NOVA SCOTIA COURT OF APPEAL
Citation: *Jeffrie v. Hendriksen*, 2015 NSCA 49

Date: 20150520
Docket: CA 414372
Registry: Halifax

Between:

Roderick Jeffrie

Appellant

v.

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

Respondents

Judges:	Oland, Farrar and Bryson, JJ.A.
Appeal Heard:	February 10, 2015, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Bryson, J.A.; Oland and Farrar, JJ.A. concurring
Counsel:	Roderick Jeffrie, appellant in person Ezra B. Van Gelder, for the respondents

Reasons for judgment:

[1] Roderick Jeffrie and Anthony Hendriksen are equal shareholders in Three Ports Fisheries Limited. Three Ports operates as a broker which purchased crab, lobster and other fish products and then sold these to processors. Three Ports was incorporated in 2004 and included a third shareholder who was bought out in 2007. Mr. Jeffrie and Mr. Hendriksen are the sole officers, directors and shareholders of Three Ports.

[2] Relations between the two principals deteriorated. They were unable to work together, particularly after Mr. Jeffrie suffered a serious illness which kept him away from the business for some time. In 2010 Mr. Jeffrie and Mr. Hendriksen entered into a series of negotiations, as a result of which Mr. Jeffrie agreed to sell his interest in Three Ports to Mr. Hendriksen. Mr. Hendriksen did not go through with the agreement. Mr. Jeffrie sued him, alleging breach of the agreement as well as oppressive conduct, in accordance with s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81.

[3] The application judge concluded that an agreement was reached on September 16, 2010 whereby Mr. Jeffrie would sell his shares to Mr. Hendriksen for $500,000, transfer of a crab allocation worth $100,000, and a Hummer motor vehicle valued at $25,000.

[4] Although he found that the parties had reached agreement, Justice Michael Wood dismissed Mr. Jeffrie's proceeding because the agreement was not in writing. He found that this was a requirement for the parties to be legally bound. He also dismissed Mr. Jeffrie's oppression claim, with the result that the stalemate between these equal owners of Three Ports endures (2013 NSSC 50).

[5] Mr. Jeffrie has appealed alleging three errors by the application judge:

1. He erred in finding that the agreement reached between the parties was not binding and enforceable.
2. He erred in failing to find that Mr. Hendriksen's refusal to commit the sale agreement to writing violated Mr. Jeffrie's reasonable expectations, thereby constituting oppressive conduct within the meaning of the Third Schedule of the *Companies Act*.

3. He erred in failing to grant relief for other breaches by Mr. Hendriksen of Mr. Jeffrie's reasonable expectations which warranted a remedy under the Third Schedule.

Contract Claim

Standard of Review

[6] In the recent decision of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court clarified that contractual interpretation is a question of mixed fact and law generally attracting a "palpable and overriding" error standard of review. Nevertheless, correctness continues to apply to extricable legal questions. These include the application of an incorrect principle or failure to consider a required element of a legal test or failure to consider a relevant factor, (*Sattva*, ¶ 53).

Decision Under Appeal

[7] In concluding that an agreement had been reached in this case, the judge made credibility findings in favour of Mr. Jeffrie and against Mr. Hendriksen, who always denied that any agreement had been reached on September 16. It is obvious from the record and the evidence of various witnesses, including evidence of legal counsel retained by the parties in connection with the agreement, that Justice Wood did not accept much of Mr. Hendriksen's evidence.

[8] By deciding that the parties had reached a verbal agreement on September 16, the application judge had to reject Mr. Hendriksen's evidence that discussions were conditional on him speaking with his wife and seeking financing. In doing so, the judge preferred the evidence of Mr. Jeffrie and the company's accountant, John Nash, C.A.

[9] Regarding what was discussed at a meeting on September 17 with Mr. Hendriksen's lawyer, Ralph Ripley, and Mr. Nash, the judge preferred the evidence of Messrs. Nash and Ripley to that of Mr. Hendriksen, who vehemently denied instructing Mr. Ripley to prepare a share purchase agreement.

