SUPREME COURT OF NOVA SCOTIA
Citation: Jeffrie v. Hendriksen, 2011 NSSC 292

Date: 20110714
Docket: Hfx. 346079
Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

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

Respondents

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	June 21, 2011, in Halifax, Nova Scotia
Final Written Submissions:	July 8, 2011
Written Decision:	July 14, 2011
Counsel:	Christa M. Brothers and Matthew Pierce, for the Applicant Ezra B. van Gelder, for the Respondents

By the Court:

[1] The respondents, Anthony Hendriksen, Inland Marine Services Limited and Three Ports Fisheries Limited, seek an order converting this application into an action pursuant to Rule 6.02(1) of the *Nova Scotia Civil Procedure Rules.*

Background:

[2] Anthony Hendriksen and Roderick Jeffrie are the present shareholders, directors and officers of Three Ports. A third individual, John Simec, was involved as a shareholder at incorporation but left the business in 2007.

[3] Mr. Jeffrie alleges that at the time Three Ports was incorporated he, Mr. Hendriksen and Mr. Simec had entered into a shareholders' agreement to govern their business relationship. According to the respondents, they did not enter into a shareholders' agreement with Mr. Jeffrie. Over time the relationship between Mr. Hendriksen and Mr. Jeffrie became strained and Mr. Jeffrie decided to leave Three Ports.

[4] Mr. Hendriksen and Mr. Jeffrie began negotiations for the sale of Mr. Jeffrie's interest in Three Ports to Mr. Hendriksen in July 2010. Mr. Jeffrie alleges that he invoked a "shotgun clause" in the shareholders' agreement and that an agreement was reached between himself and Mr. Hendriksen for the purchase of his interest in Three Ports.

[5] Mr. Jeffrie commenced this proceeding by notice of application in court on March 29, 2011 alleging that Mr. Hendriksen and the corporate respondents have failed to honour the terms of the alleged buyout agreement. He alleges breach of contract and also seeks an oppression remedy against Mr. Hendriksen personally under s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81 alleging that he has conducted the business of Three Ports in a manner which oppresses, prejudices or unfairly disregards Mr. Jeffrie's interests as an officer, director and shareholder of Three Ports.

[6] The respondents filed a notice of contest on April 20, 2011 in which they deny the existence of the agreement allegedly formed in 2004 and also deny the existence of the buyout agreement alleged to have been reached in 2010. They

deny that they carried on the business of Three Ports in a manner which was oppressive, prejudicial or unfairly disregarded Mr. Jeffrie's interests.

[7] The respondents claim that any fault for these difficulties rests with Mr. Jeffrie and say he acted in breach of his fiduciary duties as director and officer of Three Ports, and that he has interfered with the economic interests of Three Ports through his participation as director and officer in a competing company.

[8] The respondents say there is no provision in the Rules permitting a counterclaim in an application, and as a result they are awaiting the outcome of this motion before filing documents with the court in respect of these claims.

[9] The respondents submit that there are significant and complex factual disputes related to the existence of the various agreements, the alleged exercise of rights pursuant to them, the valuation of Three Ports and the serious allegations of improper conduct against Mr. Hendriksen . Significantly, they say that the past action of Mr. Jeffrie is related to the current application and, therefore, ought to be heard together with the issues raised in this proceeding.

[10] Mr. Jeffrie says the issue in this case is simple: whether there was a settlement agreement reached between the parties. He submits that this question can be answered by available documentation and by the factual accounts of witnesses. While there will be conflicting evidence, Mr. Jeffrie says the credibility and reliability of witnesses can be dealt with through cross-examination on affidavits filed in the application. He also argues that the fact that there has been an oppression remedy claimed in respect to the conduct of the business of Three Ports illustrates the urgency of the matters raised in the application, and that the very nature of an oppression remedy would suggest a speedy determination by way of the application process.

Law:

[11] The court may convert an application to an action pursuant to *Civil Procedure Rule* 6.02, which states:

> 6.02(1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.

(2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.

