8 of this decision.

[90] The first four clauses in Agreement #2 contain no change from the first four clauses in Agreement #1 except to state that what SMS: "will do" in Agreement #1 became: "will continue to do" in Agreement #2.

[91] The section regarding "Compensation" contains important wording changes. Both Agreement #1 and Agreement #2 provide that SMS will be responsible for all people, related benefits and insurance required, and the services of Matt Kimball, including office, communications and ground transportation; and that GSI will be responsible for paying the monthly fee.

[92] However, in Agreement #2 the first sentence of the Compensation section adds that the monthly fee of US$6,000.00 is "for the service of Matt Kimball".

[93] The fourth sentence provides that "GSI will continue to supplement" SMS's cost of office and vehicle at the fixed monthly rate of Cdn$500.00 and Cdn$1,080.00 respectively. By the fourth paragraph in Agreement #1, it appears that office and ground transportation were included in SMS's agreement to "provide" Matt Kimball.

[94] The second sentence in the Compensation section in Agreement #2 states that GSI " . . .will continue to pay for personnel supplied by SMS at cost plus 5%. It is understood that office support staff are included in this."

[95] Determination of GSI's contract claim depends upon the proper interpretation of the term "cost plus 5%", and whether that term, when interpreted in the context of Agreement #2 as a whole, contains an ambiguity in respect of GSI's obligation to pay for personnel supplied by SMS.

[96] Davey Einarsson's evidence is that GSI's obligation to SMS was to pay for the actual cost to SMS for the seismic crew; that is, the actual wages; together with the actual cost of benefits and related crew expenses such as unemployment insurance, workers' compensation, medical/dental, life and other insurance; plus 5% of the actual wages and benefit costs. His evidence is that SMS's "profit" or compensation for its services, was in the monthly fee agreed to in Agreement #1 and continued in Agreement #2. His evidence is that the service provided by SMS for the monthly fee

included the services of Matt Kimball as manager of operations, hiring and paying the seismic crew (with funds advanced by GSI), as well as, the provision of an office, communication services and ground transportation. The 5% was to pay SMS's overhead for paying crew wages and benefits. Einarsson described SMS as a shell company created to pay the crew; the term "cost" meant all the benefits and costs associated with people that were standard to the industry, and "5%" was to pay office staff.

[97] Matthew Kimball states that the term "cost plus 5%" meant the sum of $143,900.00 per month, or in months when crew worked part of a month, that sum prorated. This figure comes from early calculations (Exhibit 8, page 000012) made by GSI as part of the negotiation of the First Joint Venture Agreement between GSI and Rieber. GSI's budget estimated that during the first year of operation the cost of the seismic crew and benefits (including office and vehicle) would be $1,127,200.00 or $143,900.00 per month during full or peak operating months. As noted earlier, this calculation was made by Kimball and Bartlett by adding 30% to Kimball's estimate of the actual number of seismic crew needed and their actual wages to account for the expected crew benefits and other employee costs. A later spreadsheet (Exhibit 1, tab 2, page 000008) shows this figure being "reduced @ 95%" to a figure of $1,070,800.00 or $136,700.00 per month during full or peak operating months.

[98] I accept Davey Einarsson's evidence, confirmed by the evidence of Merle Carr, that, in budgeting jobs or projects at "Old GSI", Einarsson, Kimball and Gary Bartlett had followed the practice of estimating the actual wage costs for the crew, and adding 30% as a general overhead figure for benefits and other employee costs, regardless of where in the world the project was to be carried out. At "Old GSI", this calculation (30%) did not necessarily constitute the final crew cost calculation in a tender or bid. This practice of adding 30% to estimated crew wages, to get the total crew costs, was used by Einarsson, Kimball and Bartlett during the negotiations with Rieber in January 1998. The relevance of calculating total crew costs, and therefore the markup, was that the percentage of revenue to be split between GSI and Rieber (eventually 50% each) was negotiated on the basis of each party's anticipated respective capital and operating contribution to the Joint Venture. GSI was to pay the seismic crew costs from its share of the joint venture revenues. The figure of $143,900.00 per month was GSI's initial estimate of the total seismic crew costs (wages plus 30%), and was shown on spreadsheets prepared by GSI near the beginning of its negotiations with Rieber. Matthew Kimball played a large part in creating the estimate.

[99] During negotiations with Rieber, Einarsson agreed to reduce this estimate of crew costs by 5%. Kimball says that when Einarsson agreed with Rieber to do this, GSI was, effectively taking 5% off SMS's revenue as GSI had already agreed to subcontract (by Agreement #1) the seismic crew to SMS (instead of permitting SMS to become a partner with GSI and Rieber in the joint venture). Kimball says that Einarsson verbally agreed to give back to SMS the 5% it had taken off Kimball's estimate of crew costs in the Rieber negotiations. His evidence is that the original calculation made by him and used by GSI in its negotiation of the Rieber joint venture was the agreed amount of his subcontract for crew services with GSI, and that the term "cost plus 5%" in Agreement #2 is a reference to the revised crew cost calculation being reinstated, as between GSI and SMS, to the original crew cost calculation of $143,900.00 per month.

[100] Davey Einarsson says that the budget or estimate of crew costs prepared by Matthew Kimball and Gary Bartlett for the purposes of the negotiation of the Joint Venture with Rieber Shipping was never intended to be, and was never, the amount that GSI agreed to pay to SMS for the GSI's people and benefits.

[101] Matt Kimball further states that when hiring the seismic crew in the spring of 1998 he was able to hire some recent graduates at a lesser cost than estimated during the Rieber negotiation; because of the additional saving, Einarsson (for GSI) agreed that SMS could add an additional 6% to SMS's invoices for crew costs. It was never explained to the satisfaction of the court how this 6% was accounted for. At no time did Matt Kimball testify that the contract price was more than the $143,900.00 per month, that is, 6% more or $152,534.00. Davey Einarsson denied any discussion or agreement to add 6%. He stated that the written agreements already required Kimball to hire personnel and conduct operations in an efficient and cost effective manner.

[102] Among the spreadsheets relied upon by the parties was one prepared by GSI (Exhibit 8 pages 000008 and 000009) and another prepared by Rieber (Exhibit 8 page 000010), an amended version of which was attached as Appendix B to Addendum 1 to the Time Charter Agreement ("JV98-99") dated March 17, 1998. The spreadsheets were used for the purposes of arriving at the GSI-Rieber revenue sharing agreement.

[103] Mr. Kimball states that he invoiced Davey Einarsson, with his knowledge, monthly fees for the seismic crew that had no relationship to the actual wages paid and the actual benefits paid for or on behalf of the seismic crew. He gave as the reason that Davey Einarsson, on behalf of GSI, agreed to invoices that had no relationship to the actual cost of the seismic crew plus 5% was the provision in Addendum 1 to the Time Charter Agreement between GSI and Rieber which read as follows:

> The owners and the charterers have agreed to compare operation costs experienced for both parties through the month of November 1998. Based on possible variation from the general assumptions dated January 7, 1998 (Appendix B), the revenue split to be renegotiated and agreed upon both parties for the charter time after November 1998.

