SUPREME COURT OF NOVA SCOTIA
Citation: *Three Ports Fisheries Ltd. v. Jeffrie,* 2014 NSSC 228

Date: 20140619
Docket: *Halifax,* No. 354159
Registry: Halifax

Between:

Three Ports Fisheries Limited

Applicant

v.

Roderick Jeffrie and H. Hopkins Limited

Defendants

Judge:	The Honourable Justice Allan P. Boudreau
Heard:	November 13, 18, 19 and 20, 2013 in Halifax, Nova Scotia
Counsel:	Ezra B. van Gelder, for the Applicant Vincent A. Gillis, Q.C., for the Respondents

By the Court:

Introduction:

[1] The Applicant, Three Ports Fisheries Limited ("Three Ports") alleges that the Respondents, Roderick Jeffrie ("Mr. Jeffrie") and his company, H. Hopkins Limited ("Hopkins") breached their fiduciary duty to Three Ports and caused it to suffer damages. All the parties are in the business of buying and selling fish products, primarily crab and lobster. Some of them are or were fishermen as well. Mr. Jeffrie had also been a director and officer of Three Ports prior to his disagreement with Anthony Hendriksen, the other equal shareholder of Three Ports; thus the present proceedings regarding Mr. Jeffrie's and Hopkins' activities in competition with Three Ports. Three Ports claims that Mr. Jeffrie, personally and through Hopkins, breached an ongoing fiduciary duty to Three Ports.

[2] Three Ports commenced these proceedings by way of an Application in Court filed on August 18, 2011. Since then there have been two Amended Notices of Application filed, the latest being on December 27, 2013 and the latter constitutes the relevant document for this hearing. The hearing proceeded almost entirely by way of affidavits and cross-examination.

Issues:

1. Did Mr. Jeffrie owe an ongoing fiduciary duty to Three Ports after late 2010?
2. In any event, in the circumstances of this case, would Three Ports be entitled to the equitable remedy it now seeks?
3. If Mr. Jeffrie had owed a fiduciary duty to Three Ports and breached that duty, has Three Ports proven that his actions personally or through Hopkins caused any economic losses to Three Ports and has it proven the extent of those losses?
4. Has Three Ports proven that Mr. Jeffrie owes it $20,000 and $17,500 by way of unjustified and non-reimbursed advances of funds?

Background:

[3] Three Ports was incorporated in 2004, basically as a three way equal partnership between Anthony Hendriksen, ("Mr. Hendriksen"), John Simec ("Mr. Simec") and Mr. Jeffrie. The three were all crab and lobster fishermen, holding a significant number of crab licenses, quotas and lobster licenses. Three Ports was initially formed in order to provide a secure source through which all three shareholders could sell their products. The evidence is that Three Ports was viable with just the owners' business.

[4] Three Ports decided to also commence a brokerage business whereby it would purchase crab and lobster products from other fishermen and resell the product, hopefully at a markup and profit, to processors and marketers of those products. Mr. Jefffrie had considerable connections with several of the northern Cape Breton fishing groups and they decided to sell their crab and lobster products through Three Ports.

[5] Mr. Simec left Three Ports in 2007 and his shares were purchase by Mr. Hendriksen and Mr. Jeffrie, leaving the latter two as equal shareholders, directors and officers of Three Ports. This was accomplished by way of a written and executed share purchase agreement with Mr. Simec. There was no non-competition clause restricting Mr. Simec after the sale of his shares and he was at liberty to sell his product where he wished and to conduct any other business. The evidence shows that neither Mr. Hendricksen nor Mr. Jeffrie would have expected Mr. Simec to agree to a non-competition clause.

[6] It is important to note that there had never been an executed shareholder agreement between Mr. Hendriksen, Mr. Simec and Mr. Jeffrie regarding their initial ownership of Three Ports, and none was put in place after Mr. Simec's departure. Mr. Hendriksen and Mr. Jeffrie continued on, basically as equal

partners and shareholders. They were also the two remaining directors and officers of Three Ports.

