IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Geophysical Service Inc. v. **Sable Mary Seismic Inc.**, 2008 NSSC 79

Date: 20080319
Docket: S.H. #190408
Registry: Halifax

Between:

Geophysical Service Incorporated

Plaintiff

v.

Sable Mary Seismic Incorporated and **Matthew Kimball**

Defendant

Revised decision: The test of the original decision has been corrected according to the erratum dated March 27th, 2008.

Judge: The Honourable Justice Gregory M. Warner

Heard: January 3rd, 2008 at Kentville, Nova Scotia

Counsel: Colin D. Piercey, Counsel for **Geophysical Service Incorporated**

Derrick J. Kimball and Sharon L. Cochrane, Counsel for **Sable Mary Seismic Incorporated** and **Matthew Kimball**

By the Court:

A. Issues

[1] The Plaintiff/Defendant by Counterclaim (“Geophysical”) seeks to strike a jury notice filed by the Defendants/Plaintiffs by Counterclaim (“Kimball”). It argues that:

(1) the factual complexity of the issues would overwhelm a jury; and,

(2) the significant issues involve equitable claims, issues of law, and issues of mixed law and fact that are not appropriate for a jury.

B. The Claims

[2] Geophysical’s claim against Kimball is for breach of contract, negligent misrepresentation, fraudulent misrepresentation and wrongful conversion. It claims as relief an accounting, damages and/or restitution, punitive damages, a declaration that it is the beneficial owner of the converted property (that is, a constructive trust) and an equitable tracing.

[3] Kimball’s primary counterclaim is that a profit sharing (“success sharing”) agreement, partly in writing and partly by oral agreement, was reached and breached by Geophysical. Damages are claimed on a *quantum meruit* basis. Based on the evidence before me, no agreement was reached as to the method of quantifying the profit sharing, if an agreement to profit share was reached (which is disputed).

[4] Kimball also seeks, because of the manner in which an Anton Piller Order was obtained and executed by Geophysical, damages for trespass, invasion of property, infringement of intellectual property rights, violation of reasonable expectations of privacy, and personal and public embarrassment. It is not clear whether Justice Hall, in his decision noted in Paragraph 7, fully dealt with claims for relief arising out of the Anton Piller Order. During oral argument, I was led to understand that a pre-trial application may be filed to determine whether the Anton Piller claims of relief are *res judicata*. My analysis is not affected by the Anton Piller related claims.

C. Background

[5] The questions for this Court are:

(1) whether the factual issues, including assessment of damages, are so intricate or complex, or require such prolonged examination of documents or accounts that they should be removed from the jury; and,

(2) whether the claims give rise to multiple issues of mixed fact and law or pure law, or equitable issues. The primary focus of the second question is whether Geophysical's and/or Kimball's claims are for equitable remedies, and if so, whether the jury can or should have any role in the determination of facts or assessment of damages, that is, whether the remedies are matters of judicial discretion for a judge.

[6] In making the assessment, the Court must consider the relevant legislation, precedent (the case law), and Civil Procedure Rule 1.03: "The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding."

[7] The factual basis for this application is contained in:

a) the pleadings;

b) two (2) affidavits filed by Geophysical setting out, in respect of the first argument, the extensive production and disclosure demands made by the parties, and in respect of the second argument, copies of the "letter agreements" between the two (2) principals - Mr. Einarsson and Mr. Kimball, together with parts of the discovery examination of Mr. Kimball in which he purports to acknowledge that there was no written or verbal agreement respecting profit or "success" sharing;

c) a decision by Justice Hall overturning an *ex parte* Anton Piller order issued to the Plaintiff, **Geophysical Service Inc.** v. **Sable Mary Seismic Limited**, 2003 NSSC 73, Paragraphs 3 to 14; and

d) a decision arising from an appeal of a refusal of a chambers judge to strike a secondary action by Geophysical against Kimball, **Sable Mary Seismic Inc.** v. **Geophysical Service Inc.**, 2007 NSCA 124, Paragraphs 5 to 16.

[8] The central factual issue in Geophysical's claim is what the Court finds to have constituted the contract for services provided by Kimball to Geophysical. It appears that the evidence of the contract was partly in writing and partly oral. The credibility of the two (2) principal players - Mr. Einarsson and Mr. Kimball, is an important factor in the determination of what the contract consisted.

