

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Stewart v. Stewart Estate,
2005 NSSC 355

Date: 20051229

Docket: S. BW. No. 222089

Registry: Bridgewater

Between:

Ronald Ross Stewart

Plaintiff/Defendant By Counterclaim

v.

Ruth Augusta Stewart, Administrator of the Estate of
Noble Harry Stewart, Deceased

Defendant/Plaintiff by Counterclaim

Judge: The Honourable Justice Allan P. Boudreau

Heard: at Shelburne and Barrington, Nova Scotia on
March 29, 30, 31, June 2 and 20, 2005

Written Decision: December 29, 2005

Counsel: Rubin Dexter, for the Plaintiff
(Defendant by Counterclaim)
S. Clifford Hood, Q. C., for the Defendant
(Plaintiff by Counterclaim)

By the Court:

INTRODUCTION:

[1] This is another case involving a dispute over the rights to fish a lobster licence between family members of a deceased lobster fisherman. The Plaintiff, Ronald Ross Stewart (“Ronald”) is the son of the deceased lobster fisherman, Noble Harry Stewart (“Noble Harry”), and the defendant, Ruth Augusta Stewart (“Ruth”) is the widow of the late Noble Harry. Noble Harry died intestate and his lobster licence (“the Licence”) and his fishing gear were the object of an agreement for their use entered into between Ronald and Ruth. The main question to be determined is under what circumstances or terms were the Licences and fishing gear of the late Noble Harry permitted to be used by Ronald. Ronald has claimed it was for an indefinite term whereas Ruth argues it was a permission resulting from an unenforceable agreement primarily reached under duress and without consideration, or alternatively that it was at most understood to be an agreement for a fixed term of five years.

[2] There are also concurrent proceedings before the Court of Probate for Nova Scotia dealing with objections to Releases to any claim in the Estate of the late Noble Harry (“the Estate”) signed by all the siblings of Noble Harry. I

shall deal with those objections more fully in a separate decision; however, I can state here that the result of those proceedings in the Court of Probate is that all the Releases have been rejected and declared null or void and of no force and effect.

PROCEDURAL BACKGROUND:

[3] **1. Supreme Court Action - S. BW. No. 222089**

Ronald has sued the Estate of Noble Harry for alleged breach of a written agreement dated October 10, 2001 (“the Agreement”) entered into by Ruth on behalf of the Estate. He seeks damages for breach of that agreement.

Ruth has denied the validity of the Agreement and she has also counterclaimed requesting an accounting regarding fishing proceeds under the agreement of October 10, 2001 and she has alleged that she did not receive all the share of the proceeds to which she was entitled under that agreement.

[4] **2. Probate Court Applications - No. 1810**

Ronald has also filed an application in the Court of Probate for Nova Scotia claiming that a Release to any claim against the Estate which he purportedly signed is a forgery and of no force and effect. The other seven children of Noble Harry, who also signed identical releases, had initially applied for

Intervener Status in the Supreme Court action; however this was denied.

These other seven children were granted the opportunity to file a Notice of Objection in the Probate Court application initiated by Ronald and also to claim that the Releases signed by them were also of no legal force or effect in the circumstances. They did so and therefore became parties in the Probate Court action.

[5] 3. It was ruled that all the above proceedings should be tried concurrently and a consent order was taken out to that effect.

[6] I believe that I indicated orally at the end of the trial summations that the Release purportedly signed by Ronald was not in fact his signature and that he had not otherwise authorized its execution. I indicated that I was also convinced that the Releases signed by the seven other children of Noble Harry should be declared void and of no legal force and effect. A separate written decision to that effect is being prepared.

FACTUAL BACKGROUND:

[7] Ronald has been a fisherman basically all his working life. He started fishing with his father in the summers when he went to school and then full time after he completed grade eight at the age of 16. Ronald sought other fishing work after a number of years fishing with his father because he found

it difficult to make money during the summer months. Harry Noble was primarily a lobster fisherman and the summer ground fish activity produced only a very modest revenue. Ronald pursued navigational courses and he has what was referred to as a first class ticket permitting him to captain certain vessels any where in the world except the Great Lakes.