[7] Three Ports had been successful in attracting a significant number of crab and lobster fishermen to sell it their catches. There were two rather significant groups, the "Down North Group" and the "New Waterford Group", which consisted of approximately 42 and 16 fishing entities respectively. They controlled a considerable amount of crab quota. Mr. Jeffrie was president of the New Waterford Group, holding 5 of the quotas or licenses in that group, and he was the "point man" for Three Ports with the Down North Group. Except for using his connections with various fishermen and fishing groups, Mr. Jeffrie was not very involved in the management of Three Ports. This was left to Mr. Hendriksen. However, Mr. Hendriksen was not entirely in favour of Mr. Jeffries arrangements with various fishermen and fishing groups. The relationship between Mr. Hendriksen and Mr. Jeffrie became "strained".

[8] In early 2009, Mr. Jeffrie became ill with cancer and he was not able to fish or be active in Three Ports. He was not able to return to Three Ports in any capacity until the late spring or early summer of 2010. The relationship between Mr. Hendricksen and Mr. Jeffrie had deteriorated by July of 2010 to the point

where Mr. Jeffrie wanted out of Three Ports. He asked Mr. Hendriksen to buy out his shares in the company.

[9] There were negotiations for Mr. Hendriksen to purchase Mr. Jeffries shares in Three Ports during July and August of 2010. It appears that the two had reached a verbal agreement by mid-September of 2010 whereby Mr. Hendriksen would purchase Mr. Jeffrie's shares. (See para. 121 of Justice Wood's decision in *Jeffrie* v. *Hendriksen*, 2013 NSSC 50). However, Mr. Hendriksen kept changing his position and a written agreement could not be finalized. (See para. 120 of *Jeffrie* v. *Hendriksen*, *supra)*. In the final analysis, Justice Wood concluded that, because the agreement for Mr. Jeffrie to sell his shares to Mr. Hendriksen had not been able to be reduced to writing, apparently because of Mr. Hendriksen's changing position, the agreement was not enforceable by Mr. Jeffrie. (See para. 127 of *Jeffrie* v. *Hendriksen*, *supra*).

[10] Mr. Jeffrie even offered to buy out Mr. Hendriksen at the same price as requested by Mr. Jeffrie; however, Mr. Hendriksen refused. He testified that he would not have sold to Mr. Jeffrie at any price. By the end of September or early October, 2010, Mr. Hendriksen would have nothing more to do with Mr. Jeffrie. The two were not speaking to each other.

[11] Justice Wood, in *Jeffrie* v. *Hendriksen*, *supra*, found that, "once Mr. Jeffrie had decided he no longer wanted to be associated with Mr. Hendriksen, he took the reasonable approach of trying to negotiate a buyout of his shares." (See para. 195). Regarding Mr. Jeffrie, Justice Wood found that, "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."

[12] In late 2010, Mr. Jeffrie made arrangements to purchase a relatively small company, Hopkins, with a view to selling his own products through that company and also to continue a crab and lobster brokerage business. Commencing with the 2011 fishing season, a significant number of crab and lobster fishermen and fishing groups which were loyal to Mr. Jeffrie decided to do business with Hopkins, most notably the Down North and New Waterford groups. It will be recalled that these groups were doing business with Three Ports primarily because of Mr. Jeffrie's influence and presence in Three Ports. The Down North group's crab catches were tendered out each year, and in 2011, Hopkins bid for and received their business.

[13] The basis for Three Ports' present claims against Mr. Jeffrie and Hopkins for breach of judiciary duty is that Mr. Jeffrie, although no longer involved in Three Ports' business, failed to resign as a director and officer of Three Ports. This did

not occur until December of 2012, after these proceedings had been commenced. Mr. Jeffrie has testified that, although he had no involvement with nor received any remuneration from Three Ports, he did not initially resign as a director and officer in order to be able to demand information form the company so as to protect his shareholdings and to see that his name was not being used to obtain credit for Three Ports. Justice Wood recognized that this could be of benefit to Mr. Jeffrie in attempting to obtain information from Three Ports. (See para 196 of *Jeffrie* v. *Hendriksen*, *supra*).

The Parties' Positions.

