IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Curtis, MacKinnon, Bonin and MacKinnon v. Burke, 2003 NSSC 248

Date: 20031217
Docket: SN 195936
Registry: Sydney

Between:

Brian Curtis, Anthony MacKinnon,
Paul Bonin and W. Francis MacKinnon

Appellants

v.

Osbourne Burke

Respondent

DECISION

Judge: The Honourable Justice Gerald R.P. Moir

Heard: 9 and 10 September 2003, in Sydney

Written Decision: 17 December 2003

Counsel: A. Robert Sampson and Nicole E. LeBlanc for the Appellants
Andrew N. Montgomery and James D. Youden for the Respondent

Moir, J. :

[1] *Introduction* – Five Bay St. Lawrence fishermen made an agreement in 1997 under which they would participate in a partnership for "carrying out the catching of crab in Zone F, for which two crab permit/licenses have been issued or assigned to two of the parties". In 2002, four of the five took the position that the partnership had been dissolved or ought to be dissolved. The fifth, Mr. Osbourne Burke, had left the commercial fishery in 1999, and the others contended that this justified dissolution.

[2] The agreement called for arbitration under the *Arbitration Act*, RSNS 1989, c. 19 but the parties agreed to apply the *Commercial Arbitration Act*, SNS 1999, c. 5 and to give the arbitrator all the same powers as this Court has under the *Partnership Act*, RSNS 1989, c. 334 including judicial dissolution.

[3] Mr. Milton J. Veniot, QC was appointed sole arbitrator. He heard testimony late in 2002, received final submissions in January 2003 and delivered his award, with very extensive reasons, on 14 February 2003. He found in favour of Mr. Burke. The agreement had not terminated, it had not been dissolved according to its

terms, it could not be terminated under s. 29 of the *Partnership Act*, and judicial dissolution was refused. The unsuccessful partners appeal.

[4] I have concluded (1) there is no basis upon which Arbitrator Veniot's fact finding should be interfered with on appeal, (2) the learned arbitrator correctly interpreted the contract before him, (3) he correctly concluded that s. 29 was inapplicable, and (4) the learned arbitrator fairly and properly exercised his discretion respecting judicial dissolution, such that interference on appeal is unwarranted. Consequently, I shall dismiss the appeal with costs.

[5] *Standards of and Subjects for Review* – The standard is the same as that followed by the Court of Appeal on appeals from this Court in its trial capacity: *Commercial Arbitration Act, s. 48(2)*; article 4 of the Arbitration Agreement, and; *Hayes Forest Services Limited* v. *Pacific Forest Products Limited*, [1998] B.C.J. 2368 (SC). I must review the record and the decision to determine whether applicable laws were correctly understood and applied. Correctness is the standard for reviewing questions of law decided by Arbitrator Veniot. Secondly, I must examine the record to determine whether there was palpable and overriding error on factual determinations made by the learned arbitrator and challenged by the

appellants. Absent such error, I must defer to the superior vantage and the recognized function of the fact-finder. Finally, I must examine Arbitrator Veniot's refusal of judicial dissolution for failure amounting to error of law. I must not overtake his discretion. These three points summarize my understanding of this Court's obligations and restrictions on this review as discussed extensively in the authorities to which counsel referred: *Housen v. Nikolaisen* (2001), 211 D.L. R. (4th) 577 (SCC); *Alberta v. Nilsson*, [2003] 2 W.W.R. 215 (ACA); *Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114, and; *Barakett v. Levesque Beaubien Geoffrion Inc.*, [2001] N.S.J. 426 (CA).

[6] Counsel for the appellants begin by attacking various of the arbitrator's findings of fact, arguing that the findings were palpably erroneous and that errors were overriding in the sense that the error effected the conclusion of the issue to which the finding pertained. From there, the argument for the appellants turns to the arbitrator's interpretation of termination or dissolution provisions of the partnership agreement, then to his interpretation of s. 29(1) of the *Partnership Act*, concerning voluntary dissolution and, finally, to s. 38 of the same statute concerning judicial dissolution of partnerships. I will deal with the issues under these headings:

Findings of Fact, Termination or Dissolution Under the Agreement, Termination Under Section 29 and Judicial Dissolution.

[7] *Findings of Fact* – Arbitrator Veniot set out the background to this dispute at p. 4 to p. 18 of his decision and he provided more detailed findings referable to certain issues he was required to confront at p. 42 to p. 52 respecting a claim for rectification, p. 54 to p. 68 concerning an alternative assessment of the rectification issue, p. 78 and p. 79 concerning an argument that four partners had effectively dissolved the partnership in 1999 and p. 86 to p. 89, p. 99 to p. 104, p. 105 to p. 108 and p. 109 to p. 116 concerning various aspects of the argument for judicial dissolution. I do not propose to repeat the learned arbitrator's extensive discussion and findings. A brief statement will show the factual background sufficiently for the present review.