[10] Again, the judge favoured the evidence of Mr. Nash over that of Mr. Hendriksen regarding what was said between the two at a September 23 meeting. In particular, the judge said he "did not believe" Mr. Hendriksen's evidence that he advised Mr. Nash that he would not honour the deal he had made with Mr. Jeffrie.

[11] The judge also did not accept Mr. Hendriksen's version of a telephone discussion with Mr. Nash on October 30, whereby the scheduled payments for Mr. Jeffrie's shares were extended at Mr. Hendriksen's request.

[12] Finally, the judge impliedly rejected Mr. Hendriksen's version of a new proposal submitted by him through his counsel, Mr. Ripley, in early November:

> [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.
>
> [Emphasis added]

[13] The record amply supports the judge's credibility findings. In view of his rejection of much of Mr. Hendriksen's evidence, the judge was diplomatic – even generous – when he characterised Mr. Hendriksen's conduct:

> [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.***
>
> [Emphasis added]

[14] After resolving the credibility issues, the application judge found that the parties had reached an agreement:

> [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.

[15] Notwithstanding that he was satisfied that the parties had reached agreement on September 16, 2010, the application judge went on to find that the agreement was not binding and enforceable:

> [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).
>
> […]
>
> [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.

Law

[16] The fundamental question before Justice Wood was whether the parties had entered into an enforceable agreement.

[17] It is well settled that an agreement need not be in writing to be enforceable. For the proper legal test, one need look no further than this Court's decision in *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, at ¶ 75-76:

> [75] Parties may agree that they will execute a future, more formal document. If they have agreed on all of the essential terms and it is their intention that their agreement be binding, there is an enforceable contract; it is not unenforceable simply because it calls for the execution of a further formal document. ***The question is whether the further documentation is a condition of there being a bargain, or whether it is simply an indication of the manner in which the***

contract already made will be implemented. Professor Waddams, in **The Law of Contracts**, 5th ed. (Toronto: Canada Law Book, 2005) puts the question well:

> Is execution of the formal contract a step in carrying out an already enforceable agreement, like a conveyance under an agreement to buy land, or is it a prerequisite of any enforceable agreement at all? ... [T]he test must be the reasonableness of the parties' expectations. Has the promisor committed himself to a firm agreement or does he retain an element of discretion whether or not to execute the formal agreement? In the former case there is an enforceable agreement. In the latter there is none." (section 51 page 36,)

[76] ***This is a matter of the proper construction of the agreement, viewed as a whole and in light of its origins and purposes***: *Calvan Consolidated Oil & Gas Co. Ltd. v. Manning*, [1959] S.C.R. 253 at 260-61; *Bawitko Investments Ltd. v. Kernels Popcorn Ltd*. (1991), 53 O.A.C. 314, 79 D.L.R. (4th) 97(C.A.) at 103-04; *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co., supra* at para. 67.

[Emphasis added]

Improper Application of Test

[18] Initially Justice Wood stated the legal test as if it were a discrete exercise involving an assessment of whether the parties intended to be bound by their conduct. That assessment is conducted from the perspective of a "hypothetical reasonable person":

> [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.

[19] Justice Wood then cited the 5th ed. of Fridman regarding whether "the objective reasonable bystander" would conclude that the parties had an intention to contract and the terms of that contract:

> [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. ...

He reiterated this test in ¶ 68 and 69 of his decision.

[20] Having stated the reasonable bystander test, the judge re-formulated the test into a two-part one:

> [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.
>
> [Emphasis added]

[21] Nevertheless, the judge later elaborated:

> [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.