[14] Mr. Jeffrie has continued to operate Hopkins to this date. Three Ports claims that Mr. Jeffrie personally, and through Hopkins, had an ongoing fiduciary duty to Three Ports after late 2010 because Mr. Jeffrie remained an officer and director of Three Ports while commencing his new business through Hopkins, in competition with Three Ports.

[15] Mr. Jeffrie's position is that, after late 2010, he had no involvement with Three Ports. He alleges that he only remained as a director of Three Ports to protect his shareholding interest and to be able to request and hopefully obtain information about the company's finances. He alleges that this was made

necessary by Mr. Hendriksen not dealing with him in good faith when trying to negotiate a buyout of his shares in Three Ports during the period July to September of 2010.

[16] Mr. Jeffrie denies owing an ongoing fiduciary duty to Three Ports after October 2010 and he alleges bad faith on the part of Mr. Hendriksen, the only remaining directing mind of Three Ports. Mr. Jeffrie contends that, in the circumstances, Three Ports is not entitled to the "equitable" remedy it is now seeking because of the alleged bad faith by Mr. Hendriksen and the fact that, after July of 2010, he was effectively entirely shut out of Three Ports.

[17] Three Ports also claims that Mr. Jeffrie and /or the company he was using to sell his products to Three Ports prior to 2010 took a duplicate advance of $20,000 and a credit of $17,500, to which they were not entitled. With regard to the $20,000, this represented an advance cheque which was issued to Mr. Jeffrie and which he said had not been cashed. He requested and was issued a replacement cheque of $20,000 by Three Ports. It turned out that both cheques were in fact cashed.

[18] With regard to the $17,500 claim, this involved a company which was dealing with Three Ports and which Mr. Jeffrie claimed owed him $17,500 on a

license transaction. Mr. Jeffrie requested and received a credit from Three Ports for that amount. The company has denied owing Mr. Jeffrie $17,500 and denies having authorized a credit of that amount at its expense. This company has refused to pay its debt to Three Ports, which debt includes the credit given to Mr. Jeffrie. Three Ports therefore claims reimbursement of this amount from Mr. Jeffrie.

[19] Mr. Jeffrie says that Three Ports has not proven that it is owed the two amounts claimed.

[20] Nova Scotia, unlike many other jurisdictions, has not codified director's fiduciary duties in its *Companies Act*, RSNS 1989, c. 81. The existence and scope of the duty of a director of a Nova Scotia incorporated company depends on the interpretation of fiduciary doctrine as found in the common law. Having said that, there is an interesting provision in section 153 of the *Companies Act* which appears to give a court a wide discretion when hearing an action against a director:

> Court Discretion
>
> 153 If in any proceeding against a director, or person occupying the position of director, of a company for negligence or breach of trust it appears to the court hearing the case that the director or person is or may be liable in respect of the negligence or breach of trust, but has acted honestly and reasonably and ought fairly to be excused for the negligence or breach of trust, that court may relieve him, either wholly or partly, form his liability on such terms as the court may think proper. R.S., c. 81, s. 153.

[21] The director – corperation relationship is a well settled category to which a fiduciary duty presumptively applies. The Supreme Court of Canada distinguishes between (*per se*) fiduciary relationships and (*de facto*) fiduciary relationships. (*Per se*) fiduciary relationships refer to a set of historical categories that courts have traditionally recognized as presumptively attracting fiduciary duties. These include the director – corporation relationship. (See *Alberta* v. *Elder Advocates of Alberta Society*, [2011] S.C.J. No. 24, at para 33). Carol Hansel, in her publication – Directors and Officers in Canada: Law and Practice, Vol. 2, Carswell, at p. 95 put is more succinctly;

> "There is no need to analyze whether directors are fiduciaries of the corporation they serve. The courts have consistently characterized them as such since the 19th century."

[22] It is clear that a director owes a fiduciary duty to the corporation which he serves, and in some instances, possibly after he ceases to be a director. However, this raises the following questions; firstly, when does a director cease to be presumed a director?; and secondly, when does a director's fiduciary duty to a corporation cease?