[8] When the agreement was made in 1996 all five partners were commercial fishermen holding fishing licenses referable to fishing zones in the Gulf of Saint Lawrence west or north of Cape Breton. Among others, they held snow crab licenses in zone 12, where a crab fishery was well established. That zone does not boarder Cape Breton. It surrounds the Magdalenes and extends westward to

northern New Brunswick. In the mid-nineties, the Minister of Fisheries and Oceans decided to tentatively open a new zone and explore the possibilities for a crab fishery there. Zone 12Exp.F is northeast of Zone 12, extending towards southwest Newfoundland. It does not boarder Cape Breton but it is more accessible from the northwest coast of Cape Breton than the crab fishery in zone 12. The Minister was prepared to offer crab permits and quota in 12F to some commercial fisherman out of the ports of Cheticamp and Bay St. Lawrence. The Department did not want to impose terms. Rather, it encouraged the eligible fisherman to negotiate among themselves and with the Department. The respondent, Mr. Burke, performed a key function for himself and the other Bay St. Lawrence fishermen. He took over negotiations on behalf of all five. The learned arbitrator found (p. 12 - 13):

> His theory was that if all five of the Bay St. Lawrence groundfish dependent fishermen approached the area 12F temporary permits matter as a group, a suitable arrangement could be made with the Cheticamp fishermen.

As to Mr. Burke's expertise, Arbitrator Veniot found (p. 12):

> Mr. Burke was a fisherman, but he had other attributes. He was generally regarded - correctly in my view - as being very knowledgeable about and adept at manoeuvring in, the fisheries bureaucracy and in the various fishermen's organizations.

Mr. Burke was able to achieve an arrangement acceptable to the present parties, the eligible Cheticamp fishermen and the Department.

[9] As everyone knows, there is a dichotomy between the weakness of commercial fishing licenses in law and the vigour of those same licenses in trade and commerce. As a matter of law, they contain no right after expiry, usually one year. The Minister may license the same territory, species and quota to someone else or to no one the next year. The Department consistently insists upon the discretion and, consequently, it usually refuses to expressly authorize the trade in fishing licenses or to officially recognize the great value in some kinds of them, lately lobster, scallop and crab. However, the trade goes on and value is established. This state of affairs exists because the Minister almost always issues similar licenses to the same person or their nominee each year. Thus, to give up (agree not to re-apply for) a Zone 12 snow crab license would be to give up a thing of tangible value. Similarly, to acquire an initial permit in 12F would be to acquire a stake in quota that would become valuable if 12F eventually moved from exploratory to established. The five Bay St. Lawrence fishermen assessed the chance of gain in 12F as well worth giving up their zone 12 licenses. This became part of the arrangements negotiated by Mr. Burke with the Cheticamp fishermen. Although

Fisheries and Oceans would not recognize the value in a partnership agreement of the kind eventually executed by the parties, officials of the Department as well as the Cheticamp fishermen accepted a scheme under which the Bay St. Lawrence fishermen would withdraw from the Zone 12 snow crab fishery and two of them would receive Zone 12Exp.F permits equally dividing a substantial quota. Among themselves, the five would share equally in any profits realized from that quota year to year. Of course, the value in this arrangement depended on the success of the 12F experiment, which was not assured, and upon the group having control of any quota through future permits and licenses, which was somewhat assured in practice but not law. Indeed, during the negotiations Mr. Burke prepared and delivered to the Department a “Proposed Fishing Plan” signed by all five parties and it contained the following under the heading “Permit Holders”: “Brian Curtis Francis MacKinnon/1997 Anthony MacKinnon Osbourne Burke/1998 Paul Bonin Osbourne Burke/1999 Anthony MacKinnon Brian Curtis/2000 Paul Bonin Francis MacKinnon/2001". All of this lead to the partnership agreement among the present parties, details of which I shall discuss in reference to other issues.

[10] In 1999, Osbourne Burke withdrew from the commercial fishery. Although it does not officially recognize the value in fishing licenses, the Department offered

substantial sums for commercial fishermen to give up (agree not to apply for) licenses. Mr. Burke accepted terms and agreed not to fish commercially.

[11] The finding firstly challenged by the appellants is characterized by their counsel as a "finding that the Respondent would be able to continue to contribute to the partnership" despite his withdrawal from commercial fishing. The passages to which counsel refers are parts of Arbitrator Veniot's reasons for refusing judicial dissolution under s. 38 of the *Partnership Act*:

> ...Put another way, the business of the partnership has nothing necessarily to do with any of the partners actually fishing the licenses. What is important is that the partnership retain two things – the ability to hold permits or licenses and the ability to fish them. Neither of these has been impaired by Mr. Burke's DFO buyout. [p. 97 - 98]
>
> The picture which emerges out of this evidence – all of which is uncontradicted and uncontroversial – is that membership in the partnership did not depend in any way on any of the partners actually fishing an annual quota allowed by the temporary permits. [p. 102]
>
> The evidence is also clear that Mr. Burke's primary role in this partnership was not as an active fisherman in any event. He did fish for one year, but the best view of the evidence is that his key contributions were both expected to and did lie elsewhere. He was the catalyst responsible for getting everyone onside – the Cheticamp groundfish dependant fisherman, his four partners and DFO – for the arrangement which got the partners out of Area 12 and in on the ground floor of what was possibly going to be a new, permanent crab fishery in Area 12F. As the fishing season came and went for this partnership, he continued with the same kind of administrative assistance – DFO filings, fisheries meetings, arrangements with