[9] Based on the disclosure and documents demanded and produced to date, all of which are set out with the Affidavits filed with this application, the calculation of the amounts charged by Kimball to Geophysical versus the amounts which Geophysical alleges should have been charged under the contract, leads this Court to conclude that, in the absence of an agreement at this time as to what and how many of the many volumes of documents and financial records produced will be tendered and subject to examination and argument, a jury will likely become

bogged down with a prolonged examination of documents and accounts at the trial. At present the parties have not agreed that the expert report of Geophysical (or of Kimball if they obtain one) or the factual foundation of the reports will be admitted or accepted. The suggestion of counsel for Kimball that the admission of the report and documents may be agreed to before trial is speculative and no basis upon which to assess this application.

[10] Geophysical's claims for relief are a mix of common law and equitable relief. The first two basis of Geophysical's action are legal claims; the latter two are equitable claims.

[11] The primary relief sought by Geophysical is damages for the amount allegedly overpaid by reason of Kimball's breach of contract, wrongful conversion, and fraudulent or negligent misrepresentation. In support of this legal remedy, the Plaintiff calls on the principles of equitable relief for both assistance in determination of the amount of the damages - an accounting, and in the collection of damages - restitution, a finding of a constructive trust and equitable tracing. Damages are a common law remedy; the remaining relief has devolved from equitable principles. While some equitable relief is still discretionary, the judicial discretion to refuse other equitable relief has become more limited. In most circumstances, parties are almost entitled to the equitable remedies of accounting and restitution, but the circumstances for finding a constructive trust, and for granting a tracing order involve the application of the equitable concept of unjust enrichment in respect of which judicial discretion plays a major role.

[12] The principal counterclaim is for breach of a contract to profit share. The affidavit shows that the counterclaim is based upon short "letter agreements" and verbal discussions between the alter egos of the protagonists, that is Mr. Einarsson and Mr. Kimball. The evidence shows that, even if there was an intention to profit share at some future date - which may or may not be found on the application of legal principles to have resulted in a legal contract, there was no agreement as to how, or how much, of what profits would, or might, at some future date, be shared. This is an area where the issues of fact and law are so mixed as to make it very difficult to extract questions of fact for a jury. More important, the granting of a remedy where the terms of a contract are missing, if in fact there is a contract, clearly calls into play the equitable concept of unjust enrichment and the judicial discretion applicable to redress the enrichment. This differs from the determination of facts or the factually-based determination of damages.

[13] Kimball argues that it is for a jury to decide whether the discussions reached the point of discharging its onus of establishing a legally binding agreement to profit share, even in the absence of an agreement as to how and what profits would or might in future be shared. Counsel further argues that the claim for damages on a *quantum meruit* basis is a legal remedy and not exclusively an equitable remedy and is properly a matter for a jury to assess.

[14] Exhibit "C" to the Affidavit of Mr. Piercey contained portions of the discovery evidence of Matthew Kimball, whose conversations with Mr. Einarsson are the basis of Kimball's claim that an agreement to profit share existed. Exhibit "B" to the Affidavit are the letters which the Defendant says verify the existence of a profit sharing agreement.

[15] The excerpts of the evidence of Matthew Kimball contained in Exhibit "C" shows that their discussions were in generalities in terms of the nature of an profit sharing, when it would occur, and on what it would be based. For example, in questions regarding discussions in 1997, Mr. Kimball used words like "looking at the wild blue yonder . . . success share, we talked about in generalities . . . we weren't sure just exactly how far it was all going to go."

[16] At the time of the signing of a service contract in October 1998, he said that Mr. Einarsson had said words to the effect "if we can get through this thing and have our 18 months in under our belt we're going to be in a very good cashflow position, and at that time, we're going to look at - as a success share", and "we also talked about success share depending on whether it was this venture only or other ventures or whether St. Mary was going to actually get her boat. All kinds of conversations about success share."