As previously described, the judge then concluded:

> [109] In my view, a reasonable objective observer would conclude that the parties reached an agreement at the September 16, 2010 meeting…

[22] In finding that the parties reached an agreement on September 16, the application judge relied upon the following:

- Mr. Hendriksen had instructed Mr. Ripley to draft documents on the terms of the September 16 agreement, the following day (¶ 109);
- Mr. Hendriksen's need to obtain financing and the approval of his wife were not put forth as conditions to the agreement (¶ 110);
- Mr. Ripley's use of the word "reconsider" in his September 22 letter indicated that Mr. Hendriksen had "intended to reach an agreement with Mr. Jeffrie" because it "suggests a review of a decision which had *already been made*" (¶ 112);

- The first "clear indication" that Mr. Hendriksen might not be proceeding with the deal was the letter from Mr. Ripley to Mr. Rudderham on October 26 (¶ 116);
- Apart from the payment schedule, the terms remain unchanged until circulation of the draft agreement from Mr. Ripley on November 3 (¶ 118);
- As a result Mr. Hendriksen led people to believe he was proceeding toward a deal for six weeks (¶ 120).

[23] The application judge characterized the September 16 meeting as having committed Mr. Hendriksen to the deal:

> [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.
>
> [Emphasis added]

With respect, that finding of a commitment was all that was required. If a written agreement were necessary, there could be no commitment. It is inconsistent to find that a commitment had been made and then undo it because it was not in writing.

[24] In concluding that the oral agreement was not enforceable, the application judge commented:

> [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.
>
> […]
>
> [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.

[25] The application judge erred by asking the same question, and getting two different and inconsistent answers. Inconsistent findings on a central issue where, as here, the same legal test is being applied, is an error of law. In *Trajkovich v. Ontario (Minister of Natural Resources)*, 2009 ONCA 898, Justice Goudge observed:

> [18] To summarize, I conclude that the trial judge, in finding the appellant negligent, must have implicitly concluded that the appellant struck his head on a sandbar. However, in dismissing the action, the trial judge also found that he could not decide whether the appellant hit his head on a sandbar rather than the bottom of the lake. It was not open to the trial judge to make both findings. To make such inconsistent findings on the central issue of factual causation is an error of law requiring appellate intervention: see *R. v. D.R.*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291 at para. 50.

[26] The application judge erred in law by bi-furcating the "reasonable bystander" test to the facts before him. The fundamental task he was faced with was determining whether or not an agreement had been reached. Having found that such an agreement had been reached on September 16, it was an error to then super-add the requirement of writing to the question of whether a binding agreement had been reached. That exercise should have been implied in his original finding.

[27] One can only conclude the application judge found that an agreement had been reached on September 16 based on the conduct of the parties, objectively viewed, and then – using the same test – found that there was not really any binding agreement because it was supposed to be in writing.

Legal Error/Palpable and Overriding Error

[28] Alternately, based on the facts found by the application judge, a written agreement was not essential to the formation of a binding agreement between the parties. This can be characterized either as an error of law, because relevant factors were ignored (*Sattva*, ¶ 53), or more conventionally, as a clear and material error by failing to consider all the evidence relevant to the existence of a binding agreement.

[29] With respect, the application judge allowed the absence of a legally drafted contract to overwhelm his analysis of whether the parties had committed themselves. He did not consider all the contextual factors relevant to the question of whether a contract had been concluded.

[30] In *Mountain v. Mountain Estate*, 2012 ONCA 806, Chief Justice Winkler commented on the standard of review where an oral contract was in issue:

> [64] I would set aside the trial judge's determination that there was no oral agreement between Gary and his parents that he would get the farm property and assets after they were done with them. The trial judge's analysis of this issue reflects legal error. Furthermore, his reasons reveal various errors in the fact-finding process that produced unreasonable findings of fact amounting to palpable and overriding error. These errors include a failure to consider relevant evidence, a misapprehension of relevant evidence and findings without basis in the evidence: see *Peart v. Peel Regional Police Services Board*, 2006 CanLII 37566 (ON CA), [2006] O.J. No. 4457, 217 O.A.C. 269 (C.A.), at para. 159, leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 10.

[31] The application judge was clearly influenced by a letter from litigation counsel retained shortly after Mr. Hendriksen's proposed new deal in early November 2010. The judge quotes from that letter as follows:

> [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.