> dockside monitoring and on-board observer terms, and arrangements with the local co-op processors for payments out of the partnership account as required etc.
>
> The Claimants were at pains to point out that this was not very much work in the run of the season. I don't necessarily disagree, but make three points. One is the fact was that he did these things and no one else did, and all of the partners benefited from it. Secondly, it is also a fact that he did it without any remuneration except for recovery of his expenses. Finally, these partners settled into a routine early and all of them accepted it. [p. 102 - 103]
>
> What is acceptable for these partners, at law, was established by them acting as they did, and their division of responsibility inside the partnership easily can be inferred from their course of dealing. What occurred is that the partners have settled the distribution of their rights and duties over time as I have outlined above. The Partnership has worked, and will work, in its present configuration, and there is thus no necessity to imply a term. [p. 104]

Counsel for the appellants submits that fishing is the core business of the partnership and, thus, Arbitrator Veniot's findings are patently erroneous. The partnership agreement describes the purpose of the partnership as "carrying out the catching of crab in Zone F". However, this is contradicted by the terms of the agreement itself, which contains nothing requiring any partner to engage in fishing and expressly contemplates, in article 14(a), that the two partners initially holding the permits and doing the fishing may continue doing so for the duration of the partnership. Mr. Sampson argues that it was integral to the agreement that one had to fish. I reply that some had to fish. The integrity of the agreement did not depend on all partners fishing. That is why the agreement does not obligate partners to fish.

[12] I see no error in the findings quoted above. The core business of the partnership is to acquire control of 12F licenses. Some partners would have to hold permits (later, licenses if all went well) and those partners would have to fish under the permits (or licenses). The core business of the partnership depends upon fishing being carried out. However, profits from fishing are a separate reward enjoyed only by whichever partners actually fish the permits or licences. Valuable 12F crab licenses are the potential reward for the partnership. The core of the partnership agreement is the development of 12F crab licenses and the value in them. Arbitrator Veniot recognized there was value for the partnership in Mr. Burke's continuing efforts with the Department just as there was value in some partners fishing under the permits. He made no error that I can see.

[13] The finding the appellants contest secondly is at p. 103 of the decision and it reads:

> While it may be the case that the other partners could set a roster which required the partners some sort of reasonable and mandatory rotation to be responsible for actually landing the crab, Mr. Osborne [Burke] can do this by chartering a vessel, and the partners would have to – and I am sure would – pay him a charter fee which would cover his costs and provide a profit, as they have done with other partners in other years.

Counsel for the appellants says that the suggestion that Mr. Burke could provide a vessel that would fish under one of the permits is mistaken. The permit holder provides the vessel and every member of crew must hold a card. Mr. Burke cannot hold a card, let alone a permit.

[14] The finding secondly attacked by the appellants also came up in Arbitrator Veniot's extensive reasons for refusing judicial dissolution. The discussion begins at p. 84. At p. 90, the learned arbitrator quotes from the claimants' (now appellants) brief showing their position that Mr. Burke's withdrawal from commercial fishing was a ground for dissolution under s. 38(b), (c), (d) and (f) of the *Partnership Act*. The first three of these grounds for dissolution concern matters akin to breach of agreement: "(b) ...permanently incapable of performing his part of the partnership contract"; "(c) ...guilty of such conduct as... is calculated to prejudicially affect the carrying on of the business", and; "(d) wilfully or persistently commits a breach [etc.]". The appellants complain that Arbitrator Veniot paid insufficient attention to s. 38(f), which permits judicial dissolution where it is "just and equitable". I shall come to that. As regards the finding now in issue, it is clear from p. 90 - 91 of the decision that the appellants had argued before Arbitrator Veniot that Burke withdrawing from the fishery was a breach of obligation as envisioned by s. 38 (b),

(c) and (d). Arbitrator Veniot provided his reasons for concluding that the partnership agreement did not obligate Mr. Burke to keep himself in a position where he could be one of the ones taking up a permit and doing the actual fishing. I agree with that conclusion. Arbitrator Veniot stated his conclusion this way at p. 102: "membership in the partnership did not depend in any way on any of the partners actively fishing the annual quota allowed by the temporary permits". It was only after stating this critical conclusion that Arbitrator Veniot made the comment under attack, at p. 103 and as quoted above. Clearly, his point was that under some circumstances ("it may be") the partnership could impose a roster. It may be that the partnership could require a partner to fish under a permit if the permit was in danger of being lost for want of a fisherman. That eventuality has never arisen. Some partners have always been willing to fish and to take the profits of that endeavour. If the eventuality ever arose there are measures Mr. Burke could take to preserve a permit but his chartering a vessel to fish under a permit is not one of them. The mistake is inconsequential. There has never been a breach of any implied duty to preserve the permits and none is apprehended. While the learned arbitrator was in error on this point, the error was inconsequential rather than overriding.