[17] When specifically asked whether there was any discussion as to how "success" sharing would work, if and when it ever happened, Mr. Kimball referred to a statement by Mr. Einarsson in 1999: "What are you worried about? You'll have millions" to which Mr. Kimball said he replied: "All right. Good enough", from which he concluded: "I didn't need to ask any more about success sharing. Right? When we talked seriously about success sharing we talked about the different ways of calculating it. You can take it on gross revenues, given that you have a net profit that exceeds a certain percentage, or you can do it on net dollars. We didn't fix one way or the other".

[18] He testified that further discussions took place in the fall of 2000 at his residence in Windsor. He was asked whether any figures or formula were discussed at that meeting as to how his bonus would be calculated; he replied: "no, because at that point, I think the good news was just rolling in. I don't think Davey [Einarsson] really understood how much he was going to have at the end of the year, but we do know that it ends up being in the range of 3 million dollars that management took for a bonus that year."

[19] Again, Mr. Kimball was pressed as to any specific discussion as to how a bonus or success sharing would be calculated. Mr. Kimball always replied: "No, other than again the options that we had talked about before."

[20] At the end of the discovery, when asked to again clarify that nothing, either verbally or in writing, was agreed with respect to how success sharing would work, Mr. Kimball acknowledged that to be so.

[21] It is this evidence (that is, the only evidence before this court in respect of this application) upon which a judge or a jury is being asked to determine whether a binding contract was entered into, and the basis of any relief claimed in its counterclaim.

[22] It is clear that the claim for *quantum meruit* is in fact a claim for equitable relief as there is no basis in any written document or from an verbal discussions upon which any court - judge

or jury, could determine the terms of, or formula for the calculation of, any success or profit sharing.

D. The Law

D.1 Geophysical's Position

[23] To support its argument that the factual issues (especially the quantification of damages) are too complex for a jury, the Plaintiff relied on the nature, and massive volume and complexity, of documents exchanged in respect of the claim and counterclaim. Counsel cites Section 34(a)(ii) of the *Judicature Act*, and Justice Tidman's analysis of complexity in **MacIntyre** v. **Nova Scotia Power Corp**., 1995 CarswellNS 155 (NSSC), which in turn cites Hallett J. in **Leadbetter v. Brand** (1979) 37 NSR (2d) 660 (NSSC).

[24] To support its argument that the legal and factual issues are so interwoven that they cannot be separated (issues of mixed fact and law), it relied upon the analysis in:

a) **Lintaman** v. **Goodman**, 1983 CarswellNS 100 (NSSC), Paragraphs 4 and 5

b) **Barrow** v. **Keating (No. 2)**, 1985 CarswellNS 71 (NSSC); and

c) **Begg** v. **Halifax County**, 1997 CarswellNS 123 (NSCA).

[25] While the parties disagree as to whether the "letter agreements" contained the whole agreement, the Plaintiff's claim will depend on the determination and interpretation of the contract - a complex issue of mixed fact and law. While the parties disagree as to whether an agreement to profit share existed, the only affidavit evidence before this court confirms that even Kimball acknowledges that the terms of the agreement were never concluded, resulting in the relief claimed (reasonable compensation based on *quantum meruit*) being an equitable remedy not conveniently separable from the factual issue (whether there was an agreement to profit share). It cites **Alexander Enterprises Ltd.** v. **Genesis Land Development Corp**., 2007 CarswellAlta 1017 (ACA).

[26] Geophysical submitted that the counterclaims for "violation of reasonable expectation of privacy" and "personal and public embarrassment" (arising out of the manner of execution of the Anton Piller order) are not traditionally recognized as separate basis for tort claims, are novel claims, and are issues of pure law. It cites *Remedies in Tort* by Lewis Klar et. al. (Carswell, looseleaf), and **Haskett** v. **Trans Union of Canada Inc.**, 2001 CarswellOnt 4450 (OSCJ) (appeal allowed on other grounds).

[27] Geophysical submitted that the most significant counterclaim - whether any profit sharing discussions resulted in an agreement (which Geophysical disputes) - involves the determination and application of the equitable principles of unjust enrichment, restitution and

quantum meruit. This is because, based on the letters and discovery examination of Matthew Kimball, it is undisputed that discussions respecting "success sharing" did not conclude in an agreement as to the nature and quantum of such sharing.