In effect, the joint venture agreement provided for a review of each party's operating costs and if these costs differed from the original estimates, the revenue split (the percentage of revenue each party would receive) would be renegotiated. Kimball states that Einarsson was concerned that if crew costs were less that the estimates incorporated as Appendix B to the Joint Venture Agreement, GSI's revenue split may be reduced by the November 1998 review.

[104] Einarsson states that he had no such concern. Among other reasons for not being concerned was the high value and rate of depreciation Rieber put on the 'Polar Duke' during the January negotiations, which value had no relationship to reality.

[105] He further noted that lower crew costs increased GSI's net income from the joint venture, and reduced GSI's very serious cash-flow problem associated with high up-front operating costs of the project.

[106] The circumstance of the negotiation of the Rieber Joint Venture in January 1998 and the implications of a possible renegotiation of the revenue split based on comparison of operations costs is a relevant and admissible contextual factor to the interpretation of the second sentence in the compensation portion of Agreement #2. However, I accept Davey Einarsson's evidence that he had no reason to be concerned about a possible renegotiation of the revenue sharing agreement in November 1998, or that GSI had more to gain by agreeing to pay SMS more than the actual crew costs plus 5%, all of which extra cost came directly off GSI's share of the joint venture revenue.

[107] The e-mail that Matt Kimball sent Davey Einarsson and Gary Bartlett, dated January 13, 1998 (Exhibit 17, pages 000208 - 000211) 'recapping the meetings with Rieber' acknowledging that the expenses shown "are estimates on both parties and actuals will be available for each to review at the end of the first operating season".

[108] The Court does not accept, and there was no evidence to confirm, that Davey Einarsson nor anyone at GSI was aware of Matthew Kimball's interpretation of the "Compensation" provision in Agreement #2 and that it would form the basis of his monthly invoices for crew services. (In the next section of this decision, I find that Davey Einarsson was aware, at some later time, that SMS was invoicing for crew on the basis of cost plus 30%; at no time do I believe that Einarsson or GSI knew the basis of the crewing invoices.) The Court does not accept Mr. Kimball's evidence that Mr. Einarsson knew and agreed that, by Agreement #2, he was agreeing that SMS was entitled to invoice and be paid for the seismic crew at the rate of $143,900.00 for each month that a full crew was working, or by the alternate formula advanced by Kimball during the trial.

[109] At times during his oral evidence, Matt Kimball stated that the agreement respecting crew costs between he and Einarsson was for actual wages, plus 30%, plus 6%, plus 5%. This evidence contradicted his other evidence that the agreed crew costs were the fixed amount of $143,900.00 per month agreed to between GSI and SMS during GSI's negotiations with Rieber, plus the 6% extra that Kimball says Einarsson agreed to in the spring of 1998 when he hired the new graduates at a lesser wage than budgeted in January 1998. This contradiction in his own evidence was never explained to my satisfaction. As will be noted in the next section of this decision, one of the substantial problems that the court had with the defendants' evidence as to the contents of the agreement was the fact that the crewing invoices contained only the final figure, without any breakdown of how that figure was calculated by SMS. When GSI pressed for the backup documents or worksheets that were used to create the crewing invoices, Kimball stated that they were "gone". These were the best - and ***only*** - evidence, of the basis of SMS's crewing invoices. I find it improbable that no record would have existed in SMS's files of the worksheet and backup documents; that is, the basis of the crewing invoices. It caused me to doubt Matt Kimball's evidence as to the terms of the agreement.

[110] Equally unexplained was the fact that none of the crew cost invoices were for a fixed monthly equivalent of US$143,900.00 (or assuming an agreement between GSI and SMS for that amount was made in January 1998 during the GSI-Rieber negotiations and was by agreement increased by 6% in the spring of 1998, US$152,534.00).

[111] I was not satisfied by any evidence, and none was put forward by the defendants, that the amount invoiced by SMS to GSI was at the rate of, or on average, $143,900.00 per month or $152,534.00 per month. While some of the bi-monthly invoices were for a fixed amount, there was no evidence of how they related to the defendants' interpretation of the agreement between GSI and SMS.

[112] Matthew Kimball states that the operation of a crewing company was a risky business that no one would agree to do for only a 5% markup. Einarsson replies that there was no risk as GSI was advancing the crew costs before SMS was required to pay them. The financing of the operation, and cash-flow issues arising out of the speculative marine seismic survey, generated great risk to GSI, but none to SMS. I accept Einarsson's evidence, and reject Kimball's evidence, on this point.

[113] Kimball states, based on Gary MacKenzie's report and evidence, that SMS would have lost money on GSI's interpretation of the agreement, and no one with any business sense would enter into such a contract.

[114] GSI's response was to challenge, by its own evidence and cross-examination of Mr. MacKenzie, MacKenzie's analysis and calculations on several basis, including that MacKenzie's analysis:

(A) did not include the monthly fees for those months when there were no ongoing operations (for example January to March 1998, September 1998 to April 2000 and January to February 2001);

(B) did not include the office subsidy of $500.00 per month and vehicle subsidy of $1,080.00 per month;

(C) did not include all of the expenses invoiced to GSI and paid to SMS;

(D) included as income only cheques received during the operating period and therefore not those invoiced for the operating period but received afterwards;

(E) included depreciation expenses on assets not used in relation to GSI operations;

(F) included wages, benefits and costs for persons related to Matthew Kimball (family) who was not part of the seismic crew or persons for whom GSI was responsible;

(G) did not include the income paid to Abbott Contracting for the navigators, but did include, as SMS expenses, some of the salaries and expenses of those navigators.

[115] Furthermore, Mr. MacKenzie worked from SMS's journals, and never saw any invoices to verify or support entries in the journals.

[116] Mr. MacKenzie's analysis was shown to be seriously flawed in cross-examination. I found it to be unreliable. It was not based on reliable information respecting expenses, and, equally significantly, it did not include all income to SMS from GSI. The purpose of his evidence was to establish, as extrinsic evidence, the issue raised in *Consolidated-Bathurst Export v. Mutual Boiler and Machinery Insurance* [1980] 1 SCR 888, adopted in *Eli Lilly*, to the effect that it would be absurd to adopt as the proper interpretation of an agreement, an interpretation which is clearly inconsistent with the commercial interests of the parties. MacKenzie's evidence, considered with the benefit of cross-examination, the KPMG report, and the totality of the evidence, does not establish that SMS make an improvident deal.

[117] Based on the cross-examination of Mr. MacKenzie on his report and on the fiscal statements he prepared for SMS, I was satisfied that even after the payment of the salaries to Mr. Kimball, his wife and other members of his family, SMS would not have incurred a loss in respect of its agreement with GSI for the period commencing January 1, 1998 to February 28, 2002, when SMS stopped acting as the crewing company for GSI. This contextual factor does not support the defendants' interpretation of the agreement, nor give rise to an ambiguity as to the proper interpretation of the term "cost plus 5%" in respect of the compensation payable to SMS for the period that it acted as a "crewing company".