[23] The fact that Mr. Jeffrie had not formally resigned as a director and officer of Three Ports around mid-September of 2010 and that he had continued to be shown as such on the records of the Registry of Joint Stock Companies (the

Registry) raises a rebuttable presumption that he, in effect, continued to be legally *bound* regarding directors' duties and liabilities. In *McCarthy* v. *Nova Scotia* (*Workers' Compensation Appeals Tribunal*), 2001 NSCA 79, Freeman, J.A. said the following at para 25 regarding a person being listed as a director on the Registry. He first quoted the following from the Hearing Officer's Decision at para 24:

…

> "Therefore, in accordance with Section 136 of the Act, I find the Appellant is liable as a director of the Firm. Even though the Appellant may not have played a role in the decision making process of the Firm, he was listed as a director at the time the debt was incurred by the Firm. By being on the Registry as a director of the Firm he was giving notice, to all external parties, that he was, indeed, an officer and director of the Firm."

Justice Freeman went on to say at para 25:

> 25) The Hearing Officer's Decision is clearly wrong at law. The Board does not dispute this. The only evidence that the appellant was a director of Allied Roofing at relevant times was that he was shown as such in the records of the Registrar of Joint Stock Companies. This merely creates a presumption, which the appellant rebutted by submitting uncontested documentary evidence and supporting testimony that he resigned September 1, 1995.

Although the McCarthy case was not decided on the issue of fiduciary duty, the above passage clearly stands for the proposition that a director who is shown as such on the Registry may rebut the presumption that he continues in that capacity by adducing convincing evidence to the contrary.

[24] In some circumstances, it may be appropriate to treat a director as having resigned or having been effectively removed in the absence of a formal resignation. In the case of *Bernhardt* v. *Main Outboard Centre Ltd*., (1994), 96 Man. R (2^{nd}) 194, an uncle and his nephew were directors in a business holding equal numbers of shares. When their relationship broke down, the nephew packed up his tools and left the business, telling his uncle, "You don't need me. You can get along without me." Although this case was not decided in the context of fiduciary duty, the court held that the company was entitled to treat the nephew as having resigned as director and president based on his words and actions. Importantly, the court noted that the company in this case did not observe the legal formalities due to shareholders, such as annual meetings or financial information, entirely disregarding the corporate structure. The uncle had effectively treated the company as if it was his own. Beard J. noted the following at para 7 of *Bernhardt*;

> 7 The respondent was entitled to treat the applicant's actions and words in November 1971 as a resignation from his employment and from his positions as director and president of the corporation, as it was clear that the applicant was no longer interested in working at the business or being involved in the daily management activities. The applicant did not, however, give up his rights as a shareholder.

[25] The Supreme Court of Canada, in *Lac Minerals Ltd*. v. *International Corona Resources Ltd*. [1989] S.C.J. No. 83, commented on the presumption of a

fiduciary obligation, although not necessarily in the context of a director – corporation relationship, at para 28:

> …the focus is on the identification of relationships in which, because of their inherent purpose of their presumed factual or legal incidents, the Courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can he be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty…
>
> [Emphasis added]

[26] There does not appear to be any universal or hard and fast rule to determine whether a director has breached his fiduciary duty. According to Kevin McGuinness's *Canadian Business Corporations Law*, 2nd ed. There is no single rule that courts will apply to determine whether a director has breached his fiduciary duty. In this sense, while the existence of a fiduciary duty may be presumed based on settled categories in law, finding a breach of that duty depends on the specific facts in any given case. In *Canadian Aero Service Ltd*. v. *O'Malley* (*1973*), [1974] SCR 592, Laskin J. offered a non-exhaustive list of factors to guide courts in determining whether a breach occurred. (See para 48).