But it is telling that the price proposed by counsel later in this letter (other than the Hummer already in Mr. Jeffrie's possession), is what was already agreed between the parties on September 16.

[32] Counsel's letter may have been some evidence for concluding that the parties had not reached an agreement on September 16 – but the judge had already found otherwise. So he obviously rejected that interpretation of the letter. Yet the

letter reappears to undo the September 16 agreement because it was not in writing. As the judge himself acknowledges, that conclusion is at odds with everything that had happened between the parties up until Mr. Ripley's November 3 letter proposing a new deal which prompted the retention of Mr. Ryan.

[33] Earlier, the judge remarked that it was "not surprising" that Mr. Jeffrie retained litigation counsel after Mr. Ripley's November 3 letter. It was unsurprising because there was now something to litigate – Mr. Hendriksen's breach of the September 16 agreement.

[34] The application judge is quite correct that counsel's letter of November 9 did not insist on closing an existing deal, but not much reliance can be placed on this letter for a number of reasons. First and most importantly, a reading of the letter that would suggest that no agreement had been reached between the parties contradicts the judge's earlier finding that an agreement had been reached on September 16. Second, it is clear that counsel's letter is inconsistent with his client's direct evidence that an agreement had been reached. Third, the letter is premised on the mistaken assumption that there was an existing Shareholder's Agreement between the parties. Fourth, it is obvious that the retention of litigation counsel itself implies that there was something to be litigated. Mr. Jeffrie was of the view that Mr. Hendriksen had breached the September 16 agreement. Mr. Hendriksen himself conceded in cross examination that counsel's letter of November 9 first alerted him to the fact that there was a legal dispute concerning the sale of the business.

[35] It is unremarkable that parties in a business relationship would want to have a legally prepared document to evidence that relationship. There would be corporate and tax reasons for doing so, unrelated to the parties' intentions to contract. A binding agreement does not become enforceable simply because lawyers are asked to "paper" it. The application judge does not indicate what the lawyers were to do other than to type up the agreement that had already been reached between the parties. Indeed that was the task that he found had been given to solicitor Ripley, (**Decision** ¶ 109, quoted in ¶ 14 above.)

[36] As Justice Cromwell counsels in *Iskandar*, any "conditionality" of an agreement looks not only to the terms of the agreement, but also "all the material facts" and the "genesis and aims of the transaction":

> [82] The judge sought, as he should, to determine from the perspective of an objective, reasonable bystander, ***in light of all the material facts***, whether the

> parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty: see G.H.L. Fridman, **The Law of Contract in Canada**, 5th ed. (Toronto: Thomson Carswell, 2006) at p. 15. While evidence of one party's subjective intent has no independent place in this interpretative exercise, ***it has long been settled that whether the legal effect of a document is conditional on future agreements must be decided having regard, not only to the terms of the document, but to the "genesis and aims of the transaction***.": **Hillas & Co., Ltd. v. Arcos, Ltd.**, [1932] All E.R. Rep. 494 (H.L.) *per* Lord Wright at 502; **Canada Square Corp. v. Services Ltd.** (1982), 34 O.R. (2d) 250 at 258.
>
> [Emphasis added]

[37] In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, [1991] O.J. No. 495, the Ontario Court of Appeal commented on the principles where informal discussions may lead to a contract:

> As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may "contract to make a contract", that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

[38] The judge's conclusion that the parties required a written document did not answer the question of whether a written document was a *precondition* to the existence of an enforceable contract within the meaning of the test in *Iskandar*. When the application judge commented:

> [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.

he cites no direct evidence in support of that conclusion. There is no correspondence, affidavit evidence, or cross examination evidence that directly supports this outcome. Neither Mr. Jeffrie nor Mr. Hendriksen gave evidence that the agreement between them had to be in writing to be binding, perhaps because that was never a key issue.

[39] More importantly, the judge did not undertake the contextual analysis required to conclude as he did that the agreement had to be in writing to bind the parties. In doing so, he ignored important factors that contradicted his conclusion.