[15] Thirdly, the appellants say that Arbitrator Veniot erred "by finding that the Respondent's...fishing plan needed to be filed for a five (5) year period". The claimants had argued for rectification of the partnership agreement to make it for a five year term rather than open-ended. They had presented Arbitrator Veniot with evidence of a five year plan prepared by Mr. Burke and submitted to the Department of Fisheries and Oceans on behalf of the partners. The period of the plan supported the argument that they had agreed to a five year partnership but had failed to state that term in the written agreement. The finding under attack reads as follows:

> I agree there is a document at Exhibit 1/B/2 which does refer to a five year span and gives partnership members' names for each of those five years as license holders. Mr. Burke explained this in a manner satisfactory to me. His evidence was to file with DFO in this manner so that it would show each of the partners fishing each of the licenses once. He regarded this as important for the status of the partners vis a vis DFO if and when licences were granted in Area 12F.

Mr. Sampson points out that the plan has all five partners fishing once each within three years. So the explanation adopted by the learned arbitrator is clearly erroneous.

[16] At pages 29 to 68 of the Award, the learned arbitrator set out his reasons for refusing to grant the claim for rectification. Arbitrator Veniot explained correctly

the pertinent law. He found that the evidence did not establish a prior agreement inconsistent with the written document. He said, at p. 41,

> I am not satisfied that there ever was an expressed common intention that this agreement should last five years, let alone that there existed an inconsistent prior oral agreement by all of the partners to adopt such a term as part of their agreement.

At pages 43 to 46, Arbitrator Veniot summarized the evidence given by each of the claimants on this subject and he concluded at p. 46 - 47 "This evidence, taken on its own, and even before Mr. Burke's evidence is considered, is uneven, inconsistent and unsatisfactory." I have carefully reviewed the record and I agree with that assessment. The testimony of the appellants "taken on its own, and even before Mr. Burke's evidence" fell short of the "convincing proof" required for rectification: *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Limited*, [2002] SCC 20, para. 40. Specifically, it did not establish the existence and content of a prior oral agreement (para. 37) or a mistake in writing down the agreement (para. 38) or the defendant's actual or constructive knowledge of the mistake (para. 38). The evidence of the appellants was more consistent with an expectation, rather than an agreement, that it would take five years or so for the experiment at 12F to conclude, at which time it would be practical to wind up. However, in the meantime, any designated term would be impractical (Award, p. 54). Consequently,

Arbitrator Veniot did not need to consider Mr. Burke's explanation. Even if the explanation was accepted without resolving the question of three or five years, there is no basis for interference because the primary finding of fact is solidly based upon the fact-finder's assessment of the testimony proposing a five year term.

[17] In conclusion, the significant findings of fact are solidly based upon the evidence. No error has been demonstrated to be palpable and overriding.

[18] *Termination or Dissolution Under the Agreement* - The partnership agreement contains inconsistent provisions on termination or dissolution. Article 2(a) provides that the agreement terminates when "the partnership is voluntarily dissolved by the Agreement of 4/5 of the partners" and Article 12 provides for dissolution "only if all the partners agree in writing". The learned arbitrator resolved this contradiction in favour of unanimity. The appellants submit he misinterpreted the agreement.

[19] On behalf of the appellants, Mr. Sampson makes several points. It is said that the arbitrator left no room for article 2(a) to have any operation and that the first task in dealing with apparently contradictory terms is to search for plausible meanings

that would accommodate both terms. Secondly, Mr. Sampson says the arbitrator failed to take account of important textual context provided by articles 2(b) and 2(c). Thirdly, it is argued that the arbitrator misapprehended the circumstantial context in considering that a consequence of the interpretation advanced by the appellants was that the fifth partner would be left with nothing. I will return to these arguments after reviewing Arbitrator Veniot's interpretation of articles 2(a) and 12 and after providing my comments on that subject.

[20] After describing, correctly in my opinion, fundamental principles of contractual interpretation at p. 70 to p. 71 of his Award, Arbitrator Veniot set out the conflicting provisions, articles 2 and 12 of the partnership agreement. Article 2 reads:

> Subject to the provisions contained in this Agreement, the partnership shall commence as of the 15th day of April, 1997, and shall continue for a term ending on the earlier of:
>
> a. the date on which the partnership is voluntarily dissolved by the Agreement of 4/5 of the partners to this Agreement, their executors, administrators, heirs or assigns: or
>
> b. the date on which the partnership is dissolved by the operation of law; or

> c. the Minister of Fisheries cancelling or revoking without renewal the crab permit/licenses.

Article 12 reads:

> The partnership shall be dissolved only if all of the partners agree in writing. The partners shall cause the assets of the partnership to be realized and the liabilities of the partnership to be paid. The net amount realized therefrom, after deducting all reasonable expenses incurred in disposition and realization of the assets, shall be divided among the partners in accordance with their partnership interest as such sums are received.

