SUPREME COURT OF NOVA SCOTIA

Citation: Jeffrie v. Hendriksen, 2013 NSSC 50

Date: 20130226
Docket: Hfx No. 346079
Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

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

Respondents

Judge: The Honourable Justice Michael J. Wood

Heard: July 3, 4, 5, 6, 25, 26 and 27, 2012, in Halifax, Nova Scotia

Final Written Submissions: September 14, 2012

Decision: February 26, 2013

Counsel: William L. Ryan, Q.C., Christa M. Brothers and Matthew Pierce, for the Applicant
Michael S. Ryan, Q.C. and Ezra B. van Gelder, for the Respondents

By the Court:

[1] Three Ports Fisheries Limited ("Three Ports") was established in 2004 by Roderick Jeffrie, Anthony Hendriksen and John Simec. Since that time, it has operated a brokerage business, purchasing lobster, crab and other fish products, and selling these to processors. Messrs. Jeffrie and Hendriksen have been the sole officers, directors and shareholders since Mr. Simec left the business in the fall of 2007.

[2] The relationship between Jeffrie and Hendriksen has deteriorated to the point that they are unable to work together. The positions taken by the parties in their written submissions make this painfully obvious.

[3] The introductory paragraphs of Mr. Hendriksen's post-hearing brief state:

> 1. Roderick Jeffrie ("Jeffrie") would have it that this case is not about fraud. Yet in his affidavits, discovery evidence, and testimony at trial, Jeffrie has shown no hesitation, when given the opportunity, to accuse Anthony Hendriksen ("Hendriksen") of precisely that. His accusations are not unrelated to the critical role Hendriksen's credibility will play in the outcome of this case. Nor would it be the first time Jeffrie has gone out of his way to demean his actual or perceived adversary.
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> 2. Despite Jeffrie's determined assault on Hendriksen's character, the only evidence he can offer to support his slanderous accusations are his suspicions - suspicions which he took no steps to address other than to one day "confront" Hendriksen and demand that he be bought out. If Hendriksen is who he is painted to be, one can only wonder why he would agree without objection to terms so favourable to his accuser.
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> 3. The evidence does not establish oppression, much less criminality. It does establish that Hendriksen did everything he could reasonably have been expected to do to respond to Jeffrie's demands for information - even in the face of Jeffrie's damning allegations against him. The simple truth is this: no matter what Hendriksen said or did, Jeffrie would remain unconvinced of his innocence.

[4] Mr. Jeffrie's rebuttal post-hearing submissions respond as follows:

1. The Respondents' submissions amount essentially to 110 pages of attempts to demean and discredit a man who simply wanted a fair and reasonable exit from his business and to move on with his life. Unfortunately, Jeffrie has received neither.

2. The Respondents' submissions go to great length to portray Jeffrie as a conspiracy theorist who slanders Hendriksen based on unfounded suspicions. In so doing, the Respondents mischaracterize Jeffrie's role in the company and his good faith efforts to bring a rational solution to the breakdown of their business relationship. They also overlook a demonstrable pattern of irregular business which corroborates Jeffrie's concerns.

3. Further, in their profound efforts to discredit Jeffrie, the Respondents attempt to shift the focus from what remains a simple case: Jeffrie wanted out, he made a deal with Hendriksen to get out, and Hendriksen refused to honour the deal.

[5] Mr. Jeffrie commenced this proceeding as an application in court. He alleges that a binding agreement was reached in the fall of 2009 for the sale of his shares in Three Ports. Alternatively, he says that Mr. Hendriksen has operated Three Ports in a manner oppressive to his interests as a shareholder and officer of the company, and he seeks relief from that oppression pursuant to s. 5 of the Third Schedule to the *Companies Act*, R.S.N.S. 1989, c. 81. In essence, he wants out of the business relationship with Mr. Hendriksen and to receive compensation for the value of his interest in Three Ports.

[6] Mr. Hendriksen's response is simply that there is no enforceable agreement to buy Mr. Jeffrie's shares and no factual basis for the granting of an oppression remedy.

[7] The parties filed a total of eighteen affidavits from fifteen individuals. Eleven of those people were cross-examined in court over a total of seven sitting days.

EVIDENTIARY ISSUES

(A) Hearsay Evidence in Affidavits

[8] Most of the affidavits filed contained hearsay evidence, particularly with respect to the issue of the alleged oppressive conduct. Because this evidence was so pervasive and found in affidavits filed by both parties, I requested that counsel make submissions with respect to whether I should consider such evidence at all or, if so, to what extent.

[9] Counsel for both parties requested that all of the hearsay evidence be admitted and given whatever weight the Court determined was appropriate.

[10] The difficulty with second hand evidence is that it is beyond the ability of the court and parties to test it through cross-examination because the original source is not testifying. Under the principled approach to hearsay evidence, it may be admitted if the court is satisfied that it is reasonably necessary to do so and that the evidence is reliable. There was no attempt to justify admission of the hearsay affidavit evidence in this case on this basis.

[11] In light of the submissions of counsel, I will admit all of the hearsay evidence contained in the various affidavits. I will, however, give it very little weight. In the context of this case, I question the value of complicating the already extensive affidavit record by including such evidence.

(B) Respondents' Use of the Plaintiff's Discovery Transcript

[12] At the conclusion of the hearing, counsel for the respondents indicated that he wished to file some of Mr. Jeffrie's discovery evidence. *Civil Procedure Rule 18.20(2)* permits the use of such evidence by an adverse party for any purpose. I gave permission to file the discovery extracts with the respondents' closing submissions, after redaction of irrelevant and inadmissible evidence.

[13] The respondents filed the entire transcript of Mr. Jeffrie's discovery examination from which counsel had redacted hearsay. Counsel for Mr. Jeffrie objected and said that the transcript as filed included testimony which was irrelevant and should have been redacted. In addition, counsel argued that many of the excerpts from the transcript were being used for impeachment of Mr. Jeffrie, which violates the rule in *Browne v. Dunn* (1893), 6 R. 67.

[14] Discovery evidence, like *viva voce* testimony or affidavits, is subject to the rules of evidence. It should only be admitted if it is relevant and does not fall within any exclusionary rule. Subject to these qualifications, a party is entitled to file the entire transcript of the examination of an adverse party (*Fogo v. F.C.G. Securities Corp.,* [1998] N.S.J. 455 (S.C.) and *Burton v. Howlett*, 2001 NSCA 35).

[15] In *Burton v. Howlett*, the Court of Appeal recognized the obligation of a trial judge to ensure irrelevant or otherwise inadmissible evidence does not clutter the trial record. This may require careful review and redaction of a discovery transcript. In this decision, the Court described the preferred procedure to be followed at para. 18:

> 18 In light of the very broad language employed in *Rule 18.14*, I commend the method employed by the trial judge in *Founders Square Ltd. v. Coopers & Lybrand* (1999), 179 N.S.R. (2d) 375 (N.S. C.A.) where, as I was advised by counsel who appeared before me in *Fogo v. F.C.G. Securities Corp.* (1998), 172 N.S.R. (2d) 266 (N.S. S.C.), Justice Carver ordered the defendant to delete those portions of the discovery transcript which were inadmissible in evidence before he was prepared to consider such evidence at trial. Such an approach places the burden of work where it should be - squarely on the shoulders of counsel. They should be expected to take the time to isolate those pages or portions thereof, relevant and important to their theory of the case. Such extracts can then be introduced, as a package, during argument if that is the route chose by counsel. If the lawyers cannot agree on what is "relevant" and properly admissible then the trial judge can set them straight.

[16] I agree with those views. The proper course of action is for the parties to try to agree on what constitutes admissible and relevant evidence in the transcript. If there is a disagreement over any particular passage, the Court could be called upon to resolve that dispute.

[17] In this case, counsel for Mr. Jeffrie identified a number of passages in the filed transcript which they considered to be irrelevant or otherwise inadmissible. For the most part I agree with those submissions and will ignore those sections.

[18] In their closing submissions, counsel for the respondents refer to several places in Mr. Jeffrie's discovery examination where they say he contradicts his evidence at the hearing (both affidavit and cross-examination). Mr. Jeffrie's counsel says that this is not a permitted use of his discovery evidence as it violates

the rule in *Browne v. Dunn*. This rule was discussed by A.C.J. Smith in *Giffin v. Soontiens et al.*, 2010 NSSC 438. In that case, counsel for the defendants wished to undermine the credibility of the plaintiff by referring to documents on which he had not been questioned. A.C.J. Smith refused to permit this for the reasons outlined at paras. 56 and 57:

> [56] Unfortunately, Mr. Giffin was not cross examined on any of these issues at the time of the hearing despite the fact that the Defendants had the opportunity to do so. In *Browne v. Dunn* (1893), 6 R. 67, Lord Halsbury stated at pp. 76-77:
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> > .... To my mind nothing would be more absolutely unjust than not to cross examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to..........
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> [57] While the rule in *Browne v. Dunn, supra*, is not absolute, in my view it should be applied in the circumstances of this case. The Defendants should not be permitted to call into question the veracity of Mr. Giffin's loan applications without having asked him about these issues and giving him an opportunity to explain why he completed the application forms in the manner in which he did.

[19] The rule in *Browne v. Dunn* is not one of admissibility, but rather fairness. It is described by Justice Paciocco in *The Law of Evidence* (6th) (Irwin Law; 2011) at p. 437:

> *A party who intends to impeach an opponent's witness must direct the witness's attention to that fact by appropriate questions during cross-examination. This is a matter of fairness to the witness. If the cross-examiner fails to do so, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, the weight of the contradictory evidence of submission may be lessened, or such evidence may be rejected in favour of the testimony of the opponent's witness.*

[20] This case involves significant testimonial conflicts between Messrs. Jeffrie and Hendriksen, as well as other witnesses. It will be necessary for the Court to resolve many of these apparent contradictions. The credibility assessment of witnesses is a complex process. Justice Dillon of the British Columbia Supreme

Court described it in *Bradshaw v. Stenner*, 2010 BCSC 1398 as follows at para. 186:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[21] There was extensive cross-examination of Mr. Jeffrie at the hearing, including some reference to his discovery evidence. Counsel for the respondents now wish to impeach his credibility with other discovery evidence which was not put to him. If the use of these alleged contradictions is to assist the Court in its credibility assessment, it would have been far more helpful for Mr. Jeffrie to have been asked about these and given an opportunity to provide an explanation. The substance and manner of any explanation may well have affected the Court's view of his overall credibility.

[22] In light of the authorities referred to and *Rule 18.20(2)*, I believe that counsel for the respondents was entitled to proceed as he did; however, this was in violation of the rule in *Browne v. Dunn*. As a result, I will put diminished weight on the alleged contradictions arising out of Mr. Jeffrie's discovery evidence when undertaking my credibility assessment.

(C) Respondents' Use of the Decision in *Hurley v. Power*

[23] In their closing submissions, counsel for the respondents referred to the decision in *Hurley v. Power*, 2008 NSSC 363 in which Justice Edwards made the following comments concerning the testimony of Mr. Jeffrie:

> **22** Jeffery did not impress me. Jeffery was called by the Plaintiff and therefore could not be cross-examined by Plaintiff's Counsel. There was no application to have Jeffery declared an adverse witness yet Jeffery was obviously just that. Jeffery went out of his way to demean the Plaintiff whom he believes is responsible for the destruction of Jeffery's boat by fire shortly after the license transfer.