[118] As noted, SMS claimed that the worksheets and backup documents for its crewing invoices were destroyed or were "gone" shortly after the invoices were submitted - on the basis that this information was none of GSI's business. Consequently the best evidence of what benefits and other employee costs were incurred by SMS is missing. Absent the "best' evidence, I accept the detailed KPMG analysis, upon which there was not cross-examination. The evidence is clear that the cost of the seismic crew to SMS and the cost of those benefits paid by SMS for the crew never amounted to the budget estimates contained in the GSI spreadsheets during the January 1998 Rieber negotiation, or on the Rieber spreadsheet incorporated as Appendix B (Exhibit 8, page 000060) to the GSI-Rieber Time Charter Agreement.

[119] The position taken by Mr. Kimball that the clause included in Agreement #2 was intended to be a reference to a fixed monthly entitlement of $143,900.00 (when the vessel was in operation) is not a possible interpretation of the term "cost plus 5%". Whether interpreted solely within the four corners of the agreements, or on the basis of the extrinsic contextual evidence, $143,900.00 per month has no relationship to the term: "cost plus 5%', the words contained in Agreement #2, or to any invoices submitted by SMS to GSI and paid by GSI. While **Fridman** (p. 448) and **Swan** (p. 511) notes that extrinsic evidence is admissible to establish that a written agreement is not the entire agreement and that an oral collateral agreement may exist that modifies, qualifies or explains the written agreement, no extrinsic evidence in this case comes close to showing that the fixed monthly sum (prorated when not in full operation) claimed by Kimball was the true intent of the parties at the time that they wrote "cost plus 5%" in the October 1998 Agreement. To the contrary, the SMS interpretation is in direct conflict with any reasonable interpretation of the term.

[120] I conclude that the only reasonable interpretation of the contract signed by the parties on October 16, 1998, was that GSI was obligated to pay for the personnel, meaning the seismic

personnel supplied by SMS, an amount equal to the cost to SMS of supplying those personnel - actual wages, benefits and other seismic crew costs, plus 5%. The only reasonable interpretation, based upon the admissible evidence before the Court, was that the term "cost" meant the wages paid to, and benefits and related costs paid in respect of the seismic crew whose names were shown on each of the crewing invoices. I accept the evidence of Davey Einarsson, and the submission of GSI, that the term "plus 5%" was not a reference to the recovery by SMS of the 5% deducted from the calculations made during negotiations of the GSI-Rieber joint venture in January 1998, but was rather, as stated by Mr. Einarsson, an amount to supplement the SMS cost to process payment of crew wages and benefits; that is, office staff.

[121] The "consulting fee" paid to SMS every month from January 1998 to and including September 2002, varied in accordance with the extent of the services required of SMS, and carried out by Matthew Kimball: initially in the amount of US$6,000.00 (over Cdn$10,000.00 at that time); lower when no vessel was operating, and higher when operations resumed. The fee varied with the number of vessels (consequently the number of crew hired and managed) and level of activity. This fee fluctuated from a low of $6000.00 Cdn per month (exclusive of the office and vehicle subsidy of $1580.00 Cdn) when there was no or minimal activity, to a high of US$14,000.00 per month (inclusive of the office/vehicle subsidy), when two vessels were in operation. The evidence supports the conclusion that the consulting fee to SMS was intended by the parties as the mechanism to generate the profit to SMS, mainly for the management services of Matthew Kimball. This is reflected in the compensation section of Agreement #1. Initially the monthly fee was US$6,000.00. To this they added: "It is understood, this fee will change as SMS adds more personnel . . .". I find that this understanding was acted upon by the parties throughout their business relationship. It is reflected in the draft agreement dated January 26, 2001; that agreement was not signed, but the consulting fee and office/vehicle terms were implemented. This understanding is consistent with the compensation provisions of the two draft legal agreements that were prepared by lawyers for Paul Einarsson and not signed by Matthew Kimball, which compensation was in fact paid by GSI to SMS.

[122] The defendants submit that, since the crewing invoices issued by SMS to GSI were pre-invoices submitted about ten days before the crew was paid, and because many of the bi-monthly invoices were for the same amount, it should have been obvious to GSI that the amount invoiced was not an amount related to the "actual cost" of wages and benefits for each bi-monthly period. This submission is inconsistent with the type of information provided by Matthew Kimball to GSI (Merle Carr and Davey Einarsson) in late September 2000, when Paul Einarsson was questioning the SMS wage costs, and Davey Einarsson was justifying them (Exhibit 1, Tab 11). It is inconsistent with Matthew Kimball's letter of November 3, 2000, discussing crew issues (involving matters that affected crew costs). These communications were for the purpose of explaining or justifying "actual crew costs".

[123] The plaintiff caused KPMG to calculate the amount that GSI was overcharged for crewing services, applying GSI's interpretation: that is, actual crew wages plus actual benefits plus 5% for office overhead. The basis for KPMG's analysis was information made available by the defendants.

[124] I find that the agreements made between GSI and SMS, reduced to writing in Agreement #2, and renewed in Agreement #3, entitled SMS to be paid for the seismic crew *whose names appear on the invoices* on the basis of the actual wages of the named crew, the actual cost of their benefits, plus 5%. I find that KPMG's report contains an accurate representation of the intent of the parties was, as incorporated in their written agreements, and that no evidence extrinsic to the written agreements changes this interpretation, or establishes a collateral agreement.

[125] As noted, SMS's invoices for crew costs were without any details - simply a list of the last name of the crew for that period and a single figure for all crew wages and benefits and the 5%, submitted in advance twice a month.

[126] When GSI assumed direct responsibility for paying the seismic crew and their related benefits on March 1, 2002, GSI's controller noted an immediate drop in crew expenses. He investigated how this could occur without success. After a few months, he contacted Matthew Kimball, who, I find, initially agreed to look for and provide the worksheets and backup information. When pressed, Kimball advised by the September 30, 2002 e-mail that he was not prepared to do so; he had no responsibility to do so - it was none of GSI's business; and "all worksheets for people invoices are gone".

[127] GSI submits that the law implies in a "cost- plus" contract an obligation to keep proper accounts. They cite *GT Parmenter Construction* v *Saunders*, 1947 CarswellOnt 248 (OHC), followed in *Jorgensen Construction* v *Benny*, 1953 CarswellOnt 201 (OHCJ) and *891178 Ontario Inc.* v *Humphrey*, 1998 CarswellOnt 3057 to this effect.

[128] The defendants' position is that the particulars of and worksheets from which they calculated their invoices were not GSI's business.