Arbitrator Veniot then set out the parties' written summaries of their positions on the interpretation issue. His quotation from the claimant's brief, with emphasis added by the learned arbitrator, was as follows (Award, p. 73):

> It is the position of the Claimants that *Article 2(a) was intended to and in fact does provide a mechanism with which the parties to the Partnership Agreement could determine the term of the Partnership Agreement, and the date on which that term would end, thus dissolving the Partnership.* Specifically, the mechanism which was availabe to them to determine the term of the Partnership Agreement *was through an agreement of four-fifth's (4/5's) of the partners.* Article 12, on the other hand, *was intended to address a situation in which the partners sought dissolution of the Partnership prior to the end of the term* of the Partnership Agreement as determined by the mechanism available to the partners in Article 2(2). [Emphasis Original]

And from the brief on behalf of the defendant:

The Defendant's position remains consistent and clear. Clause 2(a) is subject to the provisions of the agreement and that Clause 12 was inserted as an override to clause 2(a) in order to protect against the risk of precisely what the Claimants have sought to do in expelling the Defendant from the partnership contrary to the PA and contrary to the *Partnership Act,* and without compensation!

Arbitrator Veniot stated his primary reasons this way at p. 73 to p. 75:

In my opinion the language of this agreement favours the position taken by the Defendant. If the words of sub-clause (a) only are considered, and are measured against Article 12, the two articles cannot be reconciled. Both use the word "dissolved" and I see no basis for giving the word one meaning in Article 2(a) and another in Article 12. The word "voluntarily" used in Article 2(a) to qualify the word "dissolved" does not change my view, because the dissolution described in Article 12 occurs "only if all of the partners agree in writing", which comes to the same thing.

There are two differences between those two Articles:

first, Article 2(a) requires only the agreement of four of the five partners to dissolve the partnership, while Article 12 needs the agreement in writing of all of the parties;

secondly, Article 2 expressly is made "subject to the provisions contained in this Agreement", a qualification which does not appear in Article 12.

A provisions in a written agreement stating a matter to be such and so, but still to be subject to other provisions, is a commonplace. To me, the parties have pre-empted the operation of Article 2(a) in favour of the more stringent requirements of Article 12.

What this means is that the unqualified language of Article 12 governs the dissolution of the partnership. I do not accept the Claimants' position that there is a meaningful distinction between what is described to occur under Article 2(a) and

> under Article 12. To me, they deal with precisely the same subject matter, but Article 2(a) is expressly made subject to other provisions of the agreement. I do not believe this finding leaves much of an area of operation for Article 2(a), but that is most often both the effect and intention of a "subject to" clause.

Having said that, the learned arbitrator pointed out that it is sometimes not possible to reconcile conflicting terms and, on those occasions, a meaningless term is to be ignored. Thus, the arbitrator considered the possibility of resolving the ambiguity of these two conflicting terms by reference to extrinsic evidence. He said at p. 77, "there is nothing at all in the evidence which deals in any way with the specific topic of how many of the partners would be required to dissolve the partnership". I take this to be the primary reason for concluding that extrinsic evidence does not assist the appellants. Arbitrator Veniot then provided alternate reasons at p. 77 to p. 78.

> To the extent that the intention of the parties could be inferred from extrinsic evidence of the more general circumstances in which the agreement came to be, I do not have the slightest doubt that Article 12 reflects the true intention of the parties. It is conceivable to me that any one of these five men, in 1997, all experienced in the fishery, and well knowing the value of a foot in the door, so to speak, would ever agree on a clause which would allow the other four to dissolve the partnership and walk way with the two Area 12 permits, leaving the fifth partner with nothing. They only got these permits because they acted as a group and they gave up something tangible to DFO to do so: the right to any allocation in any future Area 12 Inshore Temporary Share. That is, even if the language of Articles 2(a) and 12 are ambiguous - a finding I do not make - I would have decided this point against the Claimants.

In this context, the arbitrator's statement that he is not making a finding of ambiguity is a reference to his having resolved the conflict in favour of the unanimity required by article 12.

[21] On behalf of the appellants, Mr. Sampson referred me to *Consolidated - Bathurst Export Ltd.* v. *Mutual Boiler and Machinery Ins. Co.; McCelland and Stewart Ltd.* v. *Mutual Life Assurance Co. (Can.),* [1982] 2 S.C.R. 6; and *Continental Insurance Company* v. *Law Society of Alberta,* [1985] 1 W.W.R 481 (ACA) at para. 19 for the principle that, if possible, an interpretation should be adopted that gives meaning to all terms of a contract and rejects none as meaningless. The submission for the appellants is that Arbitrator Veniot failed to allow any meaning for Article 2 when an interpretation would have been available under which both Article 2 and Article 12 had fields of operation. The subject is put this way in the appellant's brief:

> Article 2(a) of the Partnership Agreement between the Parties is not meaningless - it clearly conveys a meaning and one which can be applied and reconciled with the meaning of Article 12. Article 2 does not deal with dissolution *per se,* but rather acts as a mechanism by which the Partners were able to determine the term of the Partnership Agreement, and the time when the Partnership would end. The heading of the Article makes clear its intention and the intention of the Partners in including the Article in the Partnership Agreement. Article 12, on the other hand, headed "Dissolution", was intended to set out a method by which the Partners could

> dissolve the Partnership outside the provision for a term of the Partnership Agreement.