(3) An application is presumed to be preferable to an action if either of the following is established:

(a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceedings, such as information about a witness that my be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

> (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[12] Also relevant to the determination of whether an application should be converted to an action is Rule 6.03, which provides:

> 6.03(1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> (a) a description of the evidence the party would seek to introduce;
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> (b) the party's position on all issues raised by the application;
>
> (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[13] Under Rule 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:

a) first, the court must assess whether any of the presumptions in favour of an application are applicable under Rule 6.02(3);

b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under Rule 6.02(4);

c) third, the court must determine the extent to which each of the four factors favouring an application are present under Rule 6.02(5) and determine the relative cost and delay as between an action and an application under Rule 6.02(6).

[14] A review of Rule 6.02 would suggest there is an emphasis on the use of the application process to achieve lower costs and greater speed in the resolution of disputes.

[15] In *Brodie v. Jentronics Ltd.*, 2009 NSSC 399, Moir J. commented at paras, 5 - 6:

> 5 Rule 6 -- Choosing Between Action and Application provides general guidance for determining whether an application should be converted to an action, or vice versa. In either case, the proponent of the action bears the onus: Rule 6.02(2). This statement of the onus shows a strong policy in favour of the use of applications.
>
> 6 Rule 6.02(6) makes it clear that proportionality is a factor in choosing between the two kinds of proceedings. When read with Rule 5.01(4), it becomes clear that the Rules invite the bar and the bench to make use of the application route to achieve lower cost and greater speed.

[16] This emphasis on the use of the application process to reduce costs and achieve greater speed echoes the object and purpose of the new Rules which is set out in Rule 1.01:

> 1.01 These Rules are for the just, speedy and inexpensive determination of every proceeding.

[17] Mr. Jeffrie has chosen to proceed by way of application. The question is whether the circumstances are such that his application should be converted into an action in order to achieve justice between the parties. To determine whether this matter should be converted to an action necessarily involves a review of the nature of the dispute between the parties.

[18] This is essentially a dispute between two sole shareholders of a closely-held company. Mr. Jeffrie and Mr. Hendriksen are the only shareholders, directors and officers of Three Ports. Mr. Jeffrie filed a notice of application in court on March 29, 2011 consisting of two claims:

a) a declaration of a valid and enforceable buyout agreement between the parties and specific performance of that agreement or damages;

b) in the alternative, relief pursuant to the oppression remedy under the third schedule of the *Companies Act*, R.S.N.S. 1989, c. 81, as amended.

[19] Mr. Jeffrie says that the first issue is a simple and straightforward issue of fact to determine whether there is an agreement between the parties. He says the court will be tasked with assessing the available documentation and the competing accounts of the pertinent witnesses to determine whether the evidence establishes the existence of a valid and enforceable contract.

[20] Mr. Jeffrie says the second claim seeking an oppression remedy is of its very nature designed to be dealt with quickly and also can be determined by a straightforward determination of fact.

[21] The respondents say there is no presumption favouring an application under Rule 6.02(3)(a), that the presumption in favour of an action in Rule 6.02(3) supports their application that this proceeding be converted into an action, and that the factors in Rule 6.02(5), which operate in favour of an application, are not applicable.

[22] Mr. Jeffrie says that the presumption in favour of an application under Rule 6.02(3) applies and, therefore, the presumptions in favour of an action in Rule 6.02(3) cannot apply. He submits that under Rule 6.02(4) the presumption in favour of an action is only triggered "if the presumption in favour of an application does not apply". In the alternative, he says the respondents have not established that the presumptions in favour of an action in Rule 6.02(4) would be applicable to the facts of this proceeding.

Rule 6.02(3) - The Presumption in Favour of an Application:

[23] The first determination under Rule 6.02 is whether either of the presumptions in Rule 6.02(3) in favour of an application apply. Mr. Jeffrie submits that the presumption in Rule 6.02(3)(a) applies.