> In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a

> conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.
>
> [Emphasis added]

[27] In *Veolia ES Industrial Services Inc.* v. *Brulé*, 2012 ONCA 173, a corporation sued its former president for breach of fiduciary duty when, upon leaving the company he started a new corporation and successfully bid on a public contract from the City of Ottawa, beating out Veolia. The Ontario Court of Appeal held that bidding for tenders against the former employer was not a breach of Mr. Brulé's fiduciary duty. Even though Brulé took a binder of information on the corporation's past bids when he left the company, the court found that, (i) the information in the binder was not confidential, and (ii) Brulé did not use it in preparing his own bid. The court noted that information about such public bids is inherently non-confidential and thus competing for these opportunities did not amount to unfair competition sufficient to breach Brulé's fiduciary duty. Although the *Veolia* case involved a former president of a corporation, the fiduciary principles enunciated by A. Hoy, J.A., at paras 33 and 34 are worthy of note:

> 33 Without disclosure and consent, a fiduciary cannot compete with his employer during the course of his employment. After his employment ends, the fiduciary employee generally cannot directly solicit the employer's customers for a reasonable period of time:... The parties agree that the fiduciary is free to otherwise compete once his employment ends, provided that he does not do so unfairly:...
>
> 34 In my view, Mr. Brulé did not compete unfairly with *Veolia*, and in the result did not breach his fiduciary duty, as a result of Clean Water Works submitting its bid to the City of Ottawa.
>
> [References and citations omitted]
>
> [Emphasis added]

Equitable Remedies and Clean Hands:

[28] There is no question that what Three Ports seeks in this Application in an equitable remedy. In *Lac Minerals*, (*supra*), para. 125, Sopinka J. described the remedy as follows:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary.

[29] Binnie J., in the Supreme Court of Canada decision, *Strother* v. *3464920 Canada Inc.*, 2007 S.C.J. 24, emphasized the nature of the equitable remedy in breach of fiduciary claims at para 74:

> 74 This Court has repeatedly stated that "[e] equitable remedies are always subject to the discretion of the court"...

[30] In a recent case form the Supreme Court of Nova Scotia, *Belliveau* v. *Belliveau*, Duncan J. made the following comments regarding "Remedies for Breach of Fiduciary Duty" and "Clean Hands Doctrine" at paras 75 -81 of his judgement:

> 75. I have found that both parties engaged in breaches of their fiduciary duties. In *Stother v. 3464920 Canada Inc*.. 2007 SCC 24 the following principals were set out at paragraphs 74 to 78:
>
> 1. Equitable remedies are always subject to the discretion of the court;
>
> 2. Disgorgement of profits is an equitable remedy which may be ordered either:
>
> a) for a prophylactic purpose (the objective being to preclude the fiduciary from being swayed by considerations of personal interest; to teach the fiduciary that conflicts of interest do not pay); or
>
> b) for a restitutionary purpose (to restore to the beneficiary the profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. This rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for a beneficiary) or
>
> c) both
>
> 76 In circumstances such as this, where any award would ultimately flow to the parties-the wrongdoers – neither of whom I can say is particularly aggrieved by the actions of the other, I decline to order an equitable remedy in general and disgorgement of profits in particular.
>
> 77 While I do not believe it necessary for the disposition of this case, I feel obliged to comment on another matter.
>
> 78 This case triggers a consideration of the legal maxim "he who comes to equity must come with clean hands." This means that the court may exercise its discretion not to grant an equitable remedy where the plaintiff has participated in a dishonest of fraudulent act, leading to the necessity of the remedy.
>
> 79 While a finding that the plaintiff does not come to court with clean hands carries some weight, it is not necessarily determinative of the final issue. It may be possible for a plaintiff without clean hands to yet obtain equitable relief. The clean hands doctrine serves to deny equitable relief only where the misdeeds or misconduct has "an immediate and necessary relation to the equity sued for "

> *Hongkong Bank of Canada* v. *Wheeler Holdings* Ltd. , [1993] 1 S.C.R. 167; *DeJesus* v. *Shariff* 2010 BCCA 121, at paras 84 to 86.
>
> 80 In *The Principles of Equitable Remedies*, 6th ed. (Spry, I.C.F) (UK: Sweet and Maxwell, 2001) the author wrote at pp. 169-170:
>
> > … it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behavior in question that it would be unjust to grant that particular relief.
>
> 81 I find, on the facts as set out herein, that in each party's actions there is an "immediate and necessary relation between the relief sought and the delinquent behavior," The use of the court in these circumstances is pure chicanery and not appropriate.