[40] In this case, the purpose of the discussions was to buy Mr. Jeffrie out; Mr. Jeffrie says because he did not trust Mr. Hendriksen. Mr. Hendriksen claims Mr. Jeffrie's ongoing illness was the reason. Either way, the goal was the same. That goal was the genesis of discussions between the two men and is therefore relevant to objectively assessing their intentions respecting the September 16 agreement, (*Iskandar*, ¶ 82 and ¶ 76 citing *Calvan*, *Bawitko* and *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 95, ¶ 67, leave to appeal ref'd, [2000] S.C.C.A. No. 526).

[41] Put otherwise, the negotiations were not casual or simply a "testing of the waters" for terms. The purpose of the discussions was to terminate the "partnership".

[42] Unlike *Iskandar*, the discussions between the parties after September 16 did not involve negotiating "outstanding issues", but rather implementing the deal already reached – until Mr. Hendriksen proposed a completely different deal on November 3.

[43] The deal was a straightforward purchase and sale of shares. No ongoing complex business relationship was involved, as in *Bawitko* (a franchise agreement). A sale of shares can be binding without a written agreement, even where one is contemplated: *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328.

[44] Moreover, these were not unsophisticated parties who had never bought or sold shares before, nor operated in the fish brokerage business. Both men were knowledgeable businessmen with prior experience in the business. Mr. Hendriksen had made business deals on a handshake in the past.

[45] Mr. Jeffrie's evidence was that he had done so again with a handshake on September 16. Mr. Hendriksen denied shaking hands with Mr. Jeffrie on September 16 because he acknowledged that would mean they "had a deal". For such men, in such circumstances, a written agreement would be superfluous.

[46] The necessity of lawyers to craft a contract is not apparent here. No terms suggested by lawyers are identified. Neither the purposes of negotiations nor the experience of the parties compelled the use of counsel to create a deal.

[47] It is important to emphasize that Mr. Hendriksen's fundamental position was that no agreement was reached on September 16 or thereafter. The application judge clearly did not agree. Mr. Hendriksen's principal alternative position was that his lawyer's conduct in submitting a completely different proposal in early November 2010 could be construed as a repudiation which was accepted by Mr. Jeffrie. The application judge did not accept that argument either.

[48] The application judge recognized that Mr. Hendriksen's conduct after the September 16 agreement was consistent with an agreement having been reached. To reiterate:

> [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…
>
> [Emphasis added]

This accords with the evidence accepted by the application judge.

[49] Particularly telling is the evidence of the company's accountant, John Nash. His evidence was alluded to earlier. It now merits elaboration. Mr. Nash's firm prepared the financial statements and tax returns for Three Ports for the years 2008, 2009, and 2010. His evidence of the agreement between Mr. Jeffrie and Mr. Hendriksen supports the trial judge's findings and presumably was accepted by the judge, particularly in his favouring the evidence of Mr. Jeffrie over Mr. Hendriksen regarding whether or not a deal had been reached. In his affidavit sworn October 20, 2011 Mr. Nash deposed, amongst other things:

> [23] …I informed him [Mr. Hendriksen] that based just upon the financial statement numbers, the company did not show as worth $1.25 million dollars.

> Hendriksen told me then that he was still going through with the deal he and Jeffrie ***had made***.
>
> [Emphasis added]

[50] In a supplemental affidavit sworn on December 16, 2011 Mr. Nash deposed:

> [9] ***At that meeting [September 16], Jeffrie and Hendriksen discussed which lawyer they should use to put their agreement into writing…Hendriksen suggested that Ralph Ripley draft the agreement instead. At no time during this meeting did Hendriksen mention having had previous discussions with Ripley about the transaction, nor did he say that he wished to obtain legal advice from Ripley in relation to the transaction.***
>
> [10] With respect to paragraph 70 of Hendriksen's affidavit, I deny that Hendriksen said anything in my presence about looking into financing, speaking to his wife, or obtaining Ripley's advice. To my knowledge, Hendriksen did not place any qualifications on the agreement during the course of our September 16, 2010 meeting.
>
> […]
>
> [16] With respect to paragraph 8 of the Ripley affidavit I do not recall being told by Ripley that he was advising Hendriksen for the purposes of the transaction. It was my understanding, based on my meeting with Hendriksen and Jeffrie on September 16, 2010 and my meeting with Ripley and Hendriksen on September 17, 2010 that Ripley was being retained by Hendriksen and Jeffrie to draft ***the agreement they had reached***.
>
> [18] At no time during my meeting with Ripley and Hendriksen on September 16, 2010 did anyone suggest that the agreement was conditional on due diligence or the receipt of independent legal advice.
>
> [Emphasis added]

[51] An affidavit filed on behalf of Mr. Hendriksen from TD Bank also suggests that Mr. Hendriksen had committed to buy out Mr. Jeffrie, even though a written agreement was not in place. Mr. Doug Arsenault, small business advisor with TD Canada Trust, deposed:

> [4] In or about July 2010 Anthony Hendriksen made an application on behalf of Three Ports to release a personal guarantee given by Roderick Jeffrie on Three Ports corporate debts and to restructure these debts. A copy of the application is attached as Exhibit A.
>
> […]
>
> [7] I discussed this approval with Hendriksen. On September 24, 2010 I resubmitted the application to the TD Credit Centre and provided the following

> comments with the application which I do verily believe accurately set out the content of my discussion with Hendriksen:
>
> > Discussed approval with the client and after he talked to his accountant he would prefer to keep the loan and line of credit as is. ***Just looking for approval to remove Roddy as guarantor.***
>
> [8] On September 27, 2010 TD approved the application to maintain the line of credit at $100,000 and the business mortgage at its existing balance with the collateral charge as security, ***and to release Roderick Jeffrie's personal guarantee***, subject to confirmation that Three Ports share registry had been updated to show Anthony Hendriksen as the 100 percent shareholder of Three Ports from the existing registry which showed Roderick Jeffrie as a 50 percent shareholder and Anthony Hendriksen as a 50 percent shareholder.
>
> [Emphasis added]

[52] While not conclusive, this shows that Mr. Hendriksen was taking steps to remove Mr. Jeffrie as a guarantor of Three Ports' loans with TD Bank *after* September 16, 2010 and absent any written agreement.

[53] Following the September 16 agreement, Mr. Hendriksen asked for an adjustment to the schedule of payments for Mr. Jeffrie's shares in Three Ports. Mr. Nash deposed:

> [30] Jeffrie and Hendriksen eventually agreed in separate phone conversations with me, to amend their agreement so that Hendriksen would still pay the same total amount, but with a different payment structure. There was to be $300,000 on closing and two payments for $100,000 each on July 15, 2011 and July 15, 2012. Given the terms were not changing and only the payment structure was changed Jeffrie agreed to Hendriksen's proposal to amend their agreement.
>
> […]
>
> [32] Hendriksen agreed to put $50,000 on deposit with Rudderham (who would be representing Jeffrie on the closing) to facilitate closing of the deal. Hendriksen, Jeffrie and I all agreed that this deposit would be non-refundable.

[54] In fact, what Mr. Rudderham received from Mr. Hendriksen was a $50,000 refundable deposit. We now know that Mr. Hendriksen was planning to submit a completely different deal to Mr. Jeffrie through legal counsel and did so on November 3. But what the foregoing shows is that Mr. Hendriksen negotiated an amendment to the September 16 agreement on the promise of an unconditional good faith deposit of $50,000. That is consistent with an existing binding agreement, not an agreement that is conditional upon anything in writing. The

conditionality of the deposit only appears when Mr. Hendriksen proposes a different deal.

[55] In any case, Mr. Jeffrie's evidence is consistent throughout – both before and after counsel's letter – that a binding agreement had been reached on September 16. Nothing in his evidence suggests that the agreement had to be in writing to bind the parties. Nor was that the evidence of Mr. Nash or Mr. Hendriksen himself. Justice Wood did not reject Mr. Jeffrie's evidence or decide any crucial point of evidence against him.