[24] Mr. Jeffrie says the first presumption clearly applies in that his substantive rights, both with respect to his ability to enforce the terms of the buyout agreement and, if unsuccessful, his ongoing interest as a shareholder of Three Ports will be eroded if this dispute is not determined in a expeditious manner.

[25] Mr. Jeffrie submits that this application is centered around allegations of a business relationship between himself and Mr. Hendriksen which is no longer workable, and he is concerned that his financial interests may be in jeopardy. He claims that he is not permitted to participate in the operation of a business where he is the named president. Mr. Jeffrie says that the very nature of oppression claims would suggest that the claim be dealt with expeditiously.

[26] The respondents say that there is no evidence to indicate the extent to which Mr. Jeffrie has allegedly been prevented from participating in Three Ports or to indicate that his substantive rights are at risk. Moreover, the respondents deny the allegations in their entirety.

[27] The respondents say that though a party may wish to have a matter resolved quickly, this does not create a presumption under Rule 6.02(3)(a). They maintain that the circumstances of this proceeding do not support a presumption in favour of an application. The respondents make reference to *Langille v. Dzierzanowski*, 2010 NSSC 379, where an elderly applicant's concern that he would not survive to see trial was deemed insufficient, and to *Citibank Canada v. Begg*, 2010 NSSC 56, [2010] N.S.J. No. 63, where a corporate applicant's concern about the capacity of the respondents to pay a judgment was insufficient to create a presumption without evidence supporting the legitimacy and seriousness of this concern.

[28] Mr. Jeffrie says the fact that this is an oppression claim distinguishes it from the cases cited by the respondents. He argues that unlike both *Langille, supra*, where the applicant was elderly and *Citibank, supra,* where the applicant simply alleged concern about recovering on an eventual judgment, the erosion of rights is an inherent concern in the relief being sought in this proceeding. The fact that Mr. Jeffrie is being deprived of his ability to participate in Three Ports, it is argued, denotes a need for expedient relief to address an ongoing wrongdoing. It is also argued that he is being deprived of his ability to participate in Three Ports, and as president, shareholder and director he may be liable for certain acts of the company over which he has no control.

[29] The erosion of substantive rights was a consideration in *Renaud v. Nova Scotia (Attorney General)*, 2005 NSSC 226. In that case the applicants alleged that s. 530 of the *Municipal Government Act* violated s. 23 of the *Canadian Charter of Rights and Freedoms*. The *Municipal Government Act* provided that schools operated by the Halifax Regional School Board and Halifax Regional Municipality

were eligible for supplementary funding, but this was not available to those operated by the *Conseil Scolaire Acadien Provincial.* The court determined that the substantive rights of the children who were potentially prejudiced by this funding scheme were being eroded at the time and found that this factor favoured an application rather than an action. The court made the following comments at para. 28:

> 28 This application deals with education funding. It affects the students enrolled in schools administered by both the Board and the Conseil. It is a significant question for the applicants whether they are entitled to additional funding. In my view, the issue is an important one, but not one of such a nature that it cannot be resolved as an application. This will not only permit the issue to be addressed, but will also allow the question to come before the Court in a timely manner. This is significant, because, should the Chambers judge find that there is a Charter violation, the deprivation would affect the children attending the Conseil schools. This factor gives the determination of the issue some urgency.

[30] This is a situation where the parties to the dispute are the sole officers, shareholders and directors of an active company. There are claims of oppression by Mr. Jeffrie. Mr. Jeffrie also claims there was a settlement agreement. He claims that the relationship between he and Mr. Hendriksen is strained and that as a result he invoked a "shotgun clause" in the partnership agreement to force an agreement for the purchase of his interest.

[31] I am satisfied that this is a matter that should be dealt with expeditiously. In particular, I am satisfied that the facts of this dispute clearly fall within Rule 6.02(3)(a), and the erosion of the substantive rights asserted by Mr. Jeffrie will be lessened if the dispute is resolved quickly by application. The very nature of an oppression remedy would suggest that it should be dealt with expeditiously. As to the alleged settlement agreement, I see no reason why this cannot be dealt with by application. Counsel for the respondents argue that any effect on Mr. Jeffrie's substantive rights can be recovered by damages. With respect, having found that Mr. Jeffrie's substantive rights are at risk, I am satisfied that he is entitled to a speedy and just resolution of this dispute.