[24] Counsel argues that this finding is somehow relevant to the credibility assessment which I must carry out in this case. I disagree. The use of such evidence has been rejected by the Ontario Court of Appeal in *R. v. Ghorvei*, 1999 CanLii 2475, where the Court stated:

> [31] In my view, it is not proper to cross-examine a witness on the fact that his or her testimony has been rejected or disbelieved in a prior case. That fact, in and of itself, does not constitute discreditable conduct. I do not think it would be useful to allow cross-examination of a witness on what is, in essence, no more than an opinion on the credibility of unrelated testimony given by this witness in the context of another case. The triers of fact who would witness this cross-examination would not be able to assess the value of that opinion and the effect, if any, on the witness's credibility without also being provided with the factual foundation for the opinion. This case, in fact, provides a good example of the difficulties that would arise if such cross-examination were permitted because, in my view, once the finding is examined in the context of the whole record in Pappageorge, it becomes apparent that it is essentially unfounded and hence can provide no assistance in determining Constable Nielsen's credibility.

[25] In my view, it is irrelevant what Justice Edwards' opinion was of Mr. Jeffrie's testimony in another case involving different issues. I will make my own determination based upon the evidence presented in this proceeding.

2004 SHAREHOLDERS' AGREEMENT

[26] Mr. Jeffrie alleges that the three original shareholders in Three Ports signed a shareholders' agreement in 2004. Such an agreement could assist the court in assessing the reasonable expectations of the parties for purposes of the claim for an oppression remedy. A signed copy of such a document has not been produced.

[27] Messrs. Jeffrie and Simec, who were two of the three original shareholders, say that the agreement was signed in the office of their lawyer Joe Rizzetto. They

both attach unsigned copies of the document as exhibits to their affidavits. In cross-examination, Mr. Simec said that the version attached to his affidavit was only an initial draft of the agreement and was not the same as the one which was signed. In particular, the draft included a non-competition provision applicable to departing shareholders which he did not agreed to.

[28] The agreement signed in November, 2007, when Mr. Simec relinquished his interests in Three Ports, was prepared by Mr. Rizzetto, but made no reference to an earlier shareholders' agreement. Neither the company's accountant, John Nash, nor its initial financing agency, Northside Economic Development Assistance Corporation Limited, saw copies of a signed shareholders' agreement. One could not be found in the corporate minute book, nor Mr. Rizzetto's files.

[29] The only evidence which suggests that there may have been a signed shareholders' agreement is the affidavit evidence of Messrs. Jeffrie and Simec. They differ on the terms of the agreement. Mr. Jeffrie says it is the draft attached as an exhibit to his affidavit, and Mr. Simec says it is a different version of the document. This evidence is insufficient for me to conclude that a signed shareholders' agreement ever existed and, if it did, on what terms.

[30] Counsel for Mr. Jeffrie argued that Mr. Hendriksen acknowledged the existence of such an agreement by discussing a "shotgun clause" with Mr. Ralph Ripley in September, 2010. The evidence is not clear with respect to who raised the issue. Mr. Hendriksen said that it was brought up by Mr. Ripley and Mr. Ripley believes that it was raised by Mr. Hendriksen. In any event, I do not believe that these discussions represent an acknowledgment by Mr. Hendriksen that there was a signed shareholders' agreement containing a shotgun clause.

[31] I would note that the document attached to Mr. Jeffrie's affidavit refers to the parties entering into a partnership to own and operate the Three Ports' business. It is not described as a shareholders' agreement. The so-called shotgun clause is clause 10, which provides as follows:

> 10. If any party wishes to sell his interest in the business, the party withdrawing shall offer to sell his interest to the other parties and shall so notify the other parties, who shall have ten (10) days from the date such notice is given to offer to purchase the said interest.

> If the remaining parties shall fail to offer to purchase the interest of the party so withdrawing, the party withdrawing shall have ten (10) days from the expiration of the period above referred to in which to offer to purchase the said interest of those not withdrawing.
>
> For the purpose of any such sale and purchase the purchase price and terms of payment shall be mutually agreed upon between the parties hereto; provided that if no agreement can be reached then the purchase price and terms of payment shall be set by arbitration in accordance with paragraph 13 hereof.
>
> If none of the parties hereto desires to purchase the interest of the other party or parties, then the business shall be dissolved and the assets sold, and the net proceeds after payment of debts and liabilities shall be distributed in equal shares between the parties hereto.

[32] This clause is quite different from what is typically referred to as a shotgun clause, which provides for a party to make a specific offer to purchase shares of the other shareholder at a defined price. If the other shareholder does not accept the offer, then they are obligated to purchase the offeror's shares at that same price. This mechanism means that when a party makes an offer, they do not know if they will be buying or selling shares at the specified price.

[33] Clause 10 in the unsigned agreement does not require that the price in the offer and counteroffer be the same, and simply says that the price shall be agreed or determined by arbitration.

[34] Neither Mr. Hendriksen nor Mr. Ripley described the type of clause which they were discussing, nor whether it was similar to clause 10 of the unsigned agreement or a more traditional shotgun clause.

[35] Mr. Jeffrie has not satisfied me on a balance of probabilities that there was ever a signed shareholders' agreement for Three Ports.

CONTRACT CLAIM

[36] Mr. Jeffrie says that a binding agreement was entered into for the sale of his shares in Three Ports to Mr. Hendriksen. This was a verbal agreement which he says was reached during a meeting on September 16, 2009.

[37] Mr. Hendriksen said that there were on-going discussions about the potential purchase of Mr. Jeffrie's shares. He recalls at least six meetings with Mr. Jeffrie on this topic between July and September, 2010. He denies that a binding agreement was ever reached with Mr. Jeffrie on the terms alleged. As an alternative, he argues that if there was a binding agreement, he repudiated it in November, 2010 and the repudiation was accepted by Mr. Jeffrie.

[38] It is common ground that there was never a signed agreement for the sale of Mr. Jeffrie's shares. The parties also agree that the issue with respect to whether a binding agreement came into existence is not to be determined based upon the subjective intention of the parties. It is to be decided by examining their conduct from the perspective of a hypothetical reasonable person. If this assessment demonstrates an intention to be bound, it is irrelevant whether the parties believed that they had reached an agreement.

[39] In their closing submissions, counsel for Mr. Jeffrie referred to the following paragraph from p. 15 of *Fridman*, *The Law of Contract* (5th ed.) (2006):

> Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. ...

[40] In their submissions, counsel for the respondents referred to the following additional passages from *Fridman* at p. 6:

> ... What emerges from the cases is that agreement or lack of agreement should be judged or determined by the standards of the reasonable observer, the person on the outside, as it were, of the transaction. Whether parties are in agreement depends not on what they themselves knew or understood, but on whether in the eyes of a hypothetical onlooker they appear to have reached agreement. ...

and at p. 16:

> If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or an agreement. ...

[41] I recently dealt with the issue of whether an agreement reached between the parties was an enforceable contract in *Chisholm v. Yuille*, 2012 NSSC 297. I concluded that an enforceable agreement had been reached despite the fact that some particulars, such as closing date, responsibility for migration of the property and closing adjustments, had not been specified. After reviewing a number of authorities on the issue of contract interpretation, I expressed my conclusion as follows:

> **58** In summary, I am satisfied that a binding settlement agreement was reached between Ms. Thomas and Mr. Yuille by the exchange of correspondence between counsel in May, 2012. In coming to this conclusion, I have considered the language used in that correspondence, the context of the agreement and the subsequent conduct of the parties.

[42] In this case I must first determine if a verbal agreement was reached and, if so, on what terms. If there was, then I need to decide whether it was intended that the creation of enforceable legal obligations be subject to a written document being executed.

[43] Mr. Jeffrie alleges that the verbal agreement was reached in a meeting which had been preceded by a series of discussions between the parties. That meeting was followed by a series of events which included further discussions between the parties, amendments to the alleged terms, drafting of agreements and payment of a deposit. In order to determine the respective obligations of the parties, I believe I need to consider the entire course of conduct between them beginning in June, 2010 and continuing until November, 2010

[44] By June of 2010, Mr. Jeffrie had decided that he wished to sever his business relationship with Mr. Hendriksen. He felt that he was being excluded from the operation of the business and he did not trust Mr. Hendriksen to treat him fairly. As a result, he initiated discussions with Mr. Hendriksen for the sale of his shares in Three Ports.

[45] Mr. Jeffrie says that the first discussion with Mr. Hendriksen took place in a parking lot in North Sydney on July 7 or 8, 2010. According to him they discussed payment on closing of $340,000.00, a further payment of $50,000.00 at some unspecified date, assignment of two area 23D crab allocation licenses and transfer of a Hummer and five ton truck owned by Three Ports. He says that they agreed that he would not be subject to a non-competition clause.

[46] Mr. Jeffrie says that two days later there was a second meeting at Don Cherry's restaurant in Sydney River. At that time, he and Mr. Hendriksen discussed a payment on closing of $540,000.00, the assignment of one area 23D crab allocation license and transfer of the Hummer. He says that they confirmed again there would be no non-competition clause.

[47] Mr. Jeffrie testified that the next substantive discussion was the meeting of September 16, 2010 at which the alleged agreement was reached.

[48] Mr. Hendriksen testified that there were four meetings in July, 2010 to discuss the potential purchase of Mr. Jeffrie's shares, as well as a further discussion in early August in the Canadian Tire parking lot. He says the first meeting took place on the side of the highway on July 13, 2010 and the terms discussed were payment on closing of $350,000.00 and an assignment of one area 23D crab allocation license. Mr. Jeffrie was to be responsible for paying the balance of the acquisition costs for the area 23D crab allocation license in the amount of $50,000.00.

[49] The second meeting described by Mr. Hendriksen took place a few days after the initial one and was in the parking lot of the North Sydney Mall. The only change from the initial discussion was that Mr. Jeffrie would also receive a Hummer vehicle that was owned by Three Ports.

[50] The third meeting described by Mr. Hendriksen took place a few days later at the Alder Point Plant operated by Three Ports. The terms were the same as the second meeting, with the exception that a supply agreement was to be included. This agreement would provide for payment of a guaranteed commission to Mr. Jeffrie for sale of lobster and crab to Three Ports, as well as the use of a five ton

truck. Mr. Hendriksen said that the parties reached an agreement on these terms at that time.

[51] Mr. Hendriksen described a fourth meeting which took place at Don Cherry's restaurant a few days after the Alder Point discussion. He says Mr. Jeffrie demanded a change in the terms of the agreement which had been reached at the previous meeting. He wanted $500,000.00 on closing, transfer of an area 23D crab allocation license and the Hummer. Although not discussed, Mr. Hendriksen assumed that Mr. Jeffrie still wanted the supply agreement. Mr. Hendriksen says that he advised Mr. Jeffrie that he needed to think about his proposal.

[52] In early August, 2010, Mr. Hendriksen says that there was a fifth meeting at the Canadian Tire store parking lot in Sydney. He says that Mr. Jeffrie suggested a payment of $400,000.00 on closing and $50,000.00 in each of April, 2011 and April, 2012. There would be transfer of an area 23D crab allocation and the Hummer, but no supply agreement. Mr. Hendriksen said he did not agree to those terms.

[53] According to Mr. Hendriksen, the next discussion between the parties was the September 16 meeting.