[28] Geophysical argued that a proper interpretation of Section 34 of the *Judicature Act* limits juries to determination of legal (as opposed to equitable) issues of fact. To support its argument, counsel submitted prior versions of Section 34 of the *Judicature Act*, and cited the following case law:

a) **Roby Estate** v. **Buley** 1989 CarswellNS 399 (NSSC),

b) **Guinan** v. **Northwestel Inc.**, 2000 CarswellNWT 62 (NWTSC),

c) **Nelson** v. **Stelter**, 2007 CarswellAlta 1180 (AQB),

d) **Salem** v. **Priority Building Services Ltd**., 2003 CarswellBC 2626 (BCSC), and,

e) **Oakleigh Properties Ltd**. v. **Kebet Holdings Ltd**., 1993 CarswellBC 2973 (BCSC).

[29] During oral argument, counsel brought to the Court's attention **Behune** v. **Melenchuk**, 1994 CarswellNS 173 (NSCA), where at Paragraph 12 Clarke, C.J.N.S., stated: "Equitable issues such as those that arise in the application of the doctrine of undue influence are permitted to be placed before a jury in Nova Scotia (See Judicature Act, R.S.N.S. 1989, c.240, s.34). This jury was entitled to make findings of fact upon which Justice Edwards was in turn entitled to apply the law." Counsel submitted that whether or not it was permissible, it was still for the Court to decide if it was appropriate for the factual questions affecting certain equitable issues should be put to the jury.

D.2 Kimball's Position

[30] A party has a *prima facie* substantive right to have issues of fact and damages assessed by a jury (**King v. Colonial Homes Ltd.** [1956] S.C.R. 528, Paragraph 17). Nova Scotia's position is somewhat unique in Canada to the extent that courts jealously guard this right (**A.D. Smith Lumber Ltd. v. General Home Systems Ltd.** (1986), 72 N.S.R. (2d) 333, Paragraph 13).

[31] The onus is on the applicant (Geophysical) to establish why the right should be denied.

[32] With respect to the argument about the complexity of the issues, especially the assessment of damages, counsel compared the case at bar to **Electrical Distributors Ltd. v. W.C.I. Canada Inc.** (1992) 116 N.S.R. (2d) 338 and **MacIntyre v. Nova Scotia Power Corp,** *supra*.

[33] In **Electrical Distributors**, MacAdam J. rejected concerns about a jury's capacity to critically analyse expert reports and supporting financial data, and the apparent difficulty in drafting jury questions (by reason of the number of legal issues and issues of mixed fact and law). In **MacIntyre** (a fire loss) Tidman J. dismissed the application to strike the jury. He acknowledged that several expert reports were "undoubtedly complex", but noted that: one should not underestimate the ability of juries to perceive and understand; it is unnecessary that the jury understand all the theory and detail; and judges are in no better position to assess the expert testimony, especially if the evidence is presented as it should be. In **Wentzell v. Kydd** (1997) 160 N.S.R. (2d) 298, Hall J. went even further, observing that, with proper instructions as to the law, seven jurors of varied experiences may be in a superior position to assess facts than a judge alone.

[34] With regards to the argument about factual complexity, counsel argued that the great volume of documentary evidence disclosed to date is an irrelevant consideration since the test for production (disclosure) is "semblance of relevance" and that most documents would not be relevant at trial. Furthermore, most of the Plaintiff's disclosure is not disputed; the information was the basis for the expert forensic reports, which are, for the most part, simple mathematics and likely to be admitted at trial without dispute. The Defendant denies that its counterclaim is complex. The counterclaim simply seeks special damages for breach of a contract to share in the Plaintiff's profits when the Plaintiff was in a profit position. The financial and tax information demanded of the Plaintiff in respect of the calculation of its profits involves simple arithmetic and is not factually complex.

[35] With respect to the argument that issues of mixed fact and law should not be before the jury, the Defendant denied that there are complex issues of mixed fact and law. It submits that the issue is essentially a factual determination of what the parties agreed to - specifically, what was agreed to be paid for services (the Plaintiff's claim) and what was agreed with respect to profit sharing (counterclaim). The agreements are partly oral and partly in writing. The written agreements are a series of simple short "letter agreements". Of more importance, the principals of the parties (Einarsson and Kimball) disagree on what agreements were made, so their credibility with regards to the oral agreements is a large part of this case.