[32] Having decided that the presumption in Rule 6.02(3)(a) applies, it is not necessary that I go on to analyze the applicability of Rules 6.02(4) and 6.02(5)(a). However, in the event that I am wrong in my determination of the applicability of the presumption found in Rule 6.02(3)(a), I will go on to comment on the

applicability of these particular sections. In particular, there was substantial argument on the applicability of Rule 6.02(4)(b) and some comment would be appropriate. For the reasons which follow, I am not satisfied that the presumptions under Rule 6.02(4) have been substantiated such that this matter should be converted to an action. Moreover, I am satisfied that the factors in favour of an application under Rule 6.02(5) are present on the facts of this proceeding. This application by the respondents should be dismissed.

Rule 6.02(4) - Presumptions in Favour of an Action

[33] Under Rule 6.02(4) an action is presumed to be preferable to an application if the presumption in favour of an application does not apply, and a party wishes to exercise a right to trial by jury, or it is unreasonable to require a party to disclose information about witnesses early in a proceeding such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[34] The respondents acknowledge that they have not proceeded by way of jury trial, but submit that credibility will be a significant factor in the trial of this proceeding. They say that there will be several witnesses who will testify about the alleged creation of various agreements between the parties, the relationship among the shareholders, their involvement in the management and operations of Three Ports and related issues. They say much of the evidence will conflict. They say given the importance that credibility will play it would be unreasonable to require the respondents to disclose information about witnesses early in the proceeding.

[35] While they acknowledge that the fact that credibility will be an issue does not necessarily give rise to a presumption under Rule 6.02(4), the respondents say that since significant issues of credibility do exist, they would be better dealt with at trial. They cite *Monk v. Wallace,* 2009 NSSC 425, [2009] N.S.J. No. 669, where the applicant sued the respondent physician and health authority for breach of contract and medical malpractice. The respondents moved to convert the application to an action. On the credibility issue, Murphy J. commented at para. 18:

> 18 On the other hand, I am satisfied that the criteria in Rule 6.02(4) have been met, deeming action to be the preferred procedure:

> ...
>
> (b) With respect to subsection (b) of Rule 6.02(4), I conclude that it is premature to determine whether issues involving impeachment of credibility will arise. The file material does not specify the type of damages claimed, and based on the limited information available, it would be unreasonable prior to document exchange and discovery examination to require the Respondents to provide the early disclosure of complete witness information which is contemplated by the application procedure. This consideration is particularly important in this case, as both Respondents predict that the issue of credibility, (as it relates to the parties, additional witnesses of fact, and experts), will be fundamental to determining the outcome.

[36] The respondents also refer to the comments of Kennedy C.J.S.C. in *Langille*, *supra*, where he accepted that significant issues of credibility supported a presumption in favour of an action he said at para. 33:

> 33 Further the Doctors' realistic submission that issues of credibility will arise causes me to agree that it would be unreasonable to require a party to disclose information about witnesses as early as in the process as required by the Application procedure.

[37] Mr. Jeffrie says that these two decisions were unique to the facts of those cases. Both were medical malpractice cases with numerous experts and other witnesses and, in both cases, a trial by jury was sought, unlike in the present proceeding.

[38] In summary, the respondents say that it would be unreasonable to require them to disclose information about witnesses who they may locate to impeach the credibility of the applicant or other witnesses early in the proceeding. They say Rule 6.02(4)(b) recognizes that in cases where information about witnesses plays a crucial role it is unfair to require a party to disclose it early in the proceeding and, therefore, the presumption in favour of an action applies.

[39] Mr. Jeffrie agrees that credibility will be important, but submits that it does not necessarily follow that this triggers the presumption under Rule 6.02(4)(b).