[54] It is interesting to note that the parties disagree significantly with respect to the discussions with took place in July, 2010, and yet they both say an agreement was reached during that month. They disagree on the dates of meetings, the terms discussed and the number of meetings which took place. They both agree that there was a discussion at Don Cherry's restaurant, which included transfer of one area 23D crab allocation license and the Hummer, but differ by $40,000.00 with respect to the amount payable on closing.

[55] John Nash was the accountant for Three Ports and testified that he had three telephone conversations with Mr. Hendriksen during July, 2010. One of these also included Mr. Jeffrie. He recalls discussing tax and accounting issues with the parties and also suggesting to Mr. Hendriksen that he use an existing company, Inland Marine Services Limited, as a holding company to acquire Mr. Jeffrie's shares. Mr. Nash does not recall being advised by either party of any sale terms.

[56] Mr. Hendriksen said that when the parties reached an agreement in the meeting at the Alder Point Plant, he suggested retaining a lawyer, Greg MacIsaac, to prepare a formal agreement for signing. Although Mr. Jeffrie denies that a meeting took place at Alder Point, he did recall agreeing with Mr. Hendriksen at some point that Mr. MacIsaac should be retained to prepare an agreement. Mr. Hendriksen indicated that he retained Mr. MacIsaac for this purpose in July, 2010.

[57] By September 14, 2010, Mr. Hendriksen had not heard anything from Mr. MacIsaac in relation to the drafting of the agreement. He says that he called Mr. MacIsaac on that date, looking to see if he had a signed copy of any shareholders' agreement for Three Ports. He says that he told Mr. MacIsaac that he had retained another lawyer, Ralph Ripley, to provide him with advice.

[58] On September 14, 2010, Mr. Hendriksen also called Mr. Ripley who testified that he was told that an agreement had been reached for the purchase of Mr. Jeffrie's shares in July. According to him, Mr. Hendriksen said that the July deal called for payment of $350,000 on closing and transfer of the Hummer and a crab allocation license to Mr. Jeffrie.

[59] Both parties agree that the September 16, 2010 meeting was requested by Mr. Jeffrie and it was held at the office of John Nash.

[60] The three participants in the September 16 meeting have somewhat different recollections of its purpose. Mr. Jeffrie said that he was having difficulty coordinating with Mr. Hendriksen in implementing the agreement reached in July. He wanted Mr. Nash to act as an intermediary so they could discuss the share purchase agreement.

[61] Mr. Hendriksen felt the purpose of the meeting was to see if a deal could be reached with the assistance of Mr. Nash.

[62] Mr. Nash's recollection was that Mr. Jeffrie advised him that an agreement was reached and he was to act as a witness as well as facilitate the closing.

[63] All of this evidence satisfies me that there was no binding agreement in place prior to September 16, 2010 for the sale of Mr. Jeffrie's shares in Three Ports to Mr. Hendriksen. The parties obviously had a number of discussions about

the terms under which a sale might take place. These took place in a variety of locations, including vehicles, parking lots and restaurants, and were not documented in any way. Both parties agree that Mr. MacIsaac was retained to prepare an agreement and I interpret this to mean that each considered this necessary before binding legal obligations arose.

[64] Mr. Jeffrie was frustrated at the lack of progress towards completion of a binding agreement and that is the reason that he requested the meeting with Mr. Nash on September 16. I believe that Mr. Hendriksen also understood that the purpose of the meeting was to try and finalize an agreement after months of relatively informal discussions.

[65] Mr. Nash was correct in interpreting his role as being a "witness" to the terms of an agreement. He testified that he understood that an agreement had been reached in advance of the meeting, and I accept that this was his view at the time.

[66] With this background, I must consider the meeting itself and the subsequent steps taken by the parties.

[67] On September 16, 2010, Messrs. Jeffrie, Hendriksen and Nash met at Mr. Nash's office. No notes were taken by any of them. There was a consensus that certain terms were discussed at the meeting with respect to the sale of Mr. Jeffrie's interest in Three Ports to Mr. Hendriksen. These were payment of $400,000.00 on closing and $50,000.00 on each of April 30, 2011 and April 30, 2012. These future payments were to be secured by the assignment of an area 23D crab allocation license. There was also to be a transfer to Mr. Jeffrie of another area 23D crab allocation license and the Hummer. There was a dispute with respect to whether Messrs. Jeffrie and Hendriksen reached an agreement at this meeting to complete the transaction on these terms.

[68] In determining whether there was an agreement, I need to assess the conduct of the parties and decide if it would indicate to an objective bystander that they intended to enter into a contract. Their subjective views as to whether this occurred is irrelevant. Counsel for Mr. Jeffrie says that Mr. Nash should be treated as that objective bystander and his view on whether an agreement was reached should govern.

[69] As noted in the extract from *Fridman, The Law of Contract*, found at paras. 40 and 41of this decision, the reasonable observer is a hypothetical onlooker created by the Court for purposes of establishing the standard whereby the evidence is to be assessed. In this case, it would not be appropriate to substitute Mr. Nash's opinion of the parties' conduct for this analysis. As with any witness, his evidence is subject to the frailties of recollection and potential interpretive bias. I note, for example, that he went into the September 16 meeting on the understanding that an agreement had already been reached and that he was simply to witness the terms. That perspective may well have influenced his conclusion that the parties had agreed on the terms discussed at the meeting. I will consider Mr. Nash's testimony along with all of the other evidence in assessing whether the parties reached a binding and enforceable agreement.

[70] Mr. Jeffrie says that he and Mr. Hendriksen reached a consensus in the September 16 meeting, shook hands on the terms and agreed that Mr. Ripley would draft the agreement. He says that they also agreed there would be no non-competition clause applicable to him. In cross-examination, he acknowledged that the parties discussed the use of Inland Marine to purchase his shares and that there would be two agreements prepared so that a portion of the purchase price would not be known to Mr. Hendriksen's wife.

[71] Mr. Hendriksen says that at the meeting, Mr. Jeffrie outlined the terms under which he would sell his shares. He denies discussing a non-competition agreement at the meeting and also denies saying that he would agree to these terms. He says that he told Messrs. Nash and Jeffrie that he wanted to look into financing, speak with his wife and obtain advice from Mr. Ripley. In cross-examination, Mr. Hendriksen testified that he never said that he would not agree to the terms proposed by Mr. Jeffrie at the meeting. He did not think that he was required to do so and was never asked. He was not sure if he said that he needed his wife's approval during the meeting on September 16. He testified that he advised the meeting he was going to see Mr. Ripley, but did not indicate that it was for purposes of preparing the agreement.

[72] Mr. Nash's recollection is that Messrs. Jeffrie and Hendriksen jointly advised him that an agreement had been reached on the terms outlined. He says that he asked if a non-competition agreement would be applicable and was told that it would not be. He asked which lawyer the parties would use to close the

deal and was told it would be Mr. Ripley. Mr. Nash agreed to set up a meeting with Mr. Ripley for that purpose. Mr. Nash denies that Mr. Hendriksen said that he needed to look into financing, get advice from Mr. Ripley or speak to his wife. He also says that there was no discussion of two agreements during the meeting of September 16.

[73] In order to assess whether the parties had reached an agreement, I need to consider their actions subsequent to the September 16, 2010 meeting.

[74] Mr. Hendriksen says that he spoke to his wife after the meeting and described the discussions which had taken place. Her response was that the amount in question was too much to pay for Mr. Jeffrie's interest in Three Ports.

[75] On September 17, 2010, Mr. Nash set up a meeting with Ralph Ripley, which he attended along with Mr. Hendriksen.

[76] Mr. Hendriksen says that the discussions in the September 17 meeting involved the restructuring of Three Ports and Inland Marine to accommodate the purchase of Mr. Jeffrie's shares. The issue of a non-competition agreement was raised and he said that it would not be necessary. Mr. Hendriksen said that Mr. Ripley explained that he could not begin drafting anything until the following week and they agreed that that would not be a problem. After Mr. Nash left the meeting, Mr. Hendriksen says that he had a further discussion with Mr. Ripley in which he advised that he wanted the transaction structured through two separate agreements, as he did not want his wife to know that he was considering agreeing to Mr. Jeffrie's demands.

[77] Mr. Nash's recollection of the September 17 meeting was consistent with the evidence of Mr. Hendriksen. The discussion included the use of Inland Marine as a holding company, Mr. Hendriksen's confirmation that a non-competition clause was not required and a request that Mr. Ripley begin drafting an agreement the following week.

[78] Mr. Ripley made notes of the September 17 meeting. He says that Mr. Nash outlined the terms on which Mr. Jeffrie was prepared to sell his shares. These were the same as had been discussed at the September 16 meeting. There were also discussions concerning the restructuring of Three Ports and Inland Marine,

with Inland Marine purchasing Mr. Jeffrie's shares. Mr. Ripley says that a non-competition agreement was discussed and Mr. Hendriksen indicated that it was not required. After Mr. Nash left the meeting, Mr. Ripley says that Mr. Hendriksen asked him to draft two agreements for the transaction because he did not want his wife to know that he was seriously considering the offer.

[79] On September 21, 2010, Mr. Ripley drafted a letter to Mr. Hendriksen confirming his retention and instructions. The letter was dated September 22, 2010 and including the following description of the discussions at the meeting of September 17:

> Also, we met on the afternoon of Friday, September 17, 2010, along with John Nash, CA.
>
> Mr. Nash indicated that he acts for both you and Mr. Jeffrie, and has in the past. He indicated in my office, that he suggested the manner in which the purchase of Mr. Jeffrie's shares be structured, and a corporate organization (or re-organization), to deal with the operation of your business enterprise.
>
> As a result, I am under the assumption that the affect (sic) of this arrangement as it relates to income tax, etc., that you have received advice from Mr. Nash, and I offer none herein or otherwise.
>
> As well, there were certain items for which either I or Mr. Nash (or both), provided advice to you, some of which despite that advice, you instructed us to take other action, which I also outline and confirm herein.
>
> I confirm the following:
>
> 1. You presently have a body corporate, Inland Marine Services Limited (*hereinafter referred to as "Island (sic) Marine"*). You indicated that company was incorporated for you by David Iannetti, but you would be obtaining the corporate minute book and seal (I confirm you dropped same off at my office on September 20, 2010).
>
> 2. I was instructed by Mr. Nash that company will enter into a share purchase agreement with Roderick Jeffrie to purchase his shares in Three Ports.
>
> 3. The current shares in Island (sic) Marine, which I understand to be issued to you personally, will be returned. I have been instructed by Mr. Nash

that company will however reissue 100 common shares to the Anthony Hendriksen Family Trust, which will be discussed below.

4. I have been instructed by Mr. Nash that 000 (sic) special voting shares in Island (sic) Marine at a price of 0.01 ¢ per share, will be issued to you.

5. I have been instructed by Mr. Nash that the shares which you currently hold in Three Ports, will be transferred to Inland Marine pursuant to s. 85 of the Income Tax Act in an agreement which sets the cost base of those shares as $550,000.00, and that the purchase from you would be payable in 1,000 preferred shares in Island (sic) Marine, which are both redeemable and retractable, and for which the total share value will be $50.00, which sets the base price for the 1,000 shares at 0.05¢.

6. I have been instructed by Mr. Nash that the family trust would be set up so that you are the primary trustee, with the power to add a secondary trustee (with the intent that upon creation of the trust, you would name your wife, Donna, as the secondary trustee).

7. The family trust would set up that the beneficiaries would be yourself, your spouse, your children, your children's spouses, and your grandchildren.