This is the same point as was made before Arbitrator Veniot in the passage from the claimants' brief from which the arbitrator quoted before setting out the reasons for his contrary view.

[22] I do not think Arbitrator Veniot missed the point. He focussed upon this point in the reasons from which I have quoted. I agree with his conclusion. Sometimes a distinction between dissolution and termination will be important. Not so in this agreement. In any event, to provide "for a term ending on...the date on which the partnership is voluntarily dissolved" equates termination and dissolution. The argument that the agreement lasts until terminated by a 4/5 dissolution and may, in the meantime, be dissolved only by all five is too fine for me to understand. Termination when "dissolved by the agreement of 4/5 of the partners" (article 2) is in contradiction of article 12 "The partnership shall be dissolved only if all partners agree in writing." There is no room for both provisions. Interpretation has to choose.

[23] Arbitrator Veniot makes the choice primarily by applying the words “Subject to the [other] provisions contained in this agreement”, which modifies or restricts the rest of article 2. The appellants criticize this approach for failing to take account of context. I see nothing in the textual or in the historical context that could assist with this problem. The contract gives its own solution by making article 2 subordinate to the others. However, an additional reason for reaching the same conclusion is the, perhaps redundant, point of 2(a) and 2(b). These want to tell us when the agreement is ended, not how the partnership is to be dissolved. These provisions want to tell us, for some reason, that dissolution is one way the agreement is ended. How dissolution is voluntarily effected is more properly a subject for the dissolution provision. Therefore, article 12 should prevail in a conflict. Perhaps that is why article 2 is expressly made subordinate.

[24] The learned arbitrator’s comment concerning the consequences of the appellant’s interpretation (“would ever agree on a clause which would allow the other four to...walk away with two Area 12 permits”) is of no consequence itself. Mr. Montgomery says that the arbitrator may well have understood that to be the appellants’ position. In any case, the arbitrator concluded that there was nothing in the parol evidence to assist with resolving the ambiguity occasioned in the

contradiction. The record supports his finding. I agree with Mr. Sampson's appraisal that the evidence shows no one expected the partnership to endure forever. However, that says nothing in favour of dissolution by four out of five because the expectation appears to have been that the partnership would last until some firm conclusion could be reached about the future of Zone 12F. In any case, that the partnership was to be temporary does not suggest that a majority could dissolve it at any time.

[25] In my assessment of his work on the subject of termination or dissolution under the partnership agreement, Arbitrator Veniot correctly ascertained the applicable legal principles and he made no error of law in applying those principles to the facts as he found them.

[26] *Termination Under Section 29* - Subsection 29(1) provides:

> Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all other partners.

The case is within this provision if the partnership agreement contains "no fixed term ... for the duration of the partnership". Arbitrator Veniot reasoned that article

12 concerning dissolution ousted s. 29. For the respondent, Mr. Montgomery submits that the learned arbitrator's reasoning is in accordance with established law starting with *Moss* v. *Elphick*, [1910] 1 K.B. 846 (CA). Our *Partnership Act* is similar to that of other provinces and they are based upon the former English statute. These have provisions like our s. 29 and s. 35. Subsection 35(1) provides "subject to any agreement between the partners, a partnership is dissolved...(c) if entered into for an undefined time, by any partner giving notice to the other...". In *Moss* v. *Elphick* it was argued that the equivalent of our s. 29(1) overroad an article in a partnership agreement providing "This agreement shall be terminated by mutual agreement only." There was no fixed term. So, the agreement did not overcome s. 29. It only overcame s. 35, which pertained to dissolution, not termination. So the argument went. Vaughn Williams, LJ said at p. 847 to p. 848:

> The arguments of the plaintiff's counsel have not convinced me that it was the intention of the Act that persons becoming partners should not be able, if they wished, to provide in the agreement of partnership that the partnership should not be at will, but should be determinable only by mutual agreement.....It was urged upon us that if we take the view that the partnership is only so determinable notwithstanding s. 26, sub s. 1, of the Partnership Act, 1890, we shall be compelled to assent to the proposition that in s. 32, the provisions of which are qualified by the words "subject to any agreement between the partners," something which has already been provided for in s. 26, sub s. 1, is again provided for in a somewhat different manner, namely, subject to a qualification not contained in s. 26, sub s. 1. Even on the assumption that this is so, I am of opinion such an overlapping of provisions in a statue, in this case it is impossible to come to the conclusion that it was intended by the Act to forbid persons entering into partnership from making such a stipulation as that contained in clause 4 of the agreement in this case.

Similar opinions were expressed by Fletcher Moulton, LJ and Farwell, LJ. Isaac, J. referred to numerous texts in support of his conclusion that *Moss* v. *Elphick* is accepted law in England and Ontario: *Partridge* v. *Seguin,* [1991] O.J. 1355 (OGD).

[27] Respectfully, I am of the opinion that the argument made on behalf of the respondents is the same as was made for the appellant in *Moss* v. *Elphick.* It is now said that the *Partnership Act* distinguishes between dissolution (s. 35) and fixed term (s. 29), the agreement provides for dissolution but it does not provide a fixed term and, therefore, it is terminable under s. 29 though not dissoluble under s. 35. The answer is as it was in *Moss* v. *Elphick.* Sections 29 and 35 overlap. Section 29 means that a partnership agreement is terminable at will only if the parties have not agreed otherwise. An agreement requiring unanimity for dissolution overrides s. 29.