- [8] Ronald captained his own vessel for a year or two. He only had a longlining licence with his vessel and it burned during the second year of operation. During this time Noble Harry continued his primary lobster fishing activity with a modest summer longlining activity. Noble Harry had had the M. V. "Lois & Carey" built in 1975 or 1976. It appears that Noble Harry had had some heart problems prior to 1991 when he and Ruth approached Ronald to go lobster fishing aboard the "Lois & Carey". Ronald testified they told him they needed someone reliable to go fishing with Noble Harry. Ronald agreed. Ronald also says he was told he would have the fishing operation when his father retired, however that is not part of his present claim. Ronald fished with his father until 2001. During the lobster season Ronald received one third of the proceeds from the catch, after expenses. Ronald took the "Lois & Carey" longlining during the summer, usually with his brother,

Calvin Gary, and paid his father 20% of the ground fish proceeds, in cash.

This arrangement continued until Noble Harry died.

- [9] Noble Harry died suddenly on July 8, 2001. He died intestate, that is, without a will. At the time of his death, Noble Harry was the owner of the M. V. "Lois & Carey", a lobster fishing licence, a ground fish longlining licence and fishing equipment for those operations. Needless to say, the Estate had to be probated in order to deal with Noble Harry's fishing assets.
- [10] Ruth sought legal advice and she retained the services of James Dipersio in the summer of 2001, shortly after her husband's death. Ruth, through Mr. Dipersio, had prepared and requested all the children to sign renunciations to administration of Noble Harry's Estate in order to permit her to be appointed the Administrator. Even though the total value of the estate was shown as only \$138,000.00, significantly below its actual market value, it was becoming apparent that Ruth would have difficulty obtaining the required bond to secure her administration. In order to avoid the necessity of a bond, it was decided to have all the children execute releases to any interest they may have in Noble Harry's Estate. It appears that all the children except Ronald executed the releases, although Augusta O'Sullivan's release was apparently signed by Ruth with Augusta's

telephone approval. No one knows who signed Ronald's release and it was not signed in the presence of the witness. It is clear that all the children who signed or authorized releases did so on the condition that all other siblings executed releases. It is also clear they were doing so in order for Ruth to be appointed the Administrator and to be able to deal with the assets of the Estate. It turned out that the renunciations initially signed by the children and filed in December of 2001 were not in a form acceptable to the Registrar of Probate and replacement renunciations had to be obtained. The replacements are dated in early January 2002 and they were filed in mid January 2002. Those latter documents made it clear that none of the children are prejudicing any right to inherit from the Estate. For those and other reasons, I decided at end of the trial to set aside all releases and declared them of no legal force or effect.

- [11] The circumstances surrounding the signing of Ronald's renunciation and a written agreement dated October 10, 2001 between Ronald and Ruth are central to this Supreme Court action. Ruth requested that Ronald sign a renunciation of his potential right to administration of his late father's intestacy. Ronald testified that his mother had verbally agreed that he could fish his late father's boat, gear and licences, subject to certain conditions.

Ronald stated that he did not trust his mother because of the alleged promises made to him in 1991 and that, this time, he wanted any agreement in writing before he signed any renunciation. Ronald had the person who prepared his income tax returns, a Mr. Ronald Newell (“Mr. Newell”), who is also the manager for the South West Fisheries Quota Group Association to reduce to writing the agreement which he stated he had reached with Ruth. Ronald had a day or so previously sought the advice of Mr. Newell regarding the meaning of the renunciation which Ruth had presented to him for signature. Once Ronald understood the meaning of the renunciation, he decided he would have the verbal agreement reached with Ruth reduced to writing and signed by both he and Ruth. Mr. Newell did this for Ronald without providing any advice as to its terms or conditions. The resulting agreement is found at Tab 1 of Exhibit 1 (“The Agreement”). The document was signed by both Ronald and Ruth on October 10, 2001 after which Ronald provided Ruth with his signed renunciation and later, around January 2002, a revised renunciation acceptable to the Registrar of Probate. Ruth was not appointed Administrator of the Estate until January of 2002. She argues that she had no authority to bind the Estate in October of 2001 and that the Agreement is therefore not enforceable against the Estate.

[12] The October 10, 2001 document is very concise and provided the following agreements by Ruth and by Ronald.

“Therefore, I, RUTH AUGUSTA STEWART of Barrington Passage, County of Shelburne, and Province of Nova Scotia hereby agree by virtue of my witnessed signature below to:

(1) I will not sell or trade the fishing assets described above (boat, licences, gear), once my son Ronald Ross Stewart renounces his right to administration of his father’s, Noble Harry Stewart’s estate.