8. The purchase of Mr. Jeffrie's 50 shares in Three Ports would be purchased pursuant to two agreements and the shares divided proportionately in accordance with the proportion of the purchase price associated with those agreements.

9. You have instructed that the first lot of shares would be sold for $475,000.00, payable by $350,000.00 at the time of closing, transfer of a "crab allocation", particulars of which you will provide to me prior to drafting the agreement, and the transfer of a motor vehicle (a "Hummer"), to Mr. Jeffrie, which is valued at $25,000.00.

10. You and Mr. Nash have instructed that the remaining shares would be purchased for $150,000.00, of which $50,000.00 will be payable at the time of closing, and a promissory note from Inland Marine, guaranteed by yourself with crab allocation held by you personally, placed as security for that guarantee. The $100,000.00 would be payable without interest, but with two payments, one payable on or before April 30, 2011, and the other on or before April 30, 2012.

> While you were at my office, both John Nash and I raised with you, whether you would require from Mr. Jeffrie, a non-competition agreement by which he would be constricted from competing with Three Port (sic) within a specified geographical area and within a specified time period. Both Mr. Nash and I indicated to you that it was normal in such a transaction, especially given the amount that you were paying to require such an agreement from the selling shareholder. **You confirmed that you did not require same, and did not wish to have a non-competition agreement prepared**. If I hear differently from you prior to the closing (in which case you should also raise the issue with Mr. Jeffrie), we will prepare same.
>
> As well, with respect to the beneficiaries for the family trust, as well as the consideration and the structure of the purchase of the shares (both the consideration, use of two agreements, security, etc), that all that was presented to me on September 17, 2010, by both yourself and Mr. Nash, and that structure was **not** as a result of any advice received from myself.
>
> As well, there was discussion that the crab allocation that was to be transferred to Mr. Jeffrie was one that was purchased by Three Port (sic) (as opposed to one that was held by either Island (sic) Marine or yourself), yet that is set up as part of the consideration to be transferred to Mr. Jeffrie when it was not Three Port (sic), but Island (sic) Marine that is actually transferring that crab permit. As a result, in some fashion, that permit, it would appear, should be transferred to Inland Marine to be transferred to Mr. Jeffrie at the time of sale.

[80] The September 22 letter also confirmed Mr. Ripley would not be able to start drafting the agreements until September 22 and, at the earliest, the first agreements would be available for circulation on October 1, 2010. The final paragraph of the letter was added as the result of a telephone call with Mr. Hendriksen on September 22 and it states as follows:

> I also confirm that on September 22, 2010, you advised that you were reconsidering whether to enter into the agreement and that as a result, I should "hold" preparation of those agreements until I hear back from you (which would alter when they, as a result, can be prepared).

[81] In the meantime, Mr. Jeffrie retained Dwight Rudderham as his legal counsel on September 21, 2010. Mr. Rudderham described the scope of his retainer in his affidavit as follows:

> 5. It was my understanding, based on discussions with Jeffrie, that an agreement had been reached between Jeffrie and Hendriksen as to the key terms of the share purchase, and that Ralph Ripley ("Ripley") was to commit the agreement to writing for the parties' signature. I was retained by Jeffrie to, among other things, review the agreement as drafted to ensure that it conformed to the agreement reached, and to set up a holding company and family trust for Jeffrie in order to hold the sale proceeds once the transaction was completed.

[82] On September 21, 2010, Mr. Rudderham met with Messrs. Jeffrie and Nash. He made notes of this meeting. According to Mr. Rudderham, they described the agreement reached with Mr. Hendriksen as including a $400,000.00 immediate payment, with $50,000.00 payments on April 30, 2011 and April 30, 2012. These future payments would be secured by assignment of a crab allocation license belonging to Mr. Hendriksen. Mr. Rudderham recalled that Mr. Jeffrie would also receive a share in a numbered company, worth approximately $100,000.00 and a 2005 Hummer. Mr. Jeffrie would be removed as guarantor from all Three Ports' debts, and the agreement would not include a non-competition clause. Mr. Rudderham was advised that there would be two separate agreements in order to hide later payments from Mr. Hendriksen's wife.

[83] On September 23, 2010, Mr. Hendriksen met with Mr. Nash. Mr. Hendriksen says that Mr. Nash told him that Mr. Jeffrie's "demands" were not supported by Three Ports' financial statements. Mr. Hendriksen says that he advised Mr. Nash that he was not prepared to accept Mr. Jeffrie's proposal which had been described to Mr. Ripley in the meeting of September 17. He says that he told Mr. Nash that he was prepared to purchase the shares on the terms of the agreement reached in July, 2010 in the meeting at the Alder Point Plant.

[84] Mr. Nash's recollection of the September 23 discussion is that Mr. Hendriksen called the meeting and asked him about the valuation of Three Ports. Mr. Nash says that he advised him that based upon the financial statements, the company was not worth 1.25 million dollars. He says that Mr. Hendriksen advised that he was still going through with the deal that he and Mr. Jeffrie had made.

[85] On October 4, 2010, Mr. Hendriksen met with Mr. Ripley and instructed him to prepare a draft agreement which provided for $300,000.00 payable by Inland Marine on closing and two payments of $100,000.00 on each of July 15,

2011 and July 15, 2012. There would be a transfer of a crab allocation license and the Hummer from Three Ports to Jeffrie, and Mr. Jeffrie would execute a non-competition agreement. They also discussed the potential tax consequences of the transfer of the crab allocation license from Three Ports. The explanation given by Mr. Hendriksen in his affidavit for these instructions was that he believed he would only be able to raise $300,000.00 cash for the payment due on closing.

[86] Mr. Ripley's recollection of the October 4th meeting is consistent with that of Mr. Hendriksen. He confirmed his instructions by letter dated October 7, 2010 advising that he would begin drafting the agreements. It appears from his time records that he had completed the drafting by October 14, 2010,

[87] On October 5, 2010, Messrs. Nash and Ripley discussed the tax implications of the transfer of the crab allocation license, and that it might result in a taxable benefit to either Mr. Hendriksen or Mr. Jeffrie.

[88] In his affidavit, Mr. Jeffrie says that some time after September 21, 2010 he and Mr. Hendriksen agreed to revise the cash payment terms of the agreement. The initial payment would become $350,000.00, with $75,000.00 payable on each of April 30, 2011 and April 30, 2012. Mr. Hendriksen denies that such an agreement was reached. Mr. Nash says that he was advised of the restructured payment agreement by Mr. Jeffrie on October 27, 2010.

[89] In late October, 2010, Mr. Rudderham began pressing Mr. Ripley for copies of the draft sale documentation. As of October 21, Mr. Ripley indicates that he had sent the draft documents to his client for review. On October 25, Mr. Ripley spoke with Mr. Hendriksen about the draft agreement. Mr. Hendriksen advised him that he had not yet decided to purchase Mr. Jeffrie's shares at the price most recently discussed. Mr. Ripley was instructed to hold off releasing the draft agreement to Mr. Rudderham.

[90] On October 26, 2010, Mr. Ripley sent a letter to Mr. Rudderham on Mr. Hendriksen's instructions, the text of which is as follows:

> Thank you for your email, which I received on Monday, October 25, 2010. Coincidently, I had spoken to Mr. Hendricksen (sic) that same afternoon with respect to this matter.

> My client has indicated to me that at present, he has asked me to hold release of the draft Share Purchase Agreement, as given the existing debt load for Three Ports Fisheries Ltd, and other contingent liabilities, he has not as yet decided to purchase Mr. Jeffrie's shares in that Company for the price that they most recently discussed (as opposed to the price that Mr. Jeffrie presented to him in July 2010).
>
> I trust the above addresses your email, and I remain.

[91] On October 29, 2010, Messrs Nash and Hendriksen spoke by telephone. Mr. Hendriksen says that he advised Mr. Nash that he was not prepared to purchase Mr. Jeffrie's shares on the terms which he demanded, but remained willing to purchase the shares on the terms of the so-called Alder Point agreement. He says Nash indicated that Mr. Jeffrie would be prepared to buy his shares for $500,000.00, which Mr. Hendriksen rejected.

[92] Mr. Nash's recollection of the conversation is that Mr. Hendriksen indicated that he did not know if he was going to complete the agreement which he and Jeffrie had reached. He says he informed Mr. Hendriksen that Mr. Jeffrie was prepared to purchase his shares on the same terms, but this was rejected by Mr. Hendriksen.

[93] On October 29, 2010, Mr. Hendriksen says that he instructed Mr. Ripley to revise the draft agreement to reflect the terms of the Alder Point agreement which he said was $250,000.00 payable by Inland Marine on closing, as well as the transfer of a crab allocation license and Hummer from Three Ports to Jeffrie. There would also be a supply agreement to be drafted by Mr. Jeffrie's lawyer and a non-competition clause.

[94] As of October 29, Mr. Ripley had prepared the documentation for the share rollover involving Inland Marine, as well as the new share certificates for Three Ports. Although dated for November, 2010, they were signed on October 29, 2010 when he met with Mr. and Mrs. Hendriksen to review these documents.

[95] Mr. Ripley described a conversation with Mr. Hendriksen which took place on November 2, 2010 according to his affidavit and time records. He said that Mr. Hendriksen advised him that Mr. Nash had told him that Mr. Jeffrie was prepared to sell his shares for $250,000.00, along with the transfer of the vehicle and crab allocation license and execution of a supply agreement to be drafted by Mr.

Rudderham. Mr. Hendriksen instructed him to revise the draft agreements to reflect these terms. According to his time records Mr. Ripley did this on November 2, 2010.

[96] There were three draft versions of a share purchase agreement between Mr. Jeffrie and Inland Marine entered into evidence. Mr. Ripley said that he prepared these. Two of them were dated the blank day of October, 2010 with a November 5, 2010 closing date. One (exhibit 15) had a purchase price of $500,000.00, with $300,000.00 payable on closing and a deposit of $25,000.00 which was to be increased to $100,000.00. There was no reference to the transfer of a Hummer or crab allocation to Mr. Jeffrie.

[97] The other October agreement (exhibit 16) was for a purchase price of $525,000.00, consisting of transfer of the Hummer, valued at $25,000.00, and cash. There was a deposit of $1,000.00 and $299,000.00 payable on closing. Installments of $100,000.00 would be paid on July 15, 2011 and July 15, 2012 to be secured by an area 23 crab allocation. The agreement recites that there had been a prior transfer of an area 23 crab allocation license to Mr. Jeffrie by Three Ports. It also required Mr. Jeffrie to agree not to compete with Three Ports for a period of five years.

[98] The November, 2010 agreement (exhibit 17) had a purchase price of $275,000.00, consisting of a transfer of the Hummer valued at $25,000.00 and cash. There would be a deposit of $1,000.00 and $249,000.00 payable on closing, which would take place on November 26, 2010. The agreement confirmed the prior transfer of an area 23 crab allocation license to Mr. Jeffrie by Three Ports. The five year non-competition requirement was included in this document as well.

[99] Further telephone conversations took place amongst Messrs. Nash, Hendriksen and Jeffrie on October 30, 2010. Mr. Hendriksen said that he advised Mr. Nash that he was only prepared to buy Jeffrie’s shares on the terms of the Alder Point agreement. He understood from Mr. Nash that Mr. Jeffrie refused to sell his shares for anything other than the amounts discussed on September 16, 2010. Mr. Hendriksen says that Mr. Nash suggested a down payment of $50,000.00 be made to Mr. Rudderham as a sign of good faith, and he agreed to do so.