[28] Mr. Sampson relies upon *Kirkham* v. *Vandegoede*, [1999] B.C.J. 1566 (S.C.). I agree with Mr. Montgomery's submission that a close reading shows that the Court held s. 35(1) (a) and (b) and s. 43 were obviously inapplicable and s. 29 and s. 35(1)(c) applied unless there was an agreement for termination or dissolution. The

submission for the appellants also relies upon *Gendron* v. *Begin*, [1996] B.C.J. 1353 (SC). In that case there was no agreement respecting dissolution.

[29] In my opinion, Arbitrator Veniot correctly concluded that s. 29 was inapplicable to the partnership agreement at hand and that the agreement would terminate upon voluntary dissolution as provided in article 12.

[30] *Judicial Dissolution* - As I said, the parties had agreed that the arbitrator could exercise the powers of this Court under s. 38 of the *Partnership Act.* Either explicitly or implicitly they agreed to abide by his determination, subject to appeal. Therefore, I approach this issue with deference to the discretion conferred upon the learned arbitrator.

[31] The case for judicial dissolution was based largely on the basis of Mr. Burke having put himself out of the commercial fishery in 1999. The submissions are referred to at p. 90 to p. 91 of the Award. This position took the arbitration into a close analysis of whether Mr. Burke was required by the partnership agreement to fish under the permits and whether the extent of his involvement in the partnership without fishing constituted a violation of Mr. Burke's agreement with Fisheries and

Oceans (p. 91 to p. 108). Mr. Sampson points out that these subjects could go to the grounds for dissolution under 38(b) ("conduct ... calculated to prejudicially affect ... the business") or s. 38(d) (breaches or other misconduct making the partnership business impracticable). Those sorts of grounds are prominent in the paragraph in which the learned arbitrator concluded his discussion:

> It is well to remind ourselves that section 38 of the *Partnership Act* permits, but does not require, the dissolution of a partnership. I see nothing in this evidence to indicate that Mr. Burke has misconducted himself in any manner which would justify dissolving this partnership, and would order no remedy under section 38.

However, Mr. Sampson points out that the broad grounds of s. 38(f) ("circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved") mandate a broader inquiry that goes beyond the allegations of misconduct. Mr. Sampson argued that the arbitrator's effort was "too narrow a review" even in respect of s. 38(c) and s. 38(d). On the contrary, it is clear that the arbitrator considered all allegations of misconduct and gave full reasons for not exercising his discretion under s. 38(c) or s. 38(d). What of the broader issue concerning "just and equitable" under s. 38(f)?

[32] At the end of his decision, the arbitrator provides his broad assessment. He does not have to say explicitly that he would regard dissolution by the Court at this

time as unjust and inequitable. That conclusion follows clearly from his reasons. Mr. Sampson expresses particular concern over one aspect of this assessment and I will return to that after setting out Arbitrator Veniot's extensive comments on the broad issue in full.

[33] The pertinent remarks begin with his reasons under an issue that had been raised for Mr. Burke. At this point the arbitrator had set out the facts going to Mr. Montgomery's argument that the claimants waived by conduct any complaints they might have had respecting Mr. Burke having left the fishery. The arbitrator provided his conclusion and then gave more general remarks at p. 110 to p. 111.

> I would not have found a waiver on these facts. However, I have come to the same functional conclusion by relying on section 22 of the *Partnership Act*: they all agreed to carry on regardless. That was the result of their 1999 meeting. They altered their mutual rights and duties by accepting Mr. Burke's situation and working with him for the further reasons. I also add here that this acquiescence distinguishes Mr. Burke's situation from the possible doomsday scenario envisioned by Mr. Sampson: one in which all five partners take DFO buyouts and no-one could fish. Why this would happen I do not know, but it is a matter that the partners would have to discuss and either accept or not. Here, they did accept Mr. Burke's situation in 1999 and cannot now resile from that position.
>
> In the result, my finding is that this partnership functioned perfectly well, with no strains or stresses until the Claimants determined in the spring of 2002 that it was either expired or dissolved or both. In my opinion, it is neither. There is no dissolution under section 29 of the *Partnership Act*. There is no basis for an ordered dissolution under section 38 of the *Partnership Act*, and no present regulatory problem with DFO occasioned by Mr. Burke's 1999 buyout. DFO knew

about the sharing of the five Area 19F temporary permits, and the 1999 buyout, but sees no breach of the buyout agreement and regards the matters between partners as not one of its concerns.

In such circumstances, no case has been established that this partnership should be dissolved, and I shall make no such order.

[34] The broad issue is dealt with extensively by Arbitrator Veniot as a conclusion to his entire reasons at p. 112 to p. 117.

I have now considered all of the issues given over to me. In my opinion, the events which began in the spring of 2002 and which led to this arbitration, in view of my findings, leaves the parties where they were on, say, April 8, 2002: getting ready for another crab fishing season in Area 12F.