[56] As earlier stressed, Mr. Hendriksen always denied that there was any September 16 agreement. The judge did not agree:

> [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.***
>
> [Emphasis added]

[57] The judge was satisfied that Mr. Hendriksen committed himself on September 16 (¶ 23 above).

[58] Nothing in the evidence or the application judge's observations suggest that the binding quality of the agreement was *conditional* on the signing of the agreements which Mr. Ripley had been told to draft. No additional terms were suggested by Mr. Hendriksen. No conditions were conveyed to Mr. Ripley. There was no indication that a binding agreement had not already been reached. It is clear that the parties wanted a legally prepared record of the agreement. That desire does not transform an agreement into a preliminary negotiation.

[59] Mr. Hendriksen breached his agreement to buy Mr. Jeffrie's shares in Three Ports. Mr. Jeffrie seeks specific performance or damages in the amount of the lost purchase price of his shares. He should have relief for breach of the September 16 agreement. That relief is addressed further in the conclusion.

Oppression

[60] In dismissing Mr. Jeffrie's claim for oppression Justice Wood concluded:

> [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.

[61] There were problems with the record keeping at Three Ports. The explanations given for these problems were not altogether adequate. Nevertheless, I agree with the application judge that the court should afford no remedy because Mr. Jeffrie did not exhaust his corporate opportunities to resolve these record keeping discrepancies. Crucially, Mr. Jeffrie led no expert evidence to question the integrity of the financial records.

[62] The most troubling evidence for the application judge involved commission payments to Kenny White for certain crab sales by Three Ports. Kenny White was to have a commission of five cents per pound for sales to a particular customer.

Three Ports' records show that crab sales were only $1.5 million dollars to that customer, which should have netted Mr. White about $78,000 in commissions. That figure appears in the general ledger. But in fact, Mr. White received $260,000 ($206,000 for 2010 alone). That was several times more than he should have received if indeed he was being paid five cents per pound. The $260,000 is consistent with invoices from Kenny White.

[63] An additional matter for concern was that many of the payments to Mr. White were actually paid directly to Mr. Hendriksen who said that he later paid Mr. White in cash. He testified that payments were made directly to him presumably because Mr. White was in a hurry to receive funds. Clearly these transactions are unusual and call for explanation – but Mr. Jeffrie only pursued them as examples of poor record keeping. He did not allege that either Mr. Hendriksen or Mr. White had been improperly paid. As an allegation of poor accounting, this was something that Mr. Jeffrie, as a 50% shareholder, director and president, had the ability to investigate.

[64] While Mr. Jeffrie emphasises the "tremendous latitude" in making oppression orders, that must be preceded by a finding of oppressive or like conduct. Breach of reasonable expectation – necessary to a finding of oppression – does not arise where other steps were available to the plaintiff. In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, Chief Justice McLachlin put it this way:

> [78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. Thus it may be relevant to inquire whether a secured creditor claiming oppressive conduct could have negotiated protections against the prejudice suffered: *First Edmonton Place*; *SCI Systems*.

[65] The application judge was right to decline oppression relief to Mr. Jeffrie. As a general principle, the court will not give a litigant relief under the *Companies Act*, Third Schedule which the litigant had the means of pursuing corporately himself.

Conclusion

[66] The appeal should be allowed. I would remit this matter to the application judge to determine whether specific performance or an assessment of damages would be the appropriate remedy. Both were requested before the judge originally.

[67] The cost award of the application judge is set aside. I would leave the assessment of costs of the original application and the costs of the assessment of remedy to the application judge.

[68] The original application costs were approximately $70,000.00. Obviously forty percent of that on appeal would be excessive. Although he was self-represented on this appeal, Mr. Jeffrie did have counsel prior to the hearing of the appeal. I would award Mr. Jeffrie costs on the appeal of $10,000.00 inclusive of disbursements.

Bryson, J.A.

Concurred in:

Oland, J.A.

Farrar, J.A.