[31] The English Court of Appeal had an opportunity to consider a case with very similar facts to Three Ports' present claim: *In Plus Group Ltd*. & *Ors* v. *Pykes*, [2002] EWCA Civ 370. Mr. Pyke was one of two directors in a company, each also being a 50% shareholder. Pyke suffered a stroke in 1996. By January 1997, his relationship with the other director, Mr. Plank, had deteriorated. Plank tried to squeeze Pyke out of the company, which Pyke actively resisted. In June 1997, while he was still technically a director of the claimant company, Pyke set up his own company, relying on the business of one of the claimant's major clients. Pyke was not formally removed as a director of the claimant company until the following year, promoting Plant to sue Pyke for breach of fiduciary duty. After expressing serious concern over the principle in Mashonaland (i.e. that there is nothing inherently offensive to the fiduciary duty of a director who simultaneously serves two corporations in competition with one another) without

overturning it, Sedley L.J. concluded that the case could be decided on separate grounds. He found that there was no conflict in this particular case and thus no breach of Pyke's fiduciary duty because, even though Pyke remained a director in name and had poached one of the company's clients, it would have been inequitable for the court to impose a strict duty upon him as fiduciary when, as a matter of fact, he could not exercise the power of a director:

> Quite exceptionally, the defendant's duty to the claimants had been reduced to vanishing point by the acts… of his sole fellow director and fellow shareholder, Mr. Plank. Accepting as I do that the claimants' relationship with [the client] was consistent with successful poaching on Mr. Pyke's part, the critical fact is that it was done in a situation in which the dual role which is the necessary predicate of [a breach of fiduciary duty] is absent. The defendant's role as a director of the claimants was throughout the relevant period entirely nominal, not in the sense in which a non-executive director's position might (probably wrongly) be called nominal <u>but in the concrete sense that he was entirely excluded from all decision making and all participation in the claimant company's affairs. For all the influence he had, he might as well have resigned</u>.
>
> [Emphasis added]

[32] Parker L.J. echoes Sedley L.J.'s line of reasoning. "Had Mr. Pyke formally resigned as a director in late 1996 of early 1997, his resignation would have done no more than reflect what had in practice already happened." (See para 94 of *In Plus*). This case is a prime example of the court's desire to achieve a just result, notwithstanding the normally strict standards imposed by the fiduciary obligation.

It also emphasizes that the decision as to whether a fiduciary duty has been breached is highly fact-specific.

Analysis:

Issue No. 1

[33] Did Mr. Jeffrie owe an ongoing fiduciary duty to Three Ports after late 2010?

The law is clear that Mr. Jeffrie would, as a former and continuing director of Three Ports, be presumed to owe a fiduciary duty to that company. However, as the jurisprudence quoted previously indicates, that is a presumption which can be rebutted with cogent and convincing evidence to the contrary. The facts are that Mr. Jeffrie and Mr. Hendriksen had come to an impasse regarding Mr. Jeffries continued involvement in Three Ports. By mid-2010 it was clear that Mr. Jeffrie wanted out of Three Ports and that Mr. Hendrickson wanted the same thing. After mid-2010, Mr. Jeffrie had no involvement whatsoever in the operations of Three Ports. In fact, Mr. Hendrickson completely shut him out of the company's operations and management decisions. While Mr. Jeffrie did not immediately resign as an officer and director of Three Ports, he said he thought that this would provide him with a vehicle by which to obtain information about the company,

financial or otherwise. That proved to be a false assumption because even Three Ports' bank refused him financial information. There is also the added circumstance that Mr. Jeffrie was of the opinion he had reached an agreement with Mr. Hendriksen in mid-September of 2010, whereby the latter would buy the former's shares in Three Ports. This would obviously have ended Mr. Jeffrie's involvement as a shareholder, officer and director of the company. Mr. Jeffrie was so convinced of his opinion in this regard that he sued Mr. Hendriksen for breach of the alleged verbal share purchase agreement which he contended was reached in September of 2010. That matter is now before our Court of Appeal.

[34] The case at bar is very similar to the circumstances in the *Bernhart* and *In Plus Group Ltd*. cases cited previously. Although those cases were not decided strictly on the issue of fiduciary duty, they provide important guidance on when a director ceases to be presumed as such and when a director can be presumed to have resigned or been effectively removed from his position.