The Claimants argue that the Area 12F temporary permits have no value, but I do not accept that submission at all. It is unrealistic and very unfair to Mr. Burke. I do agree that the evidence is that a temporary permit will not be transferred by DFO from one fisherman to another. I also recognize that DFO draws a distinction between its temporary licenses and its renewable licenses.

However, this argument overlooks, and the tenacity with which the Claimants fought this cause underlines, the fact that this partnership has had and still had access to real economic value. Real value in this partnership enterprise was cemented when these five fishermen, with the consent of their colleagues in Cheticamp and with the blessing of DFO, dealt themselves out of the running for a portion of the Area 12 Inshore Temporary Share, and into the two permits in the Area 12F exploratory fishery. This value has two aspects.

One is what occurs year to year as the temporary permits are issued and fished. This produces a yearly income stream and allows partners to obtain a good, year-by-year economic reward. The next season, if it is permitted by the Minister, will be the seventh under these two permits. I can see no reason to interfere with this flow of effort and income and its distribution to the five partners. It is

impossible to predict how long or if this will continue, but as long as it does, the five partners are entitled to share in it as per their partnership agreement.

The second element is the prospect that Area 12F will become the site of a permanent snow crab fishery, and that the Minister will issue at least two renewable licenses to replace the temporary permits now issued to the partnership. If this occurs, it will presumably come only after the science has established the likely existence of a business sufficient to permit a permanent, regulated, licensed and sustainable snow crab fishery in Area 12F. I recognize this as a chance, but in my opinion, the opportunity to gain this chance was one of the main considerations that drove all of the partners at the outset. That chance never looked better than it did at the start of the 2002 season. A big step along this way was taken in April 2002 when the Minister declared Area 12F to be "separate and distinct" albeit to be fished with the same licenses. Another encouraging sign is that the per permit allocation has risen from 39,600 pounds (18 MT) per permit to 50,000 pounds (22.72 MT) in 2001.

If Area 12F becomes permanent, and licences follow, it will bring to fruition the highest and best hopes of the partners. The fisherman-to-fisherman market will pay a substantial price for such licenses, and DFO will transfer the licenses to any core fisherman who agreed to buy a license from the partnership. When and if renewable, the licenses make the possibility of ensuring a continuation of the yearly income stream much firmer. There is no guarantee that this will happen, but that is the trend line and if it does the likelihood is that it will be a very significant economic event.

All five of these partners, because of their association and the Area 12F permits, have status with DFO. The fact that they are in the Area 12F fishery, and have been for years, gives this group the inside track for licenses in a permanent crab fishery for Area 12F. As is the case with the more immediate financial rewards of the temporary year to year fishery, I can see no reason or basis to interfere with the chances of the partnership to partake in such good fortune. An indefinite partnership in this fishery with these two entry permits, and any licences that were to come, was their initial bargain and I see no reason why it now should change.

This whole matter was about partners fighting about money and the chance to make money. Such disputes in partnerships - which are, after all, persons carrying on a business in common with a view of profit - are not to be considered

> as at all uncommon. This particular partnership, as I noted, adjusted internally and comfortably to what the partners most wanted to do. It worked well and was profitable for all. I saw little evidence, between these partners, of the intensely personal wrangling that can mar relationships permanently. All that has to occur for this partnership to go forward is for the partners to carry on in future as they did before the 2002 fishing season. This enterprise is of indefinite length but of considerable promise and it will not take much to get it back on track.
>
> It is always possible, of course, for the partners to come to amending arrangements among themselves on a mutually acceptable economic or other basis which will reconfigure either personnel or responsibilities or both in the partnership. There are matters of consensus, however, and are to be left to the partners themselves if they are so inclined.

[35] Mr. Sampson argues that the ultimate goal of the partnership was five licences in an established Zone 12F crab fishery. The partnership would distribute the five licences and dissolve. I have been given extensive references to the record and, on that basis, it is suggested that the learned arbitrator misapprehended essential information when he commented that value will be realized if "the Minister will issue at least two renewable licences to replace the temporary permits". I have reviewed the extensive references carefully, as Mr. Sampson requested I do. I do not think that the arbitrator misapprehended anything. It is not the number of licences that will matter. The quota attached to licences will matter much if 12F becomes established. If the opportunity is lost or if it does not come to fruition there will be nothing to divide. If the opportunity is realized the value will be divided

upon transfer of quota. I cannot see how it matters much if that is done through the transfer of two, four or five licences.

[36] Although he does not explicitly refer to s. 38(f), the remarks quoted at length above clearly dispose of the question. Having concluded that there was no misconduct on Mr. Burke's part, Arbitrator Veniot then makes it clear that dissolution at this time would unfairly collapse opportunities for which the partnership was formed and about which the partners contracted with one another.

[37] I see no basis for interfering with the learned arbitrator's exercise of his discretion in refusing judicial dissolution.

[38] Conclusion. The appeal will be dismissed. If the parties are unable to settle costs, counsel may make submissions in writing.

J.

17 December 2003

Halifax, Nova Scotia