[129] I agree with GSI that the agreement was a "cost-plus" contract. SMS had an obligation to keep proper accounts not only for GSI, but also for its own income tax purposes. Because of the absence of any SMS records to justify the invoices, the Court questions the accuracy and *bona fides* of the defendants' position as to the actual wages and benefit costs of the named seismic crew, and its submissions on the extent of the overpayment claimed by GSI and calculated by KPMG.

[130] The KPMG analysis and supporting documents were thorough, and as accurate as can now be produced in the absence of SMS worksheets and records. The conclusion stated in ¶ 16 of the KPMG report, based upon which the three methods of calculating the crew costs are applied, is that the overpayment was between $1,893,058.00 (using the T4 documents) and $1,764,251.70 (using the MacKenzie financial statements).

[131] On my interpretation of the written agreements, and in particular the term: "cost plus 5%" in respect of crew costs, I find that SMS over billed, and GSI overpaid, by at least $1,764,251.70.

D.2 Plaintiff's Tort Claim - Negligent or Fraudulent Misrepresentation

[132] By this claim, GSI seeks to make Matthew Kimball, the principal and directing mind of the defendant SMS, personally liable for the overpayment, and to invoke equitable principle of constructive trust, and equitable remedies such as tracing.

[133] In Paragraph 12 of the Statement of Claim, GSI alleges that Kimball prepared SMS's invoices, or directed their preparation, or approved them, and in so doing, acted for his personal gain outside his capacity as a director or officer of SMS. GSI states that Matthew Kimball made negligent and/or fraudulent misrepresentations to GSI in respect of crew costs and conspired with SMS to defraud GSI.

[134] In its pre-hearing brief GSI does not explain how Kimball, in preparing, authorizing or approving the SMS invoices to GSI, was "acting outside his capacity as a director or officer".

[135] For the law on negligent misrepresentation, GSI cites the five general requirements set out by the Supreme Court of Canada in *Queen* v *Cognos Inc*. [1993] 1 S.C.R. 87. GSI submits that, at a minimum, the inflated invoices were negligent misrepresentations.

[136] For the law of fraudulent misrepresentation, GSI cites *Black's Law Dictionary*; *Parna* v *G. & S. Properties Ltd.* [1971] S.C.R. 306; *MacDonald* v *MacNeil*, 1988 CarswellNS 355 and *ICBC* v *Blue Mountain Collision Ltd.*, 2002 CarswellBC 1075.

[137] In anticipation of the defendants' argument that GSI failed to exercise due diligence by failing to challenge the invoices or request back up information when invoices were rendered, GSI cites *Sylvan Lake Golf & Tennis Club Ltd.* v. *Performance Industries Ltd*., 2002 SCC 19, for the proposition that it is not a defence to fraudulent misrepresentation that the plaintiff might have known the truth by proper inquiry.

[138] On the issue of remedy, GSI first states that it is entitled to an award of damages (**Fridman**, pp. 316 and 317). In addition, GSI claims that the monies paid in excess of the amount SMS was entitled to, by reason of the fraud, is wrongfully converted property and subject to a constructive trust in favour of GSI. GSI is entitled to both an accounting and equitable tracing. It cites *Goodbody* v. *Bank of Montreal*, 1974 CarswellOnt 308 (OSCJ), *Westdeutsche Bank* v. *Islington L.B.C.* [1996] 2 W.L.R. 802 (HL) and two decisions in *ICBC* v *Dragon Driving School Canada Ltd.*, the first cited at 2006 CarswellBC 3141(BCCA) and the second cited at 2007 CarswellBC 646 (BCSC).

[139] In response, the defendants' pretrial brief states that, however the Court interprets the contract, the defendant SMS, by its principal Matthew Kimball, billed the plaintiff in accordance with the defendants' interpretation of the agreement. The defendants cite *United Shoe Machinery Co.* v. *Brunet* [1909] A.C. 330 (PC) for the elements of the tort of fraudulent representation. In closing arguments, the defendants say that Davey Einarsson knew exactly what he was being billed.

[140] It is clear that a corporation itself can commit a fraud. Furthermore, fraud by a corporation only leads to liability of a shareholder, director or officer if it is shown that the shareholder, director or officer was also involved in the fraud. On the facts of this case, if SMS committed a fraud,

Matthew Kimball committed the same fraud. The claim against Matthew Kimball personally is based upon his personal participation in the fraud claimed against SMS. While courts are generally unwilling to pierce the corporate veil, the separate personality of the corporation will be generally disregarded where the corporation has been used for a deliberate wrongdoing such as a fraud. **Kevin Patrick McGuinness**, *Canadian Business Corporations Law*, 2nd Edition (Markham:LexisNexis,2007), §§2.26-2.33.

[141] The parties' submissions respecting the fraud or fraudulent misrepresentation are not entirely clear. Deceit is an identifiable tort that requires proof of fraud. Use of the term "fraud", in the civil versus criminal sense, has evolved in a wider context, and is related to claims for equitable relief. Whether GSI's claim is intended in the sense of the tort of deceit, or in the broader equitable sense, the tort or equitable breach is not complete unless the fraudulent representation is relied upon by the victim. (Monika Gehlen, "Deceit" in Rainaldi, ed., *Remedies in Tort* (Toronto:Carswell, looseleaf to 2009-release4), c. 5, and **Peter Maddaugh** and **John McCamus**, *The Law of Restitution* (Aurora: CanadaLawBook, looseleaf to August2009)c. 5 and 20).

Analysis

[142] The facts of this case do not lend themselves to a finding of negligent misrepresentation. Either the defendants believed that their interpretation of the crewing contract with the plaintiff entitled SMS to bill what it billed or they knew that the invoices were false or made recklessly without knowing whether they were true or false.

[143] The onus is on the plaintiff to establish that SMS and Matthew Kimball, the operating mind of SMS, knew that the crewing invoices were not in accord with the crewing contract, and knowingly or recklessly misrepresented the truth to, or concealed material facts from, GSI.

[144] This issue was the most difficult aspect of this case to analyse and determine. The resolution does not depend upon the interpretation of the crewing contract. I have already found it to be: actual crew costs, inclusive of wages benefits and related costs, plus 5%, as opposed to either a fixed monthly amount, originally calculated on projected crew wages with a 30% mark up for benefits in January 1998 or an agreement based on actual crew costs plus 30% plus 6% plus 5%.

[145] Resolution of this issue depends on: (1) whether the representation made by SMS in the invoices to GSI were false in fact, that is, not in accordance with the agreement, and (2) that SMS, when it made the representation, knew that it was false, or made it recklessly without knowing whether it was true or false, and (3) that GSI was thereby induced to unwittingly pay the invoices.

[146] I agree with GSI's submission that whether GSI could have uncovered the misrepresentation by due diligence does not affect the analysis of the defendants' liability (*Swan Lake Golf & Tennis Club*); however, to the extent that I find that GSI did know the basis of the representations, then it was not induced to pay the invoices by the defendants' fraud.