[35] I find that, in the case at bar, Mr. Jeffrie can be presumed to have resigned as a director and officer of Three Ports when he agreed to sell his shares to Mr. Hendriksen in mid-September, of 2010. This would have been the obvious result of the sale of his shares to Mr. Hendriksen. Moreover, Mr. Jeffrie was effectively and totally shut out of Three Ports by Mr. Hendriksen after September of 2010.

Mr. Hendriksen has testified that, after September of 2010, he would have nothing to do with Mr. Jeffrie regarding the operation and management of Three Ports. He ran the Three Ports business by himself to the exclusion of Mr. Jeffrie, yet he refused to purchase Mr. Jeffrie's shares or to sell his shares to Mr. Jeffrie, a subject on which I will have more to say later.

[36] In the circumstances, I conclude that Mr. Jeffrie must be regarded as having agreed to resign as an officer and director of Three Ports in mid-September of 2010 or, alternatively, as having been effectively removed as such by Mr. Hendriksen after that time. I therefore find that Mr. Jeffrie did not owe a fiduciary duty to Three Ports after September of 2010. In saying this, I am aware that a fiduciary duty, if any, would be owed to Three Ports and not to Mr. Hendriksen; however, in the circumstances, Mr. Hendriksen and Three Ports must be regarded as one and the same. For all intents and purposes, Mr. Hendriksen, as the sole remaining director, was Three Ports and Three Ports was Mr. Hendriksen, after September of 2010.

Issue No. 2

[37] In any event, in the circumstances of this case, would Three Ports be entitled to the equitable remedy it now seeks?

[38] The question put in another way, "would it be just or equitable to impose and ongoing fiduciary duty on Mr. Jeffrie in the circumstances?" It will be recalled that, once an impasse was arrived at, it was Mr. Jeffrie who took the reasonable steps to resolve the situation by attempting to negotiate a buy out of his shares by Mr. Hendriksen (see Justice Wood's decision cited earlier). It appears that the two shareholders had reached agreement in mid-September 2010, (see Justice Wood's decision). It was Mr. Hendriksen who kept changing his position after that, making the reduction of the agreement to writing impossible (see Justice Wood's decision). Justice Wood's findings and comments at paras. 107, 108 and 120 of his judgement are worth being quoted here:

> 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…
>
> 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.
>
> 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…

[39] Mr. Jeffrie even offered to buy out Mr. Hendriksen on the same terms that he had agreed to sell to Mr. Hendriksen. Mr. Hendriksen testified that he would not agree to sell to Mr. Jeffrie at any price. The result being that Mr. Jeffrie could, in effect, be held "hostage" indefinitely by Mr. Hendriksen. It will also be remembered that neither shareholder would have agreed to a non-competition clause as a condition of the sale of their shares, nor would they have expected such a clause from the other.

[40] It will also be remembered that Mr. Jeffrie personally, or through Hopkins, did not unfairly or unreasonably seek to attract the business of fishing groups which had previously dealt with Three Ports. The large majority of the fishermen or fishing groups which decided to do business with Hopkins did so because they had always been loyal to Mr. Jeffrie and chose to do business with him. Mr. Jeffrie did not acquire any confidential information from or through, Three Ports. The bidding process for the Down North Group's business was open and available to any broker. Moreover, Mr. Hendriksen testified that he made very little, if any, efforts personally to retain the business, apparently because he was well aware of those individuals' loyalty to Mr. Jeffrie.

[41] Considering the above, and the factors mentioned under Issue No. 1, which have "an immediate and necessary relation to the relief sought", it would be most unfair and inequitable to hold Mr. Jeffrie to an ongoing fiduciary and to accord an equitable remedy to Three Ports.

Issue No. 3

[42] If Mr. Jeffrie had owed a fiduciary duty to Three Ports and breached that duty, has Three Ports proven that his actions personally or through Hopkins caused any economic losses to Three Ports and has it proven the extent of those losses?