(2) The said licences, boat and gear will remain the property of the immediate family, and furthermore, my son, Ronald Ross Stewart will captain the vessel, and that my other son, Calvin Gary Stewart is to be employed on the vessel as long as he is able or wishes to be employed on the vessel.

(3) Income, after expenses from lobster fishing will be shared in the following manner:

Ronald Ross Stewart - Captain	40%
Ruth Augusta Stewart	30%
Calvin Gary Stewart	30%

Ronald also signified his approval and acceptance of that document and its terms by appending his signature. The document is silent as to its duration, and, in my view, this is the pivotal question to be decided.

[13] Ronald and Ruth have both testified that they were aware DFO policy only permitted licences to remain in the name of an estate for five years, after which they had to be transferred to a named fisherman qualified to hold such licences. They were both aware that something would have to be done with

the licences at the end of the five year period. It is also somewhat telling to note that paragraph (2) of the Agreement provides, inter alia, that the fishing assets will remain the property of the immediate family, although Ronald was to captain the vessel and fish the licences according to the percentages outlined in paragraph (3) of the Agreement. The Agreement did not provide for a transfer of the licences to Ronald at any time.

[14] Ronald and Ruth abided by the agreement until the late fall of 2003. By that time Ronald and his brother, Calvin Gary, had had a falling out and Calvin Gary was no longer employed as a crew member aboard the “Lois & Carey”. Ronald alleges that Calvin Gary had a drinking problem and that he was a safety hazard drinking aboard the vessel. Calvin Gary has testified to drinking aboard the vessel. Moreover, Calvin Gary also had some physical medical problems which hampered his ability to work on the boat.

[15] Moreover, partly because Calvin Gary was no longer employed on the vessel, partly because Ruth was getting increasingly dissatisfied with the fishing operation and partly because the value of lobster licences had increased dramatically since 2001, she entered into an agreement with DFO dated December 5, 2003 to sell the lobster licence for \$850,000.00 as part of the Government of Canada’s Aboriginal Fishery Program. Ruth had also

accused Ronald of not properly accounting to her for income generated by the fishing operations.

[16] Ruth then gave notice to Ronald that she was selling the lobster licence to DFO effective June 15, 2004, but she gave him the opportunity to continue fishing until the close of the lobster season at the end of May 2004, under certain conditions. Ronald initially refused the offer, asserting his right under the October 10, 2001 agreement, but eventually, through his then legal counsel, Mr. Barro, he agreed to the offer and to not oppose or try to block the sale of the lobster licence. There is some disagreement as to whether Ronald complied with the conditions attached to his being allowed to finish fishing the lobster season to the end of May, 2004. Ronald finished the season and fact that this occurred renders allegations of noncompliance, in my view, not pertinent at this time.

[17] Ruth also alleges that Ronald, by agreeing not to oppose or try to prevent the sale of the licence and by fishing out the lobster season to the end of May 2004, has also impliedly waived any other right he may have had pursuant to the agreement of October 10, 2001.

- [18] On the other hand, Ronald claims damages for breach of the October 10, 2001 agreement, arguing that that agreement was for an indefinite term, until he retired.
- [19] Ruth argues that, if the October 10, 2001 agreement is enforceable, it is at best a simple contract of employment which could be terminated upon appropriate notice, or pay in lieu of notice, or at worst an agreement for a maximum period of five years.
- [20] The proceeds from the \$850,000.00 sale of the lobster licence, after payment of the required taxes, are being held in trust by Ruth's lawyer, Mr. Hood, pending the outcome of these proceedings.

ISSUES:

- [21] The questions to be decided are the following:
1. Is the Agreement legally binding on Ruth personally or on the Estate given that she was only granted Administration in January of 2002?
 2. Was the Agreement entered into under duress or coercion such as to render it unenforceable?
 3. Is the Agreement void for lack of consideration on the part of Ronald?
 4. Is the Agreement unenforceable because it is unconscionable?
 5. Is the Agreement unenforceable because it was entered into between close family relations?

6. Is the Agreement void because of illegal terms given DFO's five year limitation on Estates holding fishing licences?
7. Is the Agreement void for uncertainty of terms?
8. If the Agreement was valid, was it a simple indefinite contract of employment which could be terminated on appropriate notice?
9. If the Agreement was valid, did Ronald commit a fundamental breach such as to terminate or repudiate the Agreement?
10. If the Agreement was valid, did Ronald agree to terminate it under the terms agreed to between his and Ruth's legal counsel when agreeing not to oppose the sale of the licence to DFO and to fish out the lobster season until the end of May, 2004?