[40] In *Kings (County) v. Berwick (Town*), 2009 NSSC 398, [2009] N.S.J. No. 625, discussing the issue of credibility Warner J. said the following at para. 40:

> Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.

[41] Mr. Jeffrie's counsel urge a narrow construction of Rule 6.02(4)(b). They say the purpose of the Rule is on its face unclear, since the Rules plainly contemplate that credibility will ordinarily be capable of assessment within the application process pursuant to Rule 6.02(5)(d). They say that impeachment evidence is theoretically possible in every case where credibility is an issue. Therefore, if Rule 6.02(4)(b) was meant to apply in every case of possible impeachment, the party arguing in favour of an action could simply raise it whenever credibility is an issue without having to explain the specific impeachment evidence intended. They say as a result there must be some limited purpose to which Rule 6.02(4)(b) applies. They argue that Rule 6.02(4)(b) appears directed to information withheld under Rule 94.09. They say that Rule 6.02(4)(b) is meant to apply to cases involving introduction of surveillance or similar evidence to impeach a witness. With respect, I am not prepared to put such a narrow interpretation on the provisions of Rule 6.02(4)(b). If these sections were interrelated, as suggested by Mr. Jeffrie's counsel, then presumably some reference would have been had to Rule 94.09 in Rule 6.

[42] After considering the position of both parties, I am satisfied that the presumption in favour of an action in 6.02(4)(b) does not apply. While it would appear that credibility is a significant factor in this proceeding, that fact alone does not determine that the matter should proceed by action. A review of the factual background to this proceeding would suggest that we are dealing with a relatively small company and the main parties are all the shareholders, directors and officers. The evidence of Mr. Hendriksen and Mr. Jeffries and, to some extent, their legal counsel and/or other advisors, will form the bulk of the evidence on the issue of whether or not there was an agreement and what were its terms.

[43] Moreover, the suggestion by the respondents that they may call impeachment witnesses appears highly speculative. The reference to witnesses in the affidavit filed by Mr. van Gelder, on behalf of the respondents, is found at paras. 6, 7, 8 and 9 as follows:

> 6. On the hearing of this matter, Hendriksen will lead evidence establishing that the original shareholders of Three Ports, Roderick Jeffrie ("Jeffrie"), Hendriksen, and John Simec, did not enter into a shareholders' agreement at any time.
>
> 7. On the hearing of this matter, the Respondents will lead evidence establishing that no agreement was ever reached with respect to the purchase of Jeffrie's shares in Three Ports by Hendriksen or Inland Marine.
>
> 8. On the hearing of this matter, Hendriksen will lead evidence establishing that he at no time conducted the business of Three Ports in a manner that oppressed, unfairly prejudiced, or unfairly disregarded Jeffrie's interests.
>
> 9. The Respondents will lead evidence including:
>
> a. Testimony from various witnesses on the incorporation of Three Ports, the management and operations of Three Ports' business, and the negotiations between Jeffrie and Hendriksen on the purchase of Jeffrie's shares in Three Ports; and
>
> b. Business records and *viva voce* evidence respecting the issues identified in subparagraph 9(a) and Jeffrie's alleged damages.

[44] There is no reference in the affidavit materials to any impeachment witnesses. The only reference to impeachment witnesses, other than in oral argument, appears at p. 7 of the respondents brief as follows:

> As the litigation continues, we anticipate obtaining additional evidence through discoveries, document production, and additional sources of investigation. Although it is impossible to say with certainty, we anticipate that the Respondents may locate witnesses who will be called strictly to impeach the credibility of the Applicant or other witnesses. Given the allegations in dispute, it appears entirely reasonable that such evidence may be uncovered as the litigation progresses...