[43] Even if I had found in favor of Three Ports for issues No. 1 and No. 2, I would have found that Three Ports failed to prove that any breach on the part of Mr. Jeffrie or Hopkins had caused any economic losses claimed by Three Ports. The changing loyalty of fishermen *vis a vis* fish buyers and brokers is ongoing trait of the business. As Mr. Hendriksen readily admitted on cross-examination, "crab goes for three dollars a pound; whereas loyalty is worth a penny a pound."

[44] In the final analysis, Three Ports has failed to satisfy me, on a balance of probabilities" that Mr. Jeffrie or Hopkins caused it any economic losses, or the

extent of those losses. The variances in Three Ports gross business or in its bottom line is so tied to the whims and ups and down of the industry that these cannot be attributed to any particular activity on the part of Mr. Jeffrie or Hopkins.

[45] The following quotes from paragraphs 19 and 20 of the applicant's brief are telling of the purpose and intent of Three Ports and are pertinent to its claims for breach of fiduciary duty and resulting economic losses.

> 19 The parties made certain allegations in the pleadings regarding Three Ports' operation from its incorporation until 2010. Justice Wood heard evidence on these issues and held as follows:
>
> > 144 … 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.
> >
> > 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.
>
> 20 The Applicant accepts these findings.

[46] For the above reasons, I would have dismissed Three Ports claim on this issue as well.

Issue No. 4

[47] Has Three Ports proven that Mr. Jeffrie owes it $20,000 and $17,500 by way of unjustified and non-reimbursed advances of funds?

[48] The first claim is with regard to two cheques issued to Mr. Jeffrie and/or his company in the amount of $20,000 each. Mr. Jeffrie represented to Three Ports' Bookkeeper that he had not negotiated the first cheque because it had been either misplaced or lost. Sometime after that he requested and was provided a replacement cheque for the same amount of $20,000. It turns out that both cheques were cashed and copies of the cancelled cheques were placed in evidence. Only one cheque was justified. How the two cheques came to be negotiated is not clear; however, I accept the affidavit evidence in this regard, namely that only one cheque was justified.

[49] I therefore find that Mr. Jeffrie owes Three Ports $20,000 because of having received the benefit of two $20,000 advance cheques when only one was justified.

[50] With regard to the sum of $17,500 credited to Mr. Jeffrie and/or his company; this allegedly represented a sum owed by a client of Three Ports to Mr. Jeffrie for a license transaction. Mr. Jeffrie claimed that the client owed him

$17,500 and directed that he be credited that amount and that it be charged to the client's account with Three Ports. This was done, but the client has contested this credit to Mr. Jeffrie at is expense, and the client has refused to pay its debt to Three Ports. There is no evidence that Mr. Jefffrie was authorized by the client to effect the transaction in the manner which he directed it be done by Three Ports staff.

[51] I also accept Linda Kendall's affidavit evidence in this regard, as well as exhibit - 1, and find, on a balance of probabilities, that Mr. Jeffrie received the benefits of the $17,500 when it was not authorized. Mr. Jeffrie is liable to Three Ports for the sum of $17,500 which he received inappropriately and which he must re-imburse.

Conclusion:

[52] In conclusion, the claim of Three Ports alleging breach of fiduciary duty by Mr. Jeffrie personally, or through his company, Hopkins, is dismissed.

[53] Three Ports claims for re-imbursement of the sums of $20,000 and $17,500 are allowed. Three Ports shall have judgement against the defendant, Mr. Jeffrie only, in the amount of $37,500, plus prejudgement interest at the rate of 3.5% per annum from December 27, 2013 (being the date when the last Amended Notice of Application was filed) to the date of payment.

[54] In closing, I must note that the events which have unfolded will probably affect the value of both Mr. Jeffrie's and Mr. Hendriksen's shares in Three Ports. It is hoped that they can find a way to resolve the impasse and move on with their respectful businesses.

Costs:

[55] I will hear the parties on the question of costs at a mutually convenient time if they are unable to agree. The parties should consider that the success and outcome of these proceedings was divided.

Order:

[56] I will grant an order accordingly, drafted by counsel for Three Ports, and consented as to form by counsel for all the parties.

Justice Allan P. Boudreau