[147] The following constitutes my analysis of the evidence suggestive of fraud. It is not dependent upon an assessment of credibility by comparison of the believability of alleged oral exchanges between SMS (through Matthew Kimball) and GSI (primarily through Davey Einarsson) during the currency of the contract.

[148] The first source of evidence suggestive of fraud is the inconsistent, and therefore confusing, position taken by Matthew Kimball as to the terms of the crewing contract - on the one hand that it was a fixed monthly fee of $143,900 (plus a 6% bonus that he says was verbally agreed to in the spring of 1998), and on the other hand, actual seismic crew wages, plus 30%, plus 6%, plus 5%. Matthew Kimball's ambiguous evidence stands in contrast to the ease with which I came to the conclusion that clearly the proper interpretation of the crewing contract called for GSI to pay SMS actual crew wages, plus the actual cost of benefits and related (mostly statutory) costs, plus 5%.

[149] A second source of evidence suggestive of fraud was the manner in which SMS carried out the crewing contract and invoiced under it. On each bi-monthly crew invoice, SMS listed the names of the crew members for whom that invoice related. This was a clear acknowledgement that, at a minimum, SMS was obligated to calculate the actual crew wages for each invoice and either adds 30% plus 6% plus 5% (by one of SMS's interpretation of the agreement) or alternatively the actual cost of crew benefits and related statutory costs plus 5% (GSI's interpretation). Either way, SMS was obliged to calculate actual crew wages. A quick look at the bi-monthly invoices show that the calculation was obviously not done on the invoice itself. The only reasonable inference is that calculation was made on a worksheet, based on and supported by back up records and information. There is no reason that these backup records and worksheets would not be kept. There are several obvious reasons why they would be kept. One of them is the obvious obligation to account to GSI for how it arrived at the amount contained in the bi-monthly crewing invoices.

[150] Instead, when GSI asked for these invoices in 2002, SMS first delayed, then refused to provide the information, and then, incredibly, stated that all its backup records were "gone".

[151] In *Farnya* v *Chorny*, 1951 CarswellBC 153 (BCCA), the Court wrote at ¶ 10 that the test of credibility of interested witnesses cannot be gauged solely by demeanour but "the test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that time and in those conditions."

[152] It is not credible that those worksheets and back up records, when pressed for, went missing and have never surfaced since.

[153] The missing records, being the backup record for the crewing invoices, contain the only original contemporaneous information that would show the basis of SMS's crewing invoices and therefore how it interpreted the contract. At trial, no document, contemporaneous with the submission of the crewing invoices, was produced that might support (a) SMS's interpretation of the crewing contract, and (b) that the crewing invoices were in accord with SMS's interpretation. The

absence of any documents which clearly existed at one time, and which logically would have been retained for some period of time, causes me to conclude that the defendants knew that the invoices were not in accord with the agreement - the agreement either as interpreted by GSI, *or as interpreted by the defendants*. The evidence of Wayne Lam and Matthew Kimball dealt with the events leading to Kimball's September 30, 2002 e-mail that the worksheets were "gone".

[154] Recognizing the limitation to determining credibility on demeanor, and adopting O'Halloran J.A.'s analysis in *Faryna*, I accept the evidence of Mr. Lam over that of Mr. Kimball and conclude that the worksheets went missing because their contents were not consistent with the position the defendants took at trial as to the proper interpretation of the contract, and how it invoices GSI for crew costs.

[155] A third source of evidence suggestive of fraud is contained in the written communications during the currency of the contract which demonstrate GSI's understanding that the contract was a "cost plus" contract; Kimball did not then correct what he now says (at trial) was GSI's improper interpretation. In communications, GSI referenced their understanding that the contract was for actual crew costs plus 5%. Nowhere in writing does Matthew Kimball suggest that it was a fixed price contract based on the budget prepared by GSI in January 1998 as part of its negotiation of the Rieber Joint Venture or at the rate of $143,900.00 per month. No written document exists that supports the defendants' alternative interpretation: actual wages plus 30% plus 6% plus 5%. Instead Kimball's written communications always refer to the agreement in terms of cost plus 5%. When Davey Einarsson met with Matt Kimball at Halifax on October 8, 2002, Kimball justified the crew costs by referring to expenses such as hotel accommodations, safety boots, coveralls and taxis, not by stating that it was a fixed price or that crews benefits and related costs were at a fixed percentage of wages.

[156] Not all of the evidence supports a finding that GSI paid the crewing invoices as a result of SMS's representations. Evidence suggestive that GSI knew at some point later during the currency of the contract the basis of SMS's crewing invoices includes:

1. Merle Carr, whose evidence I accept as truthful, had worked closely with Davey Einarsson for a long time. She agreed with the following descriptions of Mr. Einarsson: He was a pretty shrewd business man. He was a "line by line" guy. He was meticulous, and he was not someone to rubber stamp invoices. She stated that it was the practice of GSI not to pay invoices without back up. The crewing invoices were the only instance when he did not ask for back up. She stated that Davey Einarsson was familiar with the names of the seismic crew. She prepared quarterly, and reviewed with Davey Einarsson, the financial records of the Rieber Joint Venture and all operations. The quarterly analysis included comparisons of expenses with budget figures; this included comparing the crewing invoices with the budget prepared for the Rieber Joint Venture in January 1998. She testified that Davey Einarsson and Matthew Kimball were in almost daily contact. Ms. Carr's evidence is strongly suggestive that GSI was aware of the circumstances related to crew costs on an ongoing basis and that it had to have known, at least in a general sense, the basis for SMS's crewing invoices, otherwise, Davey Einarsson would have asked Matthew Kimball about it.

2. Nine of the crewing invoices in 1999 were identical in amount. They were prepared and sent ten days before SMS was due to pay the monies. There were no followup invoices adjusting the predetermination of the amounts contained in the bi-monthly invoices. It is illogical that GSI's representative, Davey Einarsson, who was in regular contact with Matt Kimball and approved every invoice, would accept that a series of identical invoices was an accurate representation of ***actual*** crew costs for each of those periods.

3. In April 2001 Paul Einarsson had lawyers prepare, among other documents, a Services Agreement between GSI, SMS and Kimball. The draft agreement provided at Paragraph 5(c): "GSI shall reimburse SMS for all direct personnel costs (plus 5%) for all personnel costs reasonably incurred by SMS in order to discharge its obligations to provide the services in accordance with the terms of hereof . . ." By e-mail dated April 26, 2001, Matt Kimball sent Paul Einarsson a revision of that agreement. Paragraph 5(c) (Paragraph 4(c) in the Kimball revision) reads as follows: "GSI shall reimburse SMS for all direct personnel costs (plus 5%) for all personnel costs reasonably incurred by SMS in order to discharge its obligations to provide the services in accordance with the terms herein. GSI shall reimburse SMS on a bi-monthly basis as described in 4(f) below. ***Direct personnel costs are payroll, payroll costs and benefits, billed as a gross salary plus 30%.***" [My emphasis].