[100] Mr. Jeffrie says that Mr. Nash told him during these conversations that Mr. Hendriksen wished to restructure the $500,000.00 cash payment so that he would pay $300,000.00 up front and $100,000.00 on each of July 15, 2011 and July 15, 2012. There would be two crab allocation licenses assigned by Mr. Hendriksen as security for these future payments. In addition, he was to receive the Hummer and a crab allocation license with a $25,000.00 liability that was to be assumed by him. Mr. Jeffrie said that he agreed to these terms, but wanted further assurance that Hendriksen would proceed with the deal. He says that there was an agreement for a non-refundable deposit of $50,000.00 to be paid by Mr. Hendriksen to Mr. Rudderham.

[101] Mr. Nash also testified about the telephone conversations of October 30, 2010. He described acting as a go-between, advising Messrs. Jeffrie and Hendriksen of each other's position. He says that they agreed, in separate phone conversations with him, to amend the agreement to provide for a $300,000.00 payment on closing and two $100,000.00 payments on July 15, 2011 and July 15, 2012. Hendriksen also agreed to provide two crab allocations as security for the future payments. The other terms remained the same. Mr. Hendriksen agreed to pay a non-refundable deposit of $50,000.00 to Mr. Rudderham to facilitate closing of the deal.

[102] Mr. Nash advised Mr. Rudderham on November 1, 2010 that he would be receiving a $50,000.00 deposit from Mr. Hendriksen to be held in trust for the transaction.

[103] On November 2, 2010, Mr. Hendriksen attended Mr. Rudderham's office and paid a deposit of $50,000.00. He instructed Mr. Rudderham to prepare a direction for him to sign which stated as follows:

INSTRUCTIONS:

To: Dwight Rudderham

From: Anthony Hendriksen

Date: November 2, 2010

> I hereby provide you with a cheque in the amount of $50,000.00 "in trust". The purpose of this amount is as a deposit in good faith to facilitate the transfer of shares of 3 Port Fisheries between myself and Rod Jeffrie. This deposit is to be held in trust by you until such time as satisfactory Agreements have been completed on this matter. The deposit will then be credited against the purchase price for the shares on closing. In the event we are unable to conclude satisfactory Agreements, you may deduct your outstanding legal fees related to this matter and the balance is to be returned to me.
>
> *(signature - Anthony F. Hendriksen)*

[104] On November 3, 2010, Mr. Ripley sent the redrafted share purchase agreement to Mr. Hendriksen and indicated that he was awaiting his instructions before sending it to Mr. Rudderham. The attached draft was the November agreement with a closing date of November 26 and a purchase price of $275,000.00 (ie. exhibit 17). After receiving Mr. Hendriksen's approval, Mr. Ripley sent the draft share purchase agreement to Mr. Rudderham later that day.

[105] On November 9, 2010, William L. Ryan, Q.C. sent a letter to Mr. Ripley, the text of which is as follows:

> Please be advised that our firm has been retained by Mr. Jeffrie in connection with the sale and/or purchase of shares of Three Ports Fisheries Limited. We would therefore ask that all future correspondence in connection with this matter be directed to the attention of the undersigned. We have asked Mr. Dwight Rudderham to forward his file material directly to us.
>
> We are in receipt of a copy of your letter dated November 3, 2010 to Mr. Rudderham outlining the terms of the possible sale and purchase of Mr. Jeffrie's shares. Please accept this letter as formal notification that the offer is unacceptable both to price and to terms.
>
> Any purchase or sale of these shares in connection with "Three Ports Fisheries Limited" would be subject to the terms and conditions of the Shareholders Agreement made in 2004. We are sure you have a copy of that Agreement in your possession but if not, kindly notify the undersigned and we will arrange for you to receive a copy.
>
> In accordance with Clause 10 of the Shareholders Agreement, our client is prepared to sell all of his shares in Three Ports Fisheries Limited (which consists of one-half of the outstanding common shares issued) to your client upon terms

and conditions to be mutually agreed upon and consistent with the existing Shareholders Agreement which was executed in 2004. The purchase price that Mr. Jeffrie is prepared to accept for the sale of his 50% interest in the company is as follows:

(a) $300,000 cash at time of closing plus the transfer and acquisition of an Area 23 crab allocation, I.D. of such allocation to be agreed upon by the parties. In addition, there are to be two additional payments of $100,000 each, with the first payment due on July 15, 2011, and the last payment due on July 15, 2012. The payment of the two $100,000 instalments (over and above the $300,000 which is due on closing) is to be secured by the pledge of two additional crab quotas for Area 23, plus Mr. Hendriksen's personal guarantee.

If the above purchase price is agreeable then it will be incumbent upon you and I to draft a mutually acceptable Agreement of Purchase and Sale in connection with the outstanding common shares owned by Mr. Jeffrie.

If Mr. Jeffrie's offer to Mr. Hendriksen is not acceptable by him, then please accept this letter as formal notification that Mr. Jeffrie is prepared to purchase Mr. Hendriksen's shares for the exact same purchase price as outlined above (which includes the payment of $300,000 on closing, transfer of crab quota and two further instalments of $100,00 (sic) each on the July dates as specified above). The terms and conditions of that Agreement of Purchase and Sale would be consistent with the existing Shareholders Agreement as well.

As it appears that the parties have been trying to negotiate a deal for some time, our client is interested in bringing this matter to a head and completing the transaction (one way or another) as soon as possible. Accordingly, we would ask that your client indicate what his position is with respect to either purchasing or selling shares by no later than Friday, November 12, 2010 by 3:00 p.m. Once we have agreement on the price, then it should not be difficult for you and I to work together in drafting an acceptable Agreement of Purchase and Sale which would be consistent with the existing Shareholders Agreement.

If for any reason whatsoever, your client is not prepared to agree to either the purchase or selling price, or to enter into a mutually acceptable Agreement of Purchase and Sale, then our client intends to immediately invoke Clause 13 of the Shareholders Agreement which would require the parties to resort to arbitration. As noted in the Shareholders Agreement, "The award and determination of such arbitrator or arbitrators, or any three of such five arbitrators, shall be binding upon the parties hereto and their respect heirs, executors, administrators and assigns."

> As Mr. Jeffrie is extremely anxious to resolve this situation we would hope that it does not proceed to arbitration. If, however, the parties cannot agree, then we would like to proceed to arbitration as soon as possible and hopefully no later than the end of 2010.
>
> It would be greatly appreciated if you would acknowledge receipt of this correspondence and thereafter seek instructions from your client and respond no later than Friday of this week.

[106] The sale of Mr. Jeffrie's shares in Three Ports to Inland Marine did not proceed, and Mr. Hendriksen received a full refund of the $50,000.00 deposit in December, 2010.

[107] The evidence of the three participants in the September 16, 2010 meeting is very consistent with respect to what was discussed. Mr. Jeffrie would sell his shares in Three Ports for an immediate payment of $400,000.00 and two $50,000.00 payments in April, 2011 and April, 2012. These future payments were secured by the assignment of a crab allocation license. Mr. Jeffrie would also receive the Hummer and the transfer of another crab allocation. Mr. Ripley was to be retained to draft the necessary documents. There was a disagreement about whether Mr. Hendriksen verbally confirmed his agreement with these terms to those at the meeting. He says that he did not and was never asked to do so.

[108] The next day Mr. Hendriksen met with Mr. Ripley and instructed him to draft two agreements for the purchase of Mr. Jeffrie's shares on the terms discussed the previous day. He also advised that a non-competition covenant by Mr. Jeffrie was not required.

[109] In my view, a reasonable objective observer would conclude that the parties reached an agreement at the September 16, 2010 meeting. I am particularly influenced by Mr. Hendriksen's instructions to Mr. Ripley the following day to proceed with drafting the documents on the same terms which had been discussed at the meeting.

[110] While Mr. Hendriksen may have mentioned that he wished to speak with his wife concerning the transaction and would need to look into financing, I am not

satisfied that he expressed any such comments in terms which would indicate that these were preconditions to the agreement.

[111] Shortly after making the commitment to proceed with the transaction, Mr. Hendriksen began to have second thoughts. He spoke to his wife on the evening of September 16 and she expressed her unhappiness with the terms and, in particular, felt the price being paid to Mr. Jeffrie was too high. The next day Mr. Hendriksen asked Mr. Ripley to separate the transaction into two agreements, so that a portion of the price could be kept from his wife.

[112] According to Mr. Ripley, on September 22, 2010 Mr. Hendriksen called him and asked him to stop work on drafting the documents because he was "reconsidering" whether to proceed. The use of the word "reconsidering" suggests a review of a decision which had already been made. This confirms my opinion that Mr. Hendriksen had intended to reach an agreement with Mr. Jeffrie at the September 16 meeting.

[113] The day after he asked Mr. Ripley to put the documents on hold, Mr. Hendriksen spoke with Three Ports' accountant, Mr. Nash, about the value of the company in relation to the terms discussed at the September 16 meeting. Mr. Nash advised that the company's financial statements did not support the purchase price. Mr. Hendriksen says that he then told Mr. Nash that he would not proceed with the transaction on the September 16 terms. Mr. Nash denies this.

[114] On October 4, 2010, Mr. Hendriksen asked Mr. Ripley to resume the drafting process. The only changes which he requested from the September 16 terms was to reduce the payment on closing by $100,000.00, increase the two future payments by $50,000.00 apiece and postpone them by two and a half months. He also required Mr. Jeffrie to sign a non-competition covenant. In his affidavit, Mr. Hendriksen explained the revised terms on the basis that he could not come up with the full $400,000.00 on closing. This is inconsistent with his advice to Mr. Nash on September 23 that he would not agree to Mr. Jeffrie's financial terms. The total value of the transaction had not changed from the amount discussed on September 16.

[115] I do not believe that Mr. Hendriksen told Mr. Nash on September 23 that he did not wish to proceed with the transaction in accordance with the September 16

agreement. Mr. Nash was entitled to, and did, believe that Mr. Hendriksen intended to complete the transaction as previously discussed.

[116] The first clear indication by Mr. Hendriksen that he might not be proceeding with the September 16 agreement was Mr. Ripley's letter to Mr. Rudderham of October 26, 2010. This was followed shortly thereafter by Mr. Hendriksen's telephone call with Mr. Nash on October 29 when he advised that he was not sure if he was going to proceed. Mr. Ripley's letter is not a rejection of the September 16 terms, but simply a statement that Mr. Hendriksen had not decided whether to complete the transaction. I conclude that this was the same message which he conveyed to Mr. Nash on October 29.

[117] There was a series of telephone conversations on October 30, 2010 among Messrs. Nash, Hendriksen and Jeffrie. Mr. Hendriksen said that he advised Mr. Nash that he was only prepared to buy Mr. Jeffrie's shares on the terms of the Alder Point agreement. According to his affidavit, those terms were cash of $350,000.00 on closing, transfer of an area 23 crab allocation and the Hummer from Three Ports and a supply agreement for the purchase of crab and lobster from Mr. Jeffrie.