[45] The position of the respondents is that there may be impeachment evidence. Considering Mr. van Gelder's affidavit and his comments in the brief, it would appear that there is no certainty that there will be impeachment witnesses. If the mere assertion that impeachment evidence may be called is sufficient to prove the presumption in 6.02(4)(b), it would apply in any proceeding where there are questions of credibility. I am not satisfied that this was the intent of the Rule. In *Citibank, supra,* at paras. 17 and 18, Justice Bryson commented:

> 17 If an issue of credibility excused parties from the obligation to disclose witness information, one would have thought Rule 6.02 would say so. But to the contrary, Rule 6.02(5) contemplates that credibility may be an issue. Moreover, the mere assertion that credibility will be important, without more, does not settle the question. Particularly in a case such as this, in which the suit is founded upon commercial documents, the court would need to understand specifically what the crucial credibility issues were, and how, for example impeachment played a critical role. Otherwise, the mere assertion of the importance of credibility would relegate all proceedings to an action.
>
> 18 Rule 6.03(2) excuses a party from describing its impeachment evidence on a motion to convert. But that does not relieve that party from describing how impeachment is important to the issues that will be decided.

[46] At this point, it is not clear from the evidence before me how impeachment is important to the issues that will be decided in this proceeding, other than the assertion by the respondents that there may be impeachment evidence. I am not satisfied that the respondents have met their burden under Rule 6.02(4)(b).

[47] An example of the type of evidence required by Rule 6.03 can be found in *Kings (County), supra,* where three respondent municipalities sought to convert an application into an action. Warner J. took note of Rule 6.03 and added that the three towns had filed affidavits of their CAOs. In considering Rule 6.02(4)(b), he said:

> 20 I agree with Mr. Rogers' analysis of Rule 6.02(4)(b). In the affidavits filed by "Three Towns" and in their written submission, they state that there is evidence, which they have been unable to uncover in the short time since the filing of the application, of witnesses (they set out a long list of potential witnesses) and potential documents, that, in their view, might be relevant as extrinsic evidence in the interpretation of the agreements and which may establish

> context for determining reasonable notice, if the agreement is terminable unilaterally by Kings County.
>
> 21 That kind of evidence is not what Rule 6.02(4)(b) is about. Rule 6.02(4)(b) refers to information about witnesses that a party should not be required to disclose before trial, not information which, at this time, is not available.
>
> 22 In summary, no circumstance advanced in this motion create a presumptive preference for an action pursuant to Rule 6.02(4).

[48] Considering the question of credibility, Warner J. said at para. 41:

> 41 There is no identification in the three affidavits of the Three Towns of a particular issue of credibility (as opposed to reliability) that could become so significant that it could not be satisfactorily dealt with by way of cross-examination. The issues in this case are focussed enough that the use of affidavits to present direct evidence will probably assist everyone in focussing on the relevant factual context and avoiding the irrelevant.

[49] The mere presence of credibility issues should alone not displace the presumption in favour of an application. The specifics that a moving party must address in its affidavit evidence are set out in Rule 6.03(1). Rule 6.03(2) qualifies (1) by permitting the moving party to withhold disclosure of evidence and investigations relating only to impeachment. Speculation about the possible availability of impeachment witnesses is not sufficient to raise the presumption in Rule 6.02(4)(b). This does not preclude the respondents at some future date from revisiting this issue should the issues of impeachment and witnesses become clearer and less speculative.

Rule 6.02(5) - Do the Factors in Favour of an Application Apply?

[50] Rule 6.02(5) lists four factors in favour of an application.

[51] The first factor is the ability of the parties to "quickly ascertain who their important witnesses will be". The respondents say that the notice of application does not identify the witnesses on whom Mr. Jeffrie intends to rely. They say they have identified at least three important witnesses and that additional lay witnesses are expected and expert evidence will likely be adduced on the valuation of Mr. Jeffrie's interest in Three Ports. They submit that based on the documents now

filed in the proceeding, it is not clear that the parties can quickly ascertain who their important witnesses will be.