[157] I accept that the draft agreement Paul Einarsson caused his legal department to prepare and forward to Matt Kimball was not intended to change the provisions of the crewing contract. Equally I am satisfied that Matthew Kimball's revised agreement was not intended as a new proposal but rather a reflection of his understanding of the crewing contract.

[158] I conclude, on a balance of probabilities, that at some point during the currency of the contract, likely by the time of Kimball's reply to Paul Einarsson of April 26, 2001, Davey Einarsson (and therefore GSI) was aware of and believed that SMS, through Matthew Kimball, was invoicing for crew costs on the basis of actual wages of the crew listed on each invoice plus 30%; that is, by the formula used by them in "Old GSI" and in the January 1998 negotiations with Rieber. To the extent that crew invoices claimed payment for actual seismic crew wages plus 30%, I conclude that GSI, based on the knowledge of Einarsson, did not rely upon the representations contained in the SMS's invoices. Otherwise, I find that GSI did rely upon the fraudulent misrepresentations contained in the crewing invoices prepared by Matthew Kimball and issued by SMS.

[159] I find, on a balance of probabilities, that Matthew Kimball and SMS included in its crewing invoices claims for persons other than the seismic crew listed on the crewing invoices such as family members and navigators for whom Abbott was separately paid by GSI as well as a mark up on Matthew Kimball's own wages.

[160] This finding is made without the benefit of SMS's original worksheets and back up documents.

[161] Based upon the totality of the evidence, I conclude that the most likely reason that the only records, made contemporaneously with the crewing invoices and which would show the basis of

SMS's crewing invoices, went missing was that SMS and Matthew Kimball knew that those invoices contained charges that were not only outside the terms of the crewing contract as I interpreted it, but also outside any information that Davey Einarsson would likely possess.

[162] I therefore find that, as a matter of law, a deceit or fraud was completed by SMS and Matthew Kimball in respect of those portions of the crewing invoices that exceeded the actual wages of the seismic crew listed on the bi-monthly invoices plus 30%.

[163] I have struggled to quantify the amount of over billing that was fraudulent. The oral evidence of Matthew Kimball was not reliable. SMS's original worksheets and back up documents are "gone". The only reliable evidence is contained in the KPMG analysis, but it alone does not provide a complete picture of what portion of SMS's crewing invoices were other than for the actual wages of the crew members named in each invoice, plus 30%.

[164] From the totality of the evidence I accept that SMS invoiced fraudulently (a) for relatives who were not seismic crew named on the crewing invoices, (b) for some navigators working under the Abbott Contract, (c) a mark up on the salary taken by Matthew Kimball from SMS, and (d) a mark up greater than that which GSI/Davey Einarsson was aware of. The quantification contained hereafter is based on the KPMG analysis.

[165] **Relatives**. To calculate the likely fraudulent overpayment to relatives, I refer to the analysis in the KPMG report and the attached Schedules 12, 21, 25 and 26. I do not include Mary Kimball's wages and benefits, which I presume were a form of income-splitting of Matt Kimball's wages and benefits.

[166] I find that the following were fraudulent misrepresentations.

[167] On Schedule 12 (JV 98-99), Darlene DeCoste's remuneration per T4 documents: in 1998 totalling $2,971.62 and in 1999 totalling $16,551.59. Per Schedule 21, during JV 2000, payments to relatives totalled $1,878.98. Per Schedule 25 and 26, in the year 2001, payments to relatives totalled $66,129.49.

[168] The total benefits paid to relatives that were not disclosed to GSI were $87,531.68.

[169] **Navigators**. For this analysis, I rely upon Schedule 33 in the KPMG report and I adopt the analysis that wages totalling at least $104,851.05 were paid by SMS and included in SMS's crewing invoices to GSI.

[170] **The Undisclosed Mark Up.** I found that GSI/Davey Einarsson likely believed that SMS/Matthew Kimball was invoicing for crew on the basis of actual wages plus 30%, when it was likely that the invoices were for actual wages plus 30% plus 6% plus 5%. I look to the KPMG analysis to determine the amount by which SMS marked up actual wages by more than 30%. The KPMG report calculates the 5% mark up, using the lowest total from the three methodologies it used to determine the over billing. In Schedule 2, for JV 98-99, KPMG calculates the 5% mark up as

$92,006.48; in Schedule 16, for JV 2000, KPMG calculates the 5% mark up as $23,178.80, and in Schedule 22, for 2001 and 2002, KPMG calculates the 5% mark up as $101,066.96. The total is $216,252.24.

[171] In order to determine the 6% bonus claimed by Matthew Kimball, but not established, and in my view not disclosed to GSI, I divided $216,252.24 by 5 and multiplied by 6. This adds $259,502.68 to the amount GSI is entitled to recover from SMS and Matthew Kimball for fraudulent misrepresentation.

[172] In summary, the minimal quantifiable amount established by SMS's fraudulent misrepresentation, and for which I find both SMS and Matthew Kimball liable, is $451,885.41.

D.3 Profit or Success Sharing

[173] **SMS's position**. SMS claims that a binding agreement exists between GSI and SMS that SMS would profit share with GSI. It says that the agreement is both written (the Letter Agreements) and verbal. It acknowledges that no structure for providing profit sharing was ever completed, although, at one point during the currency of the agreement, Kimball testified that he and Davey Einarsson talked about a formula and that Kimball asked for a 30% share in GSI's profit and Einarsson countered at "10% of the people". SMS acknowledges that an agreement to profit share was never concluded during the currency of the agreement because of GSI's cash flow problems. SMS submits, however, that GSI was profitable during the currency of the agreement, in part, on the basis that revenue earned in the years after the termination of the agreement (October 2002) on speculative data collected during the currency of the agreement, created profit for GSI, which it says should be attributed to the pre-termination period.

[174] SMS claims that the agreement to profit share was more than an "agreement to agree"; it constituted a complete agreement upon which the parties acted. In closing argument, counsel for SMS submitted that, in the absence of an agreed upon structure or formula for profit sharing, the Court should award damages on the basis of *quantum meruit* in the amount of $1,390,000.00. This figure was advanced by SMS on the basis that during the currency of the agreement GSI had paid to each of the Einarssons $1,390,000.00 in bonuses or dividends. (The Court notes that the Einarssons lent the amount of the bonuses or dividends, net of income taxes, back to GSI, as GSI needed the money.)

[175] The Letter Agreements of December 5, 1997, and October 16, 1998 (renewed on October 12, 2000) both contain a clause respecting a success sharing plan. SMS acknowledges that the language in the agreements is "less than satisfactory" but it cites *Mitsui & Co* v *Jones Power*, 2000 NSCA 95, as suggesting that the intention of the parties must be examined in light of the contract as a whole and include extrinsic evidence, including how the parties acted toward each other. The question is not whether documentation was a condition of an agreement, but rather whether further documentation was simply to indicate the manner in which the agreement already made would be implemented.