ANALYSIS:

[22] Question # 1 - Is the Agreement legally binding on Ruth personally or on the Estate given that she was only granted Administration in January of 2002?

There is no question that Ruth was purporting to act both on her behalf personally as well as the Estate when she signed the Agreement on October 10, 2001. Moreover, she then proceeded to abide by the Agreement for almost three years after its signing. She took the benefit of the Agreement, both for herself and for the Estate. The evidence shows that Ruth did not differentiate in any practical or legal fashion between benefits to which she or the Estate may have been entitled pursuant to the Agreement. She most

clearly ratified the Agreement by her conduct after becoming the Administrator in January of 2002. It should be noted that she had received signed renunciations by October of 2001, or at least commitments to sign such documents by all her children. She viewed herself as entitled to sign on behalf of the Estate. I find there is no merit to this argued defence in the circumstances of this case.

[23] **Question # 2 - Was the Agreement entered into under duress or coercion such as to render it unenforceable?**

The party alleging that an agreement executed by them is not of their doing because it was entered into under such duress or coercion that it is unenforceable has the onus to prove such allegation. In this case I accept as fact that Ruth had verbally agreed to the basic terms of the Agreement prior to her renunciation request of Ronald. This fact is also confirmed by Mr. DiPersio's notes. Therefore, Ronald's request or insistence that it be put in writing before he provided his signed renunciation cannot be considered as the duress or the coercion that produced the Agreement. As pointed out by counsel for Ronald, Ruth had legal advice in dealing with the Estate throughout this time and she did not at any time voice or bring forth any concern regarding its execution. In fact, one could infer that she considered

it so matter of factly or unimportant that she did not even mention the Agreement to Mr. DiPersio or bring it to his attention. There were no threats or acts of intimidation by Ronald prior to signing the agreement. I find there is no merit to this argument.

[24] **Question # 3 - Is the Agreement void for lack of consideration on the part of Ronald?**

The agreement provides ample consideration on the part of Ronald. He is to fish the vessel and licences, he is to employ Calvin Gary and he is to provide both Ruth and Calvin Gary with an income calculated as a percentage of the proceeds from the catch. The mutual promises provide ample consideration for the Agreement. I find there is no merit to this defence.

[25] **Question # 4 - Is the Agreement unenforceable because it is unconscionable?**

It appears that Ruth is alleging the Agreement is unenforceable primarily because of the share of the catch which is agreed to be paid to Ronald. Ruth had some witnesses testify as to the common percentages for sharing proceeds in such fishing operations and those numbers were very close to those provided in the Agreement. It should also be noted that the percentage share provided for Calvin Gary, not the captain but a simple crew on the

vessel, was not that much different than that allocated for Ronald, the captain of the vessel. I find there is no merit to this argument and defence.

[26] Would the agreement be unconscionable if it would have been for an indefinite period of time until Ronald's retirement. It is not necessary for me to decide this question for reasons which will become apparent later in my analysis and findings.

[27] **Question # 5 - Is the Agreement unenforceable because it was entered into between close family relations?**

This is not a mere general promise or agreement but a very specific contract for a specific purpose. There is no indication whatsoever that it was not intended to be binding upon the parties. Quite the contrary. The evidence clearly establishes that the parties intended to be bound by their mutual promises and that they intended to take the benefits under the Agreement. They did so as stipulated in the Agreement for almost three years. I find there is no merit to this defence in these circumstances.

[28] **Question # 6 - Is the Agreement void because of illegal terms given DFO's five year limitation on Estates holding fishing licences?**

This argument appears to be based on the premise that the Agreement may have been for an indefinite period, beyond the five year DFO policy for the

retention of fishing licences in Estates. There is nothing in the Agreement that states the licences must remain in the name of the Estate beyond a five year period. The Agreement simply states that it is to remain the property of the immediate family. This can and has been achieved on numerous occasions through trust agreements, which are to this date still enforceable. There is no pressing or overriding reason which would mandate that the agreement, even if it were for an indefinite period, should be declared illegal and therefore contrary to public policy. I reject this argument and defence in these circumstances.

[29] **Question # 7 & # 8 - Is the Agreement void for uncertainty of terms?**

AND If the Agreement was valid, was it a simple indefinite contract of employment which could be terminated on appropriate notice?