[52] Mr. Jeffrie says that all of the key witnesses have been identified. In respect to the buyout agreement issue, Mr. Jeffrie, in his pleadings, suggests that there were three individuals present during the formation of the agreement, namely himself, Mr. Hendriksen and John Nash, an accountant. Therefore, the existence or otherwise of the agreement will be determined most likely by these three witnesses. Mr. Jeffrie says the respondents themselves have identified witnesses who will be called to determine whether or not an agreement existed and presumably they have identified Mr. Hendriksen and his counsel, Ralph Ripley, as witnesses from whom they intend to adduce affidavit evidence, presumably to deny the existence of an agreement. Mr. Jeffrie says that in respect of the oppression claim, there is no difficulty in identifying key witnesses given that Three Ports is a small closely held company with two directors and two officers, namely Mr. Jeffrie and Mr. Hendriksen. The key information about the conduct of Three Ports is likely to come from Mr. Jeffrie and Mr. Hendriksen but other witnesses who have relevant information, including the company's accountant, and legal counsel have been identified in the pleadings.

[53] Given the nature of the dispute and the relatively small number of witnesses identified and, the fact that this is a closely held company, I am satisfied that the parties should be able to quickly ascertain who their witnesses will be.

[54] As to whether the parties can be ready to be heard in months rather than years, for the same reasons, I am satisfied that the matter can be heard relatively quickly. As to whether the hearing is a predictable length and content, I am likewise satisfied that the length and content can be determined readily easily.

[55] The fourth factor is whether the evidence is such that credibility can be satisfactorily assessed by considering the whole of the evidence to be presented to the court. The respondents say the issues between the parties are primarily factual and credibility will play a crucial, if not determinative role in the hearing. They say that while credibility may be adequately assessed through affidavit and cross-examination where factual disputes are limited, that is not the case here.

[56] Mr. Jeffrie acknowledges that the court will be faced with differing factual accounts for which an assessment of the credibility and reliability of the respective

witnesses' testimony will be a key determinant, but maintains that the application route provides ample opportunity to make that assessment through cross-examination on the affidavits filed.

[57] I am satisfied that despite the differing factual accounts and the need to determine credibility, the application route will provide ample opportunity to make these assessments through cross-examination on filed affidavits. Therefore, I am satisfied that the presumptions in Rule 6.02(5) favour an application.

[58] Mr. Jeffrie says that this proceeding is well suited to an application. He says that the application procedure will result in less delay and less expense in litigation which is a relevant consideration under Rule 6.02(6). Proceeding by way of affidavit and cross-examination with limited pre-hearing procedures will allow the parties to focus their energy and resources on the key issues in dispute.

[59] The respondents have raised the issue that they intend to file a claim against Mr. Jeffrie. If the matter were converted, they would proceed by way of counter-claim. The respondents say they are prejudiced by not being able to do so within the current framework of the application, and if they are not successful they will be forced to bring a separate proceeding to advance those claims which will lead to increased costs and delay.

[60] Mr. Jeffrie refers to *Citibank*, *supra*, where Citibank sued Maritime Travel on the basis of a guarantee of a credit card owed by Begg. Maritime sought to have the matter converted to an action so as to bring a counterclaim against Citibank, a cross-claim against Begg and third party claims against other parties who were involved in transactions on the credit card. This reasoning appeared to be rejected by Bryson J., who stated as follows at para. 32:

> 32 While I am satisfied that the claims and defences to it can proceed by way of application, I did have some initial reservations about how to accommodate Maritime Travel's cross-claim and potential third party claim within an application. But on reflection, these can be adequately addressed in other ways. First, it may be that the cross-claim involves sufficient overlap in issues and evidence that the motion for directions could include it. But if not, that can be a separate application, heard in conjunction with this one...

[61] Mr. Jeffrie says that while the issues raised in the proposed pleadings on behalf of Three Ports are different from those in the within application, there may

be overlapping evidence. However, Mr. Jeffrie says that if that is the case, the application process provides ample flexibility to allow this to take place, that is, that the issues may be heard together without the need to convert to an action. I agree.

[62] For all the foregoing reasons, the respondents' motion to convert this proceeding from an application to an action is dismissed. Mr. Jeffrie shall have his costs in the amount of $1000 payable in the cause.

Pickup J.