[176] SMS submits that an agreement to profit share exists and it is a question of fact for the Court to determine, applying the principle of *quantum meruit*, what special damages are owed by GSI by reason of its failure to honour its promise to profit share.

[177] SMS did not argue its claim for profit sharing on the basis of the equitable principles of unjust enrichment but rather confined itself to a contractual claim that "the language of the letter agreements establishes an entitlement in favour of SMS."

[178] **GSI's position**. GSI submits that the Letter Agreements of December 5, 1997 and October 16, 1998, definitively establish that no success sharing plan was ever concluded or implemented or that any terms of the success sharing plan were ever agreed to. It argues that, at most, the language used was an agreement to agree and not a contract. GSI relies upon the analysis of **John Swan** in *Canadian Contract Law* at pp. 233 and 234; of Scanlan, J. in *United Gulf Developments* v *Iskandar*, 2007 NSSC 157, especially ¶¶ 34 and 49; the analysis of Cromwell, J.A., on the appeal of that decision reported as 2008 NSCA 71, especially ¶¶ 75 to 82.

[179] GSI argues that an essential term of a success sharing agreement is an agreement on how the success sharing would be calculated. It submits that Matthew Kimball's evidence of an inconclusive discussion at some point during the currency of the agreement did not constitute an offer by GSI to pay 10% of some undetermined portion of GSI's profits. Counsel submits that Matthew Kimball's e-mail to Davey Einarsson of February 12, 2002, is evidence of the lack of any agreement respecting profit sharing subsequently to the conversation that Kimball alleges and Einarsson denies occurred between them.

[180] GSI acknowledges that it always intended to put a success sharing or bonus plan in place when GSI was in a financial position to do so. Davey Einarsson testified that when he was successful, he wanted those who worked with him to share in that success. GSI tendered some evidence of a direction to their controller Wayne Lam to pursue creation of a success sharing plan for employees in December 2001 and other evidence with respect to the actual implementation of a success sharing plan in respect of the marine seismic operation in 2004. GSI also submits that it was in a serious cash flow position, and not in a profit position, during the currency of the agreement with SMS. Among the evidence it relies on are the formal financial statements, the testimony of Wayne Lam and his memo of October 26, 2006, and the fact that the Admiral had to terminate the 2001 seismic survey season to minimize operating losses.

[181] Finally, in respect of SMS's claim for damages on the basis of *quantum meruit*, GSI cited two decisions that analysed and rejected claims for *quantum meruit* damages as a remedy for alleged breach of success sharing agreements. They were *MHA Contracting* v *Christie Mechanical Contractors*, 2005 CarswellOnt 713 (OSCJ) and *Percy Alexander Enterprises* v *Genesis Land Development*, 2007 CarswellAlta 1017 (ACA). In the latter case, the Court of Appeal distinguished between situations where on the one hand the parties fail to reach an agreement and on the other hand reached an agreement but differed as to what the agreement meant. It submits that the facts in this case fall into the former category.

Factual Matrix.

[182] The evidence respecting profit or success sharing begins with the Letter Agreements. The December 5, 1997 Agreement includes the following provisions under the heading "Success Sharing Plan":

> SMS will be primarily responsible for the operations of this vessel and therefore GSI will provide at a later date a success sharing plan for SMS based on profits generated there from. When this plan is completed it will be attached to this agreement as appendix 'A'.

[183] No appendix 'A' was never prepared or attached to the Agreement.

[184] The October 16, 1998, Agreement including the following provision under the heading "Success Sharing Plan":

> It was and continues to be GSI's intent to provide a success-sharing plan for SMS. This will be announced when we are in a profit situation and will be attached to this agreement as appendix "A".

[185] On October 12, 2000, the parties renewed the October 16, 1998 Agreement for six months commencing May 15, 2000 and automatically renewed thereafter on a month-to-month basis until notice by either of them terminating the Agreement. No appendix "A" was ever prepared or attached to this Agreement.

[186] As previously noted, SMS gave a final notice of its election to terminate the Agreement and any other issues between the parties on October 8, 2002, effective November 7, 2002.

[187] Other relevant evidence about success sharing includes:

a) An unsigned Letter Agreement of January 26, 2001, which Davey Einarsson and Matt Kimball each say the other drafted. It contains the same sentence as the October 16, 1998 Agreement that was signed by the parties.

b) Matt Kimball's e-mail to Davey Einarsson of January 25, 2002, about GSI taking over responsibility of the seismic crew from SMS. The letter reads in part:

> The following needs to happen ASAP and this can start February 1st. Need the benefits package and who to talk to about issues like life insurance and disability package. What structure, if any, for profit sharing? I would prefer to leave this until we have a profit. What will GSI contribute to RRSPs for the crew? I was setting a 2% of their salary scenario, which would match, their contribution to that level.

c) Matt Kimball's e-mail to Davey Einarsson of February 12, 2002:

> The following needs to happen ASAP and this can start March 1st. Have the benefits package but issues like the life insurance at 25.0k is low. A good part is the disability, which we are unable to provide any longer. What structure if any for profit sharing? I would prefer to leave till we have a

> profit. What will GSI contribute to RRSP's for the crew, in lieu of our inability to provide disability? I was setting a 2% of their salary scenario, which we would match, their contribution up to that level.

d) Matt Kimball's e-mail to Davey Einarsson of February 14, 2002, in which he exercised his option to terminate the Agreement effective March 13, 2002 (which option he later withdrew) and in which he listed nine reasons for his decision to terminate the Agreement. They included:

> 2. We seem to remember and forget some critical items we discussed over the years. You did offer me 10% of the people during a trip to Nfld. I did turn it down, and said lets wait till we are making money. Now, you deny this?
>
> . . .
>
> 4. During your visit here in 2000, at which time we went to St. Pierre, you told Mary and I that we were going to receive a large bonus, Merle, Doug and Sam as well. Never saw it.

e) Matt Kimball's notice to Davey Einarsson of October 8, 2002, giving him notice of his intention to terminate the agreement, which " covers my consulting for GSI and any other issues where GSI and Sable Mary have any business relationship".

[188] The Court is satisfied that in December 2001 GSI instructed Wayne Lam to work on a success sharing plan for the marine seismic operation and in 2004 did introduce such a plan.

The Law

[189] The law is as described in GSI's pretrial brief. It is not complex. As stated by **John Swan** in *Canadian Contract Law, First Edition*, p. 233:

> An "agreement to agree" is a conventional way of describing an undertaking of the form, "I promise that I shall enter into a contract with you." Such a promise is said to be unenforceable and there are a great many cases that support the proposition that an agreement to agree will not be enforced. One of those cases usually cited to support this proposition is *Courtney & Fairbairn Ltd.* v. *Tolaini Brothers (Hotels) Ltd.* [1975] 1 All E.R. 716 (CA).

Later, Swan quotes Lord Denning from that decision at p. 720 as follows:

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through; or if successful, what the result would be. It seems to me that contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.