[36] As to the Plaintiff's argument that the major issues are of pure law, the Defendants submitted that the decision to strike a jury must be based on whether there is a function for the jury to perform; that is, not whether the actions raise questions of law but whether the issues are primarily questions of law. (**A.D. Smith Lumber**, Paragraph 12 and **Isaac v. Harnacek** (1974) 13 N.S.R. (2d) 273, Paragraph 10).

[37] With respect to the two novel tort claims of "questionable legal foundation", the Defendant argued that it is for the trial judge, not the judge on a chambers motion to decide whether to withdraw them from the jury. The Defendant cited **Killorn v. Health Vision Corp.**, (1996) 148 N.S.R. (2d) 169, Paragraph 20, and **Fickes v. Lamey** (1999) 173 N.S.R. (2d) 126, Paragraph 9.

[38] With regard to the Plaintiff's argument that the counterclaims involve equitable claims that do not belong before a jury, counsel submitted that its counterclaim for *quantum meruit*, based on an agreement to profit share, was not an equitable claim. The relief was not based on an alleged constructive trust or resulting trust, nor a claim for restitution or unjust enrichment. It argued that whether an agreement to profit share existed was a question of fact arising out a contract. The Defendant's counterclaim is for special damages; the amount of the damages may be determined on the basis of *quantum meruit*. While *quantum meruit* is a remedy for unjust enrichment, it is also a remedy for breach of contract and for that reason the Plaintiff's reference to **Peter v. Beblow** 1993 CarswellBC 44 (SCC) is not relevant.

[39] The Defendant argued that a proper reading of Section 34 of the *Judicature Act* permits equitable issues of fact to be determined by a jury. He disputed the relevance of **Roby Estate v. Buley**, because Tidman J. based his decision to strike the jury notice on a finding that the factual issues were limited and that the main issues involved difficult concepts of law requiring judicial discretion.

[40] The Defendant cited **Barrow v. Keating (No. 2)**, at Paragraph 18, where Justice Nunn stated that the principle, pervasive in other jurisdictions, to the effect that equitable remedies involving judicial discretion are appropriate for judge alone trials, is not of general application in Nova Scotia. Consequently, case law from other jurisdictions is not applicable and should be viewed with caution. He cited, as an example, Chief Justice Wachowich's decision in **Nelson v. Stelter**, 2007 CarswellAlta 1180, and Justice MacAdam's comments with respect to the difference between Ontario and Nova Scotia practice at Paragraphs 39 and 41 in **Tansley v. Gorman** (1999) 174 N.S.R. (2d) 51.

D.3 Jury Trials

[41] A short history of the evolution of jury trials is a prerequisite to understanding the right to a jury trial in civil matters.

[42] Juries predated the Norman conquest of England of 1066. Juries (called *diakaste*) of hundreds were the foundation of the Greek judicial system. During the Roman empire civilian judges determined legal cases with the aid of large juries. It is possible that this tradition was introduced into southern England by way of the Roman conquest during the time of Julius Caesar, although most historians suggest the imprint on English institutions was more likely effected through the Norman invasion of 1066.

[43] George MacAuley Trevelyan, in his *A Shortened History of England*, suggested that the committees of 12 free men (elders), who resolved disputes in local communities, were part of the Scandinavian legal custom imported into England during the Viking occupation, and this custom was codified by an early English king, Ethedred the Unready, as part of the "Wantage Code". Some recent American legal scholars attribute the origins of the juries to the Islamic "Lafif"

developed in the eighth century - a jury system bearing remarkable similarities to the early English jury.

[44] Whatever the origin, trial by jury became the standard method for resolving disputes through the legal reforms of King Henry II after 1154.

[45] By the Norman conquest, administration of local courts became more centralized. Henry II created a unified system of law "common" to the country as whole. This was in part the result of his practice of sending judges from his own central court to hear disputes throughout the country. Disputes were resolved on an *ad hoc* basis according to what the customs were interpreted to be. The king's judges then returned to the court, discussed their cases with other judges in a manner that permitted and required them to be used for the interpretation and application of the law in future cases. In this way, the laws of England developed as " common-law" - the collection of judge-made decisions based on tradition, custom and precedent, as opposed to laws derived from statutes, a civil code or equity.