[118] Both Mr. Jeffrie and Mr. Nash say that there was an agreement reached during these calls based upon a payment on closing of $300,000.00, with $100,000.00 payments on July 15, 2011 and July 15, 2012 secured by two crab allocation licenses. Three Ports would also transfer the Hummer and a crab allocation license to Mr. Jeffrie. It is interesting that these terms are identical to the agreement Mr. Hendriksen asked Mr. Ripley to prepare on October 4, with the exception of the non-competition agreement. Neither Mr. Jeffrie, nor Mr. Nash had seen the documents drafted by Mr. Ripley at this time and so the only source for this information would have been Mr. Hendriksen himself. I am satisfied that he told Mr. Nash (who informed Mr. Jeffrie) that he would proceed with the transaction on these revised terms on October 30, 2010.

[119] Three days later on November 2, 2010, Mr. Hendriksen instructed Mr. Ripley to revise the share purchase agreement to provide a payment on closing of $250,000.00, along with the transfer of the Hummer and crab allocation from Three Ports. There was also to be a non-competition covenant. Mr. Hendriksen's explanation was that he was simply reverting to the original Alder Point

agreement. The difficulty with this position is that the terms given to Mr. Ripley for the revised agreement differ from Mr. Hendriksen's description of the Alder Point agreement. In his affidavit and testimony, Mr. Hendriksen said the deal reached in July was for a payment on closing of $350,000.00, along with the transfer of the crab allocation and the Hummer. There was no suggestion of a non-competition agreement.

[120] Mr. Hendriksen offered no satisfactory explanation for his change of position in early November, 2010. For approximately six weeks, he had led Mr. Jeffrie and others to believe that he was proceeding towards a transaction whereby Mr. Jeffrie would sell his shares for cash payments totalling $500,000.00, transfer of a crab allocation and the Hummer. On November 3, he presented a new proposal which was different than any previously discussed, cutting the cash payments in half and including a non-competition agreement. The documents prepared by Mr. Ripley made no reference to the so-called supply agreement which, according to Mr. Jeffrie, had never been discussed and in Mr. Hendriksen's evidence, had not been mentioned since July. It is not surprising that Mr. Jeffrie retained litigation counsel in the face of Mr. Hendriksen's abrupt change of position.

[121] Having concluded that the parties did reach an agreement on September 16, 2010, I must still consider whether it was their intention that the verbal arrangement represent a binding and enforceable set of obligations. As with the question of the existence of an agreement, this must be determined based upon an objective assessment of the parties' conduct. If the parties proceed to implement the informal agreement, this is a strong indication that a formal document was not required to create a legal relationship (*Medjed v. 1007323 Ontario Inc.,* 2004 CanLII 40663 (ON SC) at para.67).

[122] As I have previously indicated, I am not satisfied that the parties were successful in reaching an agreement prior to September 16, 2010 because there was never a consensus on the financial terms of the transaction. It was also clear from the early discussions that a legally prepared document was required. In July, both Messrs. Hendriksen and Jeffrie agreed that Greg MacIsaac should be retained for that purpose.

[123] The requirement for a written document continued in the discussions which took place at the meeting of September 16 when everyone concluded that Mr. Ripley should be asked to draft the agreement.

[124] When Mr. Jeffrie retained Mr. Rudderham, part of his assignment was to review the documents to be prepared by Mr. Ripley. Mr. Rudderham's evidence indicates that through October, 2010 he was vigorously pursuing Mr. Ripley for these drafts.

[125] None of the parties, including legal counsel and Mr. Nash, suggested that the transaction could or should proceed without a formal written agreement. Even when it became apparent that there was a problem, neither Mr. Jeffrie, Mr. Nash nor Mr. Ryan suggested that the September 16 agreement was binding and enforceable.

[126] Mr. Jeffrie's response to receipt of the revised agreement from Mr. Ripley was Mr. Ryan's letter of November 9, 2010, which provided in part:

> As it appears that the parties have been trying to negotiate a deal for some time, our client is interested in bringing this matter to a head and completing the transaction (one way or another) as soon as possible. Accordingly, we would ask that your client indicate what his position is with respect to either purchasing or selling shares by no later than Friday, November 12, 2010 by 3:00 p.m. Once we have agreement on the price, then it should not be difficult for you and I to work together in drafting an acceptable Agreement of Purchase and Sale which would be consistent with the existing Shareholder's Agreement.

[127] It is my view that the negotiations between the parties which began in July, 2010, were always premised on the assumption that any agreement which was reached between them would not be binding until it was reduced to a signed agreement prepared by legal counsel. That position was consistently maintained up to and including November, and for this reason I conclude that the September 16 agreement cannot be enforced by Mr. Jeffrie.

OPPRESSION CLAIM

(A) General Principles

[128] As an alternative to the claim that there was an enforceable agreement for the purchase of his shares, Mr. Jeffrie claims relief pursuant to s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81, which provides in part:

> 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[129] This relief is usually referred to as an oppression remedy and similar provisions are found in corporate legislation throughout Canada. The leading case in this area is the Supreme Court of Canada decision in *BCE Inc. v. 1976 Debentureholders*, (2008) SCC 69. At para. 45, the Court described the general nature of the remedy as follows:

> [45] A third remedy, grounded in the common law and endorsed by the *CBCA*, is a s. 241 action for oppression. Unlike the derivative action, which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directions. This remedy is available to a wide range of stakeholders - security holders, creditors, directors and officers.

[130] The Court described a two-step approach to be taken in oppression cases. The first was to determine whether there was a breach of the “reasonable expectations” of the stakeholders and, secondly, whether the conduct amounted to

"oppression", "unfair prejudice" or "unfair disregard" to the interest of those stakeholders within the meaning of the statute (see para. 56).

[131] The process for determination of reasonable expectations is described in paras. 62 and 63 of the *BCE* decision:

> [62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> [63] Particular circumstances give rise to particular expectations. Stakeholders enter into relationships, with and within corporations, on the basis of understandings and expectations, upon which they are entitled to rely, provided they are reasonable in the context: see *820099 Ontario; Main v. Delcan Group Inc.* (1999), 47 B.L.R. (2d) 200 (Ont. S.C.J.). These expectations are what the remedy of oppression seeks to uphold.

[132] The burden is on the complainant to identify the expectations alleged to be violated and establish that these expectations were reasonably held. This will be a fact specific determination. Some of the factors which may assist the Court in this exercise are set out in para. 72 of the *BCE* decision:

> [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[133] Once the claimant establishes the existence of reasonable expectations, they must prove conduct which is oppressive. What is required at this stage of the inquiry was described by the Supreme Court as follows:

> [89] Thus far we have discussed how a claimant establishes the first element of an action for oppression - a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground

> actions for oppression. The court must be satisfied that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi.*
>
> [90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[134] In addition to the concept of oppression, the statutory remedy encompasses actions that are "unfairly prejudicial to" or "unfairly disregard" the interests of the stakeholder. The Supreme Court described the scope of these concepts as follows:

> [93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see *Koehnen*, at pp. 82-83.
>
> [94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see *Koehnen*, at pp. 83-84.

[135] One of the important limitations on the scope of an oppression remedy is the requirement for a connection to the company and its affairs. The stakeholders' interest must be as a shareholder, creditor, director or officer, and the conduct complained of must relate to the business or affairs of the company or result from the exercise of the directors' powers. It is also necessary that the alleged

misconduct result in some harm to their interest as a stakeholder. For example, in *Merks Poultry Farms Limited v. Wittenberg*, (2010) NSSC 278, Justice Warner found that some of the alleged breaches of the claimant's reasonable expectations were established, but refused to grant a remedy due to the absence of any significant harm. His rationale is set out at paras. 293 and 294 of the decision:

> [293] Of the thirteen specific claims upon which Merks base its claim of oppression, unfair prejudice or unfair disregard of its interests as a shareholder, my analysis supports a finding of breach by SAGI of only two reasonable expectations: the hiring of Gary McAleer at a salary of over $50,000.00 a year without the approval of a two-third majority of all shareholders and the failure to hold a September 2008 quarterly Directors Meeting. The breaches were neither oppressive nor unfairly prejudicial to the shareholders nor unfairly disregarded Merks' interests as shareholders. Neither breach is such that it should lead to any interim remedy.
>
> [294] Applying the *BCE* analysis, I find that 11 of the 13 claims were not breaches of reasonable expectations, and the two that were breaches were technical breaches made in the best interests of SAGI and without any oppressive or adverse consequences of substance to Merks.

[136] Personal disputes between shareholders or disagreements over management decisions and corporate policies alone are not sufficient to justify judicial interference through an oppression remedy. Similarly, a corporate deadlock between equal shareholders will not normally justify a finding of oppression and the granting of relief. The exercise of the discretion granted under s. 5 of the Third Schedule of the *Companies Act* is predicated on the finding of unfair treatment and resulting harm.

[137] Once the court makes a finding of oppressive conduct, it must still determine the appropriate remedy. In doing so, it should look for a solution that redresses the wrongful conduct, but does not unnecessarily interfere in the company's affairs. The authors of *The Oppression Remedy* (Canada Law Book; 2011) described the recommended approach at p. 6-7 as follows:

> Accordingly, in determining the remedy most suitable to the situation, the court should turn to its findings of fact regarding the reasonable expectations of the shareholders in each case. The court must, however, strike a fine balance between granting shareholders relief in accordance with their expectations and avoiding unnecessary interference in the company's affairs. This balance often

> leads the court to grant the least obtrusive form of relief, even though the oppression provisions clearly grant the court powers that are nothing less than "formidable".

[138] The authors went on to point out the important role of reasonable expectations in determining the scope of the remedy at p. 6-8.2:

> Despite the reluctance to interfere with discretionary remedies, appellate courts have been led to reverse elements of a remedy granted by the trial judge where, looking back on the findings of fact, the trial judge appears to have granted a remedy that exceeded the plaintiff's reasonable expectations. For example, an aggrieved shareholder must not benefit from an order that compensates the shareholder for a downturn in the business that is not related to the oppressive conduct of which the shareholder complains. Likewise, the court should not grant a remedy that gives a shareholder a "better deal" than if the oppression had not occurred.

[139] The restriction of the relief to correcting the oppression was recognized by this court in *Re Argo Protective Coatings Inc.*, (2006) NSSC 283, where Justice Warner noted at para. 27:

> [27] A further limitation is the timing of the application. Since a remedy is meant to rectify oppressive conduct, Gomery, J's statement in *Sparling* is relevant:
>
> > The jurisdiction of the Court is limited to the making of orders to rectify the matters complained of. The Court does not have jurisdiction to intervene in the management of a company's affairs otherwise. Presumably if it is not possible to rectify oppression and unfairness no order should be made.

(B) Jeffrie's Claims of Oppression

[140] It is with these principles in mind that I will consider Mr. Jeffrie's allegations of oppression. In his amended notice of application, he says that Mr. Hendriksen, as an officer, director and shareholder of Three Ports, engaged in the following:

1. Failed to comply with the terms of the agreement to purchase Mr. Jeffrie's shares.

2. Failed to keep Mr. Jeffrie informed of the day to day management decisions of Three Ports and obtain his approval.

3. Using the company for improper purposes for his personal financial gain to the detriment of Three Ports and Mr. Jeffrie.