These questions and the defences raised by them are based on the fact that the Agreement is silent on the period of its duration, regardless of whether it was a simple contract of employment or otherwise. I find that the Agreement is not a simple contract of employment. It is more akin to a partnership than anything else. It is a joint venture with the parties benefiting from the proceeds on a shared basis, rather than any fixed form of remuneration. There are no explicit or implied controls of Ronald by Ruth.

The same does not apply to Calvin Gary who was stipulated to be an employee.

[30] In my view the primary question to be decided is what was the intention of the parties with regard to the duration of this agreement. Was it that it be of indefinite duration or was it that the agreement be for a certain period of time. Ronald has testified that he was well aware of DFO policy permitting licences to remain in the name of an estate for a maximum of five years. He testified that a trust agreement or some other arrangement would have been required if he was to continue fishing the licences after the five years, but that that was never discussed with Ruth. What is clear is that Ronald knew that something would have to change after the five year period following his father's death.

[31] Ruth testified that when Ronald gave her the Agreement to sign on October 10, 2001 that he indicated to her it was only good for five years, the time that DFO would permit the licences to remain in the Estate. Ruth also testified on cross-examination that she understood the deal with Ronald would only go for five years, not an indefinite period, because she knew of the DFO policy regarding licences in the name of an estate. Ruth also testified that her other children were only told of the agreement with Ronald

after the fact and that they were not at all in favour of Ronald taking over the boat. They wanted the licence to be sold. However, Ruth wanted the deal with Ronald in order to provide employment for Calvin Gary. She testified she understood the deal was binding for five years. Carl Stewart, the son of Ruth and Noble Harry, testified that Ruth had told him the agreement with Ronald was just for a period of five years, after which the boat and licences would be sold and the proceeds distributed.

[32] With regard to the releases of any interest in the Estate signed by her children, Ruth testified on cross-examination that she told her children that she needed the releases to avoid the probate bond. She testified she told the children they would still get their share of the Estate even if they signed the releases and that she always intended to divide the Estate in accordance with the Intestate Succession Act. A number of the other children of Ruth and Noble Harry who testified on the probate application confirmed that they understood the releases to be necessary for Ruth to be able to deal with the Estate but that it would still be divided with the children according to law.

[33] In the final analysis, the evidence convinces me, on a balance of probabilities, that the parties knew, understood and intended the Agreement signed on October 10, 2001 be for a maximum period of five years. All

parties knew that DFO would require a change of ownership registration of the licences after the five year period had expired. I find that, in the circumstances, it was clearly an understood or implied term of the October 10, 2001 Agreement that it would be for a maximum period of five years. I therefore find that the October 10, 2001 Agreement was enforceable for a maximum term of five years.

[34] **Question # 9 - If the Agreement was valid, did Ronald commit a fundamental breach such as to terminate or repudiate the Agreement?**

This argument is based primarily on the fact that Calvin Gary was not employed on the “Lois & Carey” in the fall of 2003, and the allegations that Ronald did not pay Ruth all the proceeds of the catches as she was entitled under the Agreement. It is not clear that Ronald in fact fired Calvin Gary. The evidence certainly indicates that Calvin Gary was having problems coping with the rigours of the lobster fishery during the fall of 2003. Moreover, Calvin Gary had refused or declined to participate in the earlier ground fish summer activity. It is also clear that Calvin Gary, as admitted by him and testified to by others, was consuming significant quantities of alcohol while working on board the vessel. He admitted to consuming six beers on one occasion and approximately three on another. According to

Ronald and his son Nigel, this was an ongoing problem and I find that it was. Although it is not clear that Calvin Gary was fired, I am satisfied and find that Ronald would have been justified in doing so in the circumstances. I therefore reject this argument.

[35] With regard to the allegation that Ronald did not provide Ruth with all of her share in the proceeds of the catches to which she was entitled, I reject this argument as well for reasons which I shall state when dealing with the counterclaim.