[190] I adopt Scanlan, J.'s analysis in *United Gulf Developments*, and in particular his statement at ¶ 34 that there will be no binding contract when:

> 1. Essential provisions intended to govern the contractual relationship have not been settled or agreed upon.

> 2. Where the contract is too general or uncertain to be valid in itself and is dependant upon the making of a formal contract.
>
> 3. The understanding or intentions of the parties is that their legal obligations are to be deferred until a formal contract has been approved and executed.

[191] I further adopt Cromwell, J.A.'s analysis at ¶¶ 75 to 82 in the appeal of *United Gulf Developments*.

Analysis

[192] The words in the two Letter Agreements (renewed on October 12, 2000) clearly demonstrate that GSI intended to provide a success sharing plan for SMS when GSI was in a profit position. I find on the whole of the evidence that the Letter Agreements simply confirm a general intention that SMS would share the success of GSI when it was in a profit position. The Letter Agreements are vague. They disclose nothing about any of the terms of an agreement. The essential terms of a profit sharing agreement were ever negotiated or agreed upon. The oral discussions contain none of the essential terms of a success sharing plan.

[193] One such essential term is how success sharing would be calculated or structured. The factual matrix in this case is not dissimilar to that in *United Gulf Developments* where the Court held that the agreement left many issues concerning the development and lands to be resolved in the future. That is the situation in this case. Even in February 2002, Matt Kimball was asking Davey Einarsson what structure the profit sharing was intended to take.

[194] This is not a situation where one party acts on an agreement to its detriment, and it is left to the Court to determine the fair compensation for the partial performance of the contract. In this case, the services provided by SMS were all separately provided for, and paid by GSI.

[195] It is clear from the totality of the evidence that the intention of the parties was to defer determination of how the profit or success sharing plan would be structured until a future date. That date did not arrive before SMS terminated their agreement, including "any other issues where GSI and Sable Mary have any business relationship."

[196] To quote from the Court of Appeal in *United Gulf Developments*:

> If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication fo the manner in which the contract already made will be implemented.

And citing Professor Waddams in the same paragraph:

> Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement?

[197] If I am wrong in determining that the success sharing plan was simply a general intention and that its central terms were deferred to a future date, that is, it was not intended to be a legally enforceable agreement, I am not satisfied that GSI was "in a profit position" at the time SMS terminated the Agreement.

[198] The parties dispute whether GSI was "in a profit position" as of October 2002 either in respect of its east coast marine operations or its total operations when SMS terminated the Agreement. I find, and it is not disputed, on the totality of evidence that GSI had a severe cash flow problem in the early years of the marine seismic operation, especially after they purchased the "Admiral" and equipped it for seismic surveying.

[199] Part of SMS's argument (that GSI was profitable) was based on financial statements prepared subsequent to the 2002 fiscal year showing that after 2002 GSI received revenue from the sale of speculative data they had collected during the currency of the Agreement. In my view, this did not make GSI profitable during the currency of the Agreement. SMS also relied on some interim operating statements prepared by Merle Carr. Theses operating statements were not complete and did not, in my view, establish the profitability of the seismic marine operation.

[200] Finally, SMS asked the Court to consider the reports and evidence of Karen Kluska. Her last report concluded that GSI's consolidated net income before income tax and after deduction of related party transactions and benefits for the period from January 1, 1998 to December 31, 2006 was $2,606,764.00, and for the same period, before related party transactions was $28,449,125.00. This evidence was not helpful for several reasons. She could not testify as to the basis for many of the related party transactions, nor conclude that they were other than for valuable consideration; none of the related party transactions were shown, on a balance of probabilities, to have been other than for valuable consideration. The consolidated net income calculation included all GSI activity and not just the east coast marine operation in which SMS/ Matt Kimball was involved. The period covered by her report included net income in the more than four years after SMS terminated the agreement. The first exhibit to her last report suggests that the consolidated net income, before income tax, from all GSI activities to December 31, 2002 was about $1,514,000.00.

[201] The principle of *quantum meruit* applies where the Court finds that services were provided on the basis of a firm promise, or an agreement to pay has been made, but the amount agreed to be paid has not been determined. In my view, it has no application in the circumstances of this case because there is no evidence of services being provided in reliance upon a success sharing plan, or that any more than an "agreement to agree" had been entered into with respect to success sharing, and the essential terms of the plan had not been agreed to.

E. Summary of Conclusions

[202] The Agreement between GSI and SMS for crewing services, properly interpreted, obligated SMS to invoice GSI for actual seismic crew costs plus the actual cost of benefits and related crew costs plus 5%, and not $143,900.00 per month or, alternatively, actual seismic crew costs plus 30% plus 6% plus 5%. Judgment is granted to GSI against SMS for the amount of over billing as shown on the KPMG forensic report in the amount of $1,764,251.70.

[203] Matthew Kimball, for SMS, prepared or approved the crewing invoices that were submitted to GSI and paid by GSI. The nature of the contract, a cost plus contract, required SMS to be able to account to GSI for the particulars of its crewing invoices. GSI never waived the obligation of SMS to maintain records and be able to account to GSI. I am satisfied, on a balance of probabilities, that SMS was unable to account to GSI for the calculation of its crewing invoices when mysteriously, and in my view intentionally, the worksheets and back up documents for those calculations went missing. I am satisfied on a balance of probabilities that this could not have happened without Matthew Kimball's knowledge and approval. I am satisfied that the crewing invoices were fraudulent misrepresentations to GSI of the amounts owing by GSI to SMS under the contract. I am further satisfied that Davey Einarsson, the operating mind of GSI, was likely aware at some point during the currency of the contract that Matthew Kimball, for SMS, was invoicing for the seismic crew listed on each of the crewing invoices on the basis that crew costs were actual wages plus 30%.

[204] Because the working documents, worksheets and back up documents used by SMS to calculate the crewing invoices have gone missing, it is now not possible to objectively and independently determine the basis upon which SMS billed for crewing services. The Court is satisfied, based primarily on the KPMG report, and upon an assessment of the oral evidence of Matthew Kimball and Gary MacKenzie, that included in the crewing invoices were claims for wages and benefits for family members and persons working for GSI under the Abbott Contracting navigation contract. To the extent that the invoices are found to have been for more than the actual wages of listed seismic crew plus 30%, the invoices were fraudulent misrepresentations and GSI paid the invoices relying upon these fraudulent misrepresentations. GSI is entitled to judgment against SMS and Matthew Kimball jointly and severally for the amount of the fraudulent misrepresentation in the amount of $451,885.41.

[205] GSI intended to establish a success sharing in respect of the marine seismic operation and intended that SMS would share in its success when GSI was in a profit position. GSI's intention expressed in the letter agreements never amounted to more than a statement of intention. The Letter Agreements, read in the context of the written agreements and the extrinsic evidence, did not contain the essential terms of a profit-sharing plan and constitute a legally binding contract.