4. Failed to comply with certain provisions of the shareholder's agreement.

5. Failed to follow through on the terms of the settlement agreement.

6. Prevented Mr. Jeffrie from participating in the management and profits of Three Ports.

[141] In his written post-hearing submissions, Mr. Jeffrie's allegations of oppressive conduct are described as follows:

1. Being provided with inadequate and misleading financial information.

2. A series of irregularities in the financial management of Three Ports done without his knowledge or consent, including:

    a) large and allegedly unjustified increases in payroll;

    b) unsubstantiated payments to the personal bank account of Kenny White;

    c) delivery of home heating oil to the homes of two Three Ports' employees;

    d) payment of an unloading commission to Andy Frank when he was already receiving wages for that work;

3. Incorporation of Inland Marine for the alleged purpose of diverting business from Three Ports.

[142] In accordance with the approach recommended in *BCE*, I will first consider the reasonable expectations of Mr. Jeffrie. He says that these expectations were as follows:

(a) That he would receive an equal share of the net profits of Three Ports.

(b) That he would receive accurate, detailed and up-to-date financial accounts, showing all revenues and expenses of Three Ports.

(c) That any significant business decisions pertaining to Three Ports, such as the borrowing of money and the hiring of employees, would not be made without his knowledge or consent.

(d) That in the event he wished to sell his interest in Three Ports, a “shotgun” mechanism would be triggered whereby Hendriksen would have the opportunity to purchase his shares for a given price; failing which, Jeffrie would have the opportunity to purchase Hendriksen’s shares on the same terms.

[143] Reasonable expectations can change over time, depending upon the circumstances of the company. In this case, Mr. Jeffrie was gravely ill and unable to participate in the business from early 2009 until the spring of 2010. He acknowledges that he was incapable of performing any normal role at Three Ports during that time. Despite this, he maintains that it was his expectation that no significant changes would be made to the operations without his knowledge and consent, and that he would be kept apprised of Three Ports’ financial status.

[144] The determination of reasonable expectations is an exercise intended to identify the obligations and understandings surrounding the stakeholders’ decision to participate in the company. It is driven by the specific circumstances of the parties and the business in question. In this case, three businessmen, operating in the fishing industry, came together to establish a brokerage for the buying and selling of fish products. One of the main advantages was the creation of a market for their existing fishing businesses.

[145] The initial arrangement was that Mr. Hendriksen and Mr. Simec looked after most of the operational requirements, including payment of expenses. Mr.

Jeffrie spent little time in the office and was involved in negotiating contracts for the buying and selling of product.

[146] In November, 2007, Hendriksen and Jeffrie bought out Mr. Simec and became equal partners. Mr. Hendriksen continued to be primarily responsible for the administrative aspects of Three Ports' business, although he did have some responsibility for negotiating agreements with respect to the sale of product.

[147] It is obvious from the evidence of all three of the initial shareholders that the working relationships were somewhat informal. Each had outside business interests and their involvement in Three Ports seemed to reflect their areas of interest and expertise. Mr. Hendriksen was very involved in the day-to-day management of the business and Mr. Jeffrie was not. His role was to be out of the office making deals for the buying and selling of crab and lobster.

[148] Mr. Jeffrie argues that his reasonable expectations are informed by the terms of the shareholders' agreement and, in particular, the existence of a "shotgun" mechanism to facilitate the sale of his interest in the company. I have concluded that there was no shareholders' agreement in place and I am not satisfied that the draft prepared by Mr. Rizzetto reflects any common understanding among the initial shareholders. In fact, that document does not include a shotgun clause as that term is normally used.

[149] With respect to the initial expectations of Messrs. Jeffrie, Hendriksen and Simec, it is clear that they came together as equal partners in Three Ports. Their collective goal was to operate the brokerage business which complemented their other fishing activities. The initial intent was not that Three Ports itself would generate significant profit through its operations. The partners would make their money primarily through sales which they made to the company. To the extent that Three Ports did make a profit, it would be distributed equally to the shareholders.

[150] Mr. Jeffrie says that he expected to receive accurate, detailed and up-to-date financial accounts showing all revenue and expenses of Three Ports' business. As president and a director, he would be entitled to this information. In practice, he was prepared to leave those details primarily to Mr. Hendriksen, Mr. Simec (while

he was with the company), Ms. Kendall (the office administrator) and the external accountant, Mr. Nash.

[151] The evidence of Ms. Kendall is that Mr. Jeffrie would request financial information at the end of the company's fiscal year, and that he was usually looking for the bottom line profit. She said there may have been some occasions where information was provided partway through the year. For his part, Mr. Jeffrie says that he frequently asked Ms. Kendall for financial information but rarely received it, and did not recall seeing any of the written reports which she claimed to have given him. He also said that he knew financial information was available from the accountant, Mr. Nash, but he did not go looking for it. I would note that Mr. Nash prepared the financial records for a number of Mr. Jeffrie's other businesses at the same time he was doing the work for Three Ports.

[152] Mr. Jeffrie has satisfied me that he had a reasonable expectation that he would be given access to all of the company's financial information upon request.

[153] Mr. Jeffrie claims that he had an expectation that "significant business decisions" would not be made without his knowledge or consent. As president, director and fifty percent shareholder, that is a reasonable expectation. In practice, the decisions which appeared to be of interest to him were those relating to agreements for the purchase and sale of products. Things such as day-to-day management and the hiring of part-time employees were not matters in which he was involved, nor did they concern him. He was happy to leave those to Mr. Hendriksen and others.

[154] In summary, I am satisfied that Mr. Jeffrie has demonstrated that he held reasonable expectations that he would be entitled to have access to accurate, detailed financial records showing all revenues and expenses of Three Ports, and that he would be informed of, and consulted on, any significant business decisions relating to the company. Mr. Jeffrie's illness and withdrawal from the company did not change these expectations.

[155] I will now consider the specific allegations raised by Mr. Jeffrie and determine whether these expectations were violated and, if so, whether this resulted in any harm or injury to his interest in Three Ports.

(a) Inadequate and Misleading Financial Information

[156] This allegation has two components. The first is that while he was incapacitated due to illness, Mr. Jeffrie repeatedly asked for financial information and did not receive it. The second is that reports provided to him by Ms. Kendall were confusing and inaccurate.

[157] Mr. Jeffrie maintains that during his illness he spoke to Mr. Hendriksen on a daily basis and asked about financial information concerning Three Ports. He says that he got obscure answers. During this period, he did not speak with Ms. Kendall or Mr. Nash about his financial questions. He testified that he had previously asked Ms. Kendall for financial statements as far back as 2008 and was told that the information was not yet in the computer. He knew the statements for 2008, 2009, 2010 were available to him as the president of Three Ports if he had asked Mr. Nash for them, but he did not do so. He did not obtain the detailed general ledgers for 2009 or 2010 until he requested them from Mr. Nash in 2011.

[158] Ms. Kendall's testimony was that Mr. Jeffrie was given financial information any time that he requested it. There was no evidence that she had been instructed to restrict his access to information.

[159] In my view, discussions between Mr. Hendriksen and Mr. Jeffrie, when he was incapacitated by illness, were relatively general. Mr. Jeffrie was in no condition to participate in the management of the business in any meaningful way. There were significant periods of time when he was in palliative care receiving significant pain medication. In his affidavit of October 31, 2011 (para. 32), Mr. Jeffrie states:

> ... However, because of my medical condition at the time, I was not in a position to take an active role in relation to Three Ports' finances.

[160] For his part, Mr. Hendriksen does not recall Mr. Jeffrie asking for financial details concerning Three Ports. I am not satisfied that Mr. Jeffrie made any specific requests for detailed financial information during his illness. Even when he returned to health in 2010, he did not request a copy of the general ledger, which would contain these details. He obtained this after his falling out with Mr. Hendriksen in 2011. I do not believe there was any attempt on the part of Mr.

Hendriksen or anyone else at Three Ports to withhold financial information from Mr. Jeffrie.

[161] Mr. Jeffrie's allegations concerning the adequacy of financial information provided relate to certain reports attached as exhibit "B" to the affidavit of Ms. Kendall. She describes these as examples of various summary reports that she prepared for Mr. Jeffrie when he requested information. The reports do not indicate the date on which they were prepared and Ms. Kendall was unable to explain some of the information which they contained. She said that she would prepare reports containing the most important financial details which she felt Mr. Jeffrie would be interested in and, as a result, the reports are not complete records of all income and expenses for the items shown.

[162] Mr. Jeffrie says that he never saw these documents and so it is difficult to understand how they support an allegation that he was provided with inaccurate financial information.

[163] Mr. Jeffrie's complaints concerning his access to financial information are strikingly similar to those considered by the Supreme Court of British Columbia in *Mostyn v. Schmiing*, 2011 BCSC 275. That case involved a brother and sister who were equal owners in a family company. Conflicts had arisen and they were unable to work together. Mr. Schmiing's allegations against his sister included the following:

> [4] Mr. Schmiing says he contributed physical labour to the maintenance and upgrading of the building and dealt with problem tenants. He agrees that Ms. Mostyn has been primarily responsible for the financial management of the company. In fact, he says she kept the finances under her exclusive control and he now alleges mismanagement that he says he has only recently become aware of. This mismanagement is alleged to include the use of company funds for personal expenses and extravagant spending on renovations, including renovations to a penthouse suite that Ms. Mostyn lived in rent-free from 2004 to 2008. Ms. Mostyn now lives in Victoria but says she still uses the penthouse suite as an office and stays there when she is in Vancouver.

[164] As a result of these complaints, Mr. Schmiing was pursuing an oppression remedy. The Court's response is set out in paras. 14 to 16:

> [14] The difficulty with that position is that Mr. Schmiing was, at all relevant times, an equal shareholder, director and officer of the company. As such, he not only had a right to access financial records - and to seek the assistance of the court if access was refused - but a duty to be involved in or to supervise the company's affairs. Although Mr. Schmiing alleges that he has been denied timely access to financial records, those allegations relate to the time since this dispute arose in 2008. There is no evidence of him asking for or being denied access to financial records before that time. In fact, his affidavit specifically states that the current dispute "relates to my requests since 2008 for financial transparency." [Emphasis added.]
>
> [15] This is not a case of a minority shareholder being denied information and lacking the power to intervene. If Mr. Schmiing was unaware of how Ms. Mostyn was managing the company's finances, then that appears to have been the result of his own choice not to involve himself in those matters. Indeed, his lack of involvement was a breach of his own duties to the company as an officer and director.
>
> [16] Mr. Schmiing was not only in a position in which he should have known about the things he now complains of, he appears to have in fact known about many of them. For example, he knew Ms. Mostyn had renovated and was living in the penthouse unit and, prior the dispute arising in 2008, was a frequent visitor to that apartment. There is no evidence that he ever raised any complaint about what he now says were unnecessary luxurious renovations or suggested that Ms. Mostyn should be paying rent.

[165] I would echo these comments in relation to Mr. Jeffrie's allegations concerning lack of financial disclosure. He was entitled to obtain the information that he refers to, but did not pursue any of the avenues available to him to obtain it. It appears that his first complaints concerning this issue did not arise until after Mr. Hendriksen refused to honour the agreement to purchase his shares.

[166] There was no conduct on the part of Mr. Hendriksen or Three Ports which would amount to an unfair disregard of Mr. Jeffrie's interests as it relates to his access to financial information.

(b) Financial Irregularities

(i) *Payroll*

[167] Mr. Jeffrie points out that the number of employees and overall payroll for Three Ports increased between 2008 and 2010. He also points out that the total revenue for the company did not increase proportionately.

[168] Mr. Jeffrie did not provide any information to prove that there was anything improper about the number of employees or the wages paid by the company during 2009 and 2010. He complains that he was not provided any explanation and could not think of any reason for the increase, but that ignores the fact that the evidentiary burden is on him to prove oppression and not on Mr. Hendriksen or the company to disprove it.