[36] **Question # 10 - If the Agreement was valid, did Ronald agree to terminate it under the terms agreed to between his and Ruth's legal counsel when agreeing not to oppose the sale of the licence to DFO and to fish out the lobster season until the end of May, 2004?**

I find that the documentation or correspondence exchanged between Mr. Barro, Ronald's then legal counsel, and Mr. Hood in early 2004 does not establish an agreement to relinquish or waive any rights which Ronald may have had pursuant to the Agreement. The correspondence does not make any mention of such a release by Ronald. If Ruth wishes to assert such a defence against Ronald it would have to have been clearly spelled out. It was not. I find there was no such agreement. The agreement was limited to

what it says, only that Ronald would not try to prevent the sale of the lobster licence and that he fish out the spring 2004 lobster season under certain conditions, none of which include a release of any rights pursuant to the October 10, 2001 document. I therefore reject this defence.

THE COUNTERCLAIM:

[37] Ruth has alleged that Ronald did not provide her with a complete accounting or receipts and that, as a result, she did not receive all that she was entitled to under her arrangement with Ronald. The evidence, particularly that of Sherry Crowell, the bookkeeper at D. Waybret's where all of the lobster and fish were sold, shows that Ruth was a controlling figure in all of the settlements of those catches. She was always present with Ronald and she was very involved and provided her input. Ruth testified she did not trust Ronald and that she checked everything. Ms. Crowell testified she got most of her instructions from Ruth, not Ronald. There is no evidence that Ronald kept any monies to which Ruth was entitled under the Agreement. This includes both lobster and groundfish. It may be that Ronald was accounting for expenses on his income tax forms which were also accounted for by the Estate, but that was not done to deprive Ruth or the Estate of the benefit of those expenses and there is no evidence that it did so. The expenses were

usually accounted for on the settlements with Waybret's, to which Ruth was always an active and scrutinizing participant. Copies of the settlements were provided to Ruth and the Estate's accountant for income tax purposes.

[38] In the final analysis, Ruth has failed to prove any counterclaim against Ronald and this allegation is dismissed.

CONCLUSION:

[39] In the end, Ronald has proven an enforceable agreement, being the document dated October 10, 2001, for a duration of five years, being to the end of the 2006 summer ground fishery. Ruth has breached the agreement by selling the lobster licence to DFO after the end of the lobster season in May of 2004 and telling Ronald he was effectively fired after that date. Ronald is therefore entitled to damages from June 1, 2004 to the end of the 2006 summer ground fishery and it remains to calculate those damages. The period would include the summer 2004 ground fishery, the fall 2004 and spring 2005 lobster fishery, the summer 2005 ground fishery, the fall 2005 and spring 2006 lobster fishery and the summer 2006 ground fishery; in effect, two full years of fishing plus one summer fishery. Ronald's lost income would also include the employment insurance which he would have

earned had he been able to qualify because of the fishery. According to his income tax returns Ronald earned the following net income:

2001 - \$43,500
2002 - 42,800
2003 - 28,500

The year 2003 appears to be an anomaly in that it is significantly lower than the net income in previous years. 2003 is the year that Ronald testified he had serious problems with Calvin Gary. Calvin Gary refused to take part in the summer fishery and effectively did not take part in the fall lobster fishery because the passing out incident aboard the vessel occurred during the first days of the fall 2003 lobster season. Calvin Gary did not return to the boat after that. This most likely explains why the crew share expenses for 2003 are significantly higher than in 2002 and 2001. Therefore the years 2002 and 2001 are more representative of Ronald's average yearly earnings. I find that \$42,000.00 is the most appropriate average to use for Ronald's annual net income. The documents at Tab 43 of Exhibit 1 also support an annual net income from the summer fishery of approximately \$6,000.00. I therefore calculate Ronald's damages for two full years plus one summer fishery to be \$90,000.00 less any income earned after June 1, 2004. Ronald testified that he earned a total of \$2,200.00 in 2004 and 2005 and this

amount shall be deducted from the \$90,000.00 for a net award of damages of \$87,800.00. Ronald has testified that he has not been able to obtain a replacement position as a fishing vessel captain and that he is unable physically to perform the duties of a crew member. I am satisfied that this is the case and that it is unlikely that he will be able to do so in the near future; however, that is a contingency which should be taken into consideration. I would have normally allowed prejudgment interest at the rate of 5% for a period of one year in these circumstances; however, I will offset that against the contingency just mentioned and I will not award any interest. Therefore the net award of damages shall be \$87,800.00.

[40] While the parties have not addressed the question of costs, I will entertain hearing the parties at their convenience if they cannot agree. I would award the usual costs on the amount awarded according to the basic tariff existing at the time this action was commenced, plus disbursements. I would grant an order accordingly.

B. J.