[169] As president of the company, Mr. Jeffrie is entitled to information concerning who was working there, what they are being paid and what they are doing. I am not aware of what, if anything, he did to obtain this information once his health improved in 2010. Mr. Jeffrie's evidence is that by June of 2010, he had decided that he did not want to work with Mr. Hendriksen any more and he withdrew from the company. It seems that he had no active involvement after that time.

[170] In cross-examining Ms. Kendall at the hearing, counsel for Mr. Jeffrie asked a number of questions concerning records of employment that she prepared. He pointed out that the total number of employees and the number of records of employment issued did not match. He also pointed out examples where spouses both worked for the company and hours of work appeared to be allocated between them. Questions were raised concerning a fisherman who received a record of employment and who Mr. Jeffrie believed was not physically able to fish in 2010.

[171] Mr. Ricky Dixon, a former employee of Three Ports, who now works for Mr. Jeffrie, testified that he saw two individuals make payments to Mr. Hendriksen and then receive records of employment. He said that he did not believe that these individuals were employees of Three Ports. Both Ms. Kendall and Mr. Hendriksen denied that one of these individuals was an employee for the relevant year and no record of employment for that time period was ever produced for him. The other individual was a fisherman and therefore entitled to a record of employment in that capacity according to Ms. Kendall.

[172] After reciting the payroll issues, including those related to the records of employment, the closing submissions of Mr. Jeffrie state that "all of the circumstances have painted a very confusing and disconcerting picture as to who was on the Three Ports' payroll and for what purpose. As an owner with a reasonable expectation that he would be consulted on hiring decisions, Jeffrie's concerns about an inflated payroll were well founded."

[173] I am not satisfied that Mr. Jeffrie had a reasonable expectation that he would be consulted on all hiring decisions, particularly during the period when he was unable to work. As president of the company, he would be entitled to review all of the employment records at the time and raise any questions or concerns that he had. There is no evidence that he did so until after this litigation commenced. He has provided no evidence that his concerns have substance or that his interests as a stakeholder in Three Ports have been harmed.

(ii) Payments to Kenny White

[174] According to Mr. Hendriksen and Ms. Kendall, Three Ports paid Mr. White a commission of five cents per pound on all crab sold to Breakwater Fisheries. Mr. Jeffrie says that Three Ports did not have any contractual dealings with Mr. White for payment of such a commission. Mr. Hendriksen says that the commission was Mr. Jeffrie's idea and he agreed to it. There was no evidence from Mr. White on this issue.

[175] The 2010 general ledger for Three Ports shows payments to Mr. White totalling $260,000.00 as of the year-end. The ledger entries were set up as receivables and corrected by a journal entry in the amount of $260,000.00 made at the end of 2010. Mr. Jeffrie argues that treating the payments as receivables is improper; however, no accounting evidence was presented on this issue. The company's accountant, Mr. Nash, ultimately reviewed the general ledger and signed off on the company's financial statements for 2010. He said if there was anything improper in the financial statements, he would not have done so. Although he was cross-examined on his affidavit, Mr. Nash was not asked any questions concerning the Kenny White transactions.

[176] Many of the cheques comprising the Kenny White payments were made out to Mr. Hendriksen. In some instances, the debit memo on the cheque referred to

"KW", and in others it was blank. Mr. Hendriksen said that he cashed the cheques and wired the money to Mr. White.

[177] Mr. Jeffrie points out that the total payments to Mr. White in 2009 and 2010 exceed the amount that should have been paid based upon the invoices for crab sold to Breakwater. Mr. Hendriksen was not asked about this discrepancy. He requested, but was not given, an opportunity to provide an explanation through rebuttal evidence at the hearing.

[178] I agree with counsel for Mr. Jeffrie that the Kenny White transactions raise some questions for which answers have not been provided. Mr. Jeffrie is suspicious that there is something untoward about these payments; however, suspicion does not amount to proof of oppression. There is no evidence that Mr. Hendriksen was receiving any benefit from these payments.

[179] Mr. Jeffrie's argument is that this transaction and the manner in which it is recorded in the general ledger is "inherently misleading" and violates his reasonable expectation to be able to track the company's finances. Without the benefit of accounting evidence, I cannot conclude that the information is improperly recorded in the general ledger. As with the other financial issues raised by Mr. Jeffrie, he was entitled to obtain information concerning this from Mr. Hendriksen, Ms. Kendall or Mr. Nash, but apparently did not do so until after the litigation.

(iii) Heating oil for Kendall and Jessome

[180] At Christmas 2008, Mr. Hendriksen arranged for a delivery of home heating oil to the residences of Ms. Kendall and Lorne Jessome, the plant manager. They all confirm that this was done as a Christmas bonus and acknowledged it to be more than the usual bonus given to other employees.

[181] Ms. Kendall says that she was contacted by Mr. Jeffrie, who demanded that she pay for the oil and said he would call the police. Because of this, she did so. Mr. Jessome also repaid Three Ports for the oil after the issue was raised by Mr. Jeffrie. Mr. Jeffrie argues that this is an example of a decision made without consulting him. This is not the type of issue that Mr. Jeffrie could reasonably

expect to be consulted on. He was not involved in most of the day-to-day administration of the company operations, nor employee hiring.

[182] In any event, there was nothing oppressive to Mr. Jeffrie's interests in these transactions. The issue was resolved to his satisfaction at the time, until resurrected as part of the allegations in this litigation two years later.

(iv) Andy Frank

[183] Mr. Frank was paid in two different capacities by Three Ports. He received wages for his work unloading lobster as an employee of the company and received commission as an independent contractor when he was unloading crab.

[184] During her cross-examination, Ms. Kendall was asked about entries in the general ledger related to Mr. Frank. According to these entries, invoices issued by Mr. Frank for crab commission appeared to have been underpaid by an amount of $840.00. There seemed to be corresponding entries made against the wages which he had previously earned as an employee unloading lobster. She was unsure why these entries were made. Counsel for Mr. Jeffrie argues that the only logical inference is that the company was clawing back wages previously paid to Mr. Frank by way of reductions to his invoices for commissions.

[185] Whether the adjustments made were the correction of a mistake (as initially noted by Ms. Kendall), the transfer of wages from lobster to crab (as argued by Mr. Jeffrie), or some other explanation that Ms. Kendall could not recall is of marginal relevance. There are thousands of entries in the general ledger and Ms. Kendall could not be expected to have, at her finger tips, the particulars of each and every one. If Mr. Jeffrie had questions concerning these transactions, he ought to have raised them with the company accountant, Mr. Nash, obtained his own accounting advice or used his authority as president of the company to review the issue with the office manager. As with the other financial concerns he raises, Mr. Jeffrie has not satisfied me that his interest has been harmed in any way by this transaction.

[186] Mr. Jeffrie also refers to the amount that Mr. Frank was paid as commission for the unloading expenses. There is no evidence before me to suggest that these

amounts were inappropriate for the work involved or did not correspond with the agreement between the company and Mr. Frank.

[187] As a final point, Mr. Jeffrie says that a portion of the money paid to Mr. Frank was disallowed by CRA as a corporate expense as a result of "insufficient" supporting documentation. There is no other evidence provided concerning the CRA criteria, and I am not prepared to conclude that the disallowance means that the expense was not proper for the company to have incurred.

(c) Inland Marine

[188] Inland Marine was incorporated in February, 2009 by Mr. Hendriksen, Perry LeBlanc and their spouses. Mr. LeBlanc subsequently had a falling out with Mr. Hendriksen and left that company.

[189] Mr. Jeffrie filed an affidavit from Mr. LeBlanc alleging that Mr. Hendriksen said to him that the purpose of creating Inland Marine was to conduct business previously done by Three Ports. Mr. Hendriksen denied this. There is no evidence that Mr. Hendriksen ever diverted business from Three Ports to Inland Marine.

[190] I fail to see any basis on which the incorporation of Inland Marine and the alleged comments by Mr. Hendriksen could possibly constitute oppression where nothing came of them. There was no harm to Three Ports or Mr. Jeffrie even if Mr. LeBlanc's version of the conversation was to be accepted.

(C) Summary re Oppression

[191] It is clear to me that this litigation was initiated by Mr. Jeffrie in order to extricate himself from his business relationship with Mr. Hendriksen in Three Ports and to receive compensation for his interest. His primary argument is that a binding agreement was reached for the purchase of his shares that Mr. Hendriksen breached. For reasons previously discussed, I have not come to that conclusion. The alternative argument of oppression was designed to reach the same objective. The relief sought in Mr. Jeffrie's closing submissions, should I find oppression, is payment of damages equivalent to the purchase price for his shares, or alternatively, liquidation of the company.

[192] The examples raised by Mr. Jeffrie in support of the alleged oppression are not matters which appear to have concerned him prior to late 2010 or early 2011. In fact, his evidence was that as of June 2010 he withdrew from any involvement in Three Ports. He did not seek financial information or answers to any questions or concerns which he had. He pursued a sale transaction with Mr. Hendriksen as his exit strategy. When that failed, he looked for any argument which might assist him in achieving his goal, and that included the allegations of oppression. For the reasons discussed above, I am not satisfied that he has met the burden of showing any conduct on the part of Mr. Hendriksen which would amount to oppression or unfair treatment of him. He has not satisfied me that he has suffered any significant harm as a result of anything done by Mr. Hendriksen as officer, director or shareholder of Three Ports.

[193] Even if I were to conclude that there had been oppression, I would not grant the remedy requested by Mr. Jeffrie. The court should only intervene to the extent needed to rectify the oppression and nothing more. Mr. Jeffrie's concerns with respect to corporate management and accounting information would not justify requiring Mr. Hendriksen to purchase his interest in the company, nor to wind it up.

CONCLUSION

[194] It is unfortunate that the parties have lost faith in each other and are unable to work together. Three Ports has obviously been a successful venture as a result of their collective contributions. As with many partnerships, the ground rules for dealing with disputes was not put in place at the beginning when everyone was on good terms. The results are apparent from the disputes which have arisen, including those addressed in this decision.

[195] Mr. Jeffrie decided that he no longer wanted to be associated with Mr. Hendriksen and he took the reasonable approach of trying to negotiate a buyout of his shares. These discussions spanned several months but never resulted in a final and binding agreement. Despite the consensus on many of the key issues, I have concluded that legal obligations were intended to be conditional on a written agreement being signed, which never occurred.

[196] Once he began to negotiate his exit from Three Ports Mr. Jeffrie stopped participating in the business in any meaningful way. He had never been very involved in the management of the company at any time. When the negotiations broke down, Mr. Jeffrie started these legal proceedings and included a claim that he was being oppressed by the conduct of Three Ports' affairs as an alternative basis on which he might get out and be paid for his investment. Unfortunately, his complaints of oppression appear to have little substance and were not matters that seemed to have concerned him much at the time they occurred. For the most part, the questions being raised by Mr. Jeffrie could be answered by obtaining information to which he was entitled as an officer, director and shareholder of the company.

[197] The end result is that I must dismiss Mr. Jeffrie's claim for relief. This means the parties will continue to be equal parties in the Three Ports business. I encourage them to cooperate as best they can in advancing their mutual interests. If that is not possible, I trust that good faith negotiations will lead to a fair agreement for one of them to depart.

[198] If the parties cannot agree on the issue of costs, I will receive written submissions from them.

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Wood, J.