[46] The right not to be imprisoned, "disseized of his freehold", or of liberty, or of his "free customs", " <u>but by the lawful judgement of his peers</u>" (i.e., a jury) was enshrined as Article 39 of the Magna Carta in 1215.

[47] During the same period of time a court system was created. The Court of Exchequer was developed to hear disputes where the Crown sought money it claimed it was owed and answered claims for money said to be owed by the Crown. The Court of Common Plea developed as a local court for civil trials between individuals. The Court of King's Bench developed as a court for more serious disputes and for the hearing of criminal cases.

[48] As Lord Denning noted in **James v. Ward** [1965] 1 All E.R. 563 (CA) at 568: "Up to the year 1854 all civil cases in the courts of common law were tried by juries. There was no other mode of trial available."

[49] Over time procedure in the courts of common-law became convoluted and ossified. Litigants who felt they had been cheated by the common-law system would petition the King in person. From this developed a system of equity, administered by the Lord Chancellor, in the Court of Chancery.

[50] The basis for decision-making in the Court of Chancery was equity. It was a court of conscience and not a court of rules or laws.

[51] An important distinction between court of equity (Chancery) and courts of law was that a jury had no role in interpreting the law or in matters of conscience. Only a judge could dispense equity.

[52] In courts of law, the opposite was the case. The jury answered questions of fact, originally by its own investigation and later solely from the evidence produced during a trial.

Equity and law were frequently in conflict, and litigation could continue for years as courts of law countermanded courts of equity and *vice versa*. This was so even though, by the 17th century, it was established that equity should prevail over the common law.

[53] By the mid 19th century, disputes between, and conflicting orders issued by, the courts of law and the courts of equity had lead to a breakdown of the English legal system - as reflected in Charles Dickens' *Bleak House* - and the merger of the courts of law and the courts of equity by legislation in 1873 and 1875. While the principles of law and of equity remained distinct for a time after merger, legislation created a unified court system.

[54] Various statutes, both in England and in those common-law countries which derive their legal system from England, have modified the practices and procedures by which courts determine matters of law and of equity. For the most part they are based on the practices that pre-existed the English Judicature Act of 1873.

[55] ***The Law of Civil Procedure*** by W.B. Williston QC and R.J. Rolls (Toronto: Butterworths, 1970), chapter2, contains a history of the organization and procedures in the Ontario Courts. At page 53, the authors made a relevant observation respecting how legislation only amended existing civil procedure:

> " In order to have a comprehensive perception of adjectival or procedural law, it is necessary to be familiar with the courts of common law and equity which functioned before the enactment of the Judicature Acts. While almost all of our rules of practice are based on the Judicature Act, that statute is in substance only an amending statute which made decisive changes in procedure and rendered much of the former practice obsolete. The aim of the act was to remedy defects in the existing system, and no attempt was made to lay down a code of civil procedure. It presupposed the existence and operation of courts under a procedural system which was not wholly disregarded but was to be radically modified. The Judicature Acts conferred no new rights: they confirmed the rights that previously existed in the courts of law and equity. The acts do not abolish the distinction between law and equity; they merely gave to the High Court the jurisdiction previously exercised by the courts of common law and the Court of Chancery."

[56] In ***The Practice of the Chancery Division of the High Court of Justice, Being the Seventh Edition of Daniell's Chancery Practice***, by Cecil C. M. Dale et al (London: Stevens and Sons Limited, 1900), chapter XIV, the authors state:

> "Causes or matters assigned to the Chancery Division are to be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order. . . .though a discretionary power is given to the Court or a Judge to direct the mode of trial under Order XXX., the previous practice under these Rules is generally

> maintained. Under the practice thus established, the normal mode of trial is by a Judge without a jury. In actions of slander [etc.], either party may signify his desire to have the issues of fact tried by a Judge with a jury, . . . Causes or matters assigned by the Judicature Act, 1873, to the Chancery Division are to be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order, and an action falling within this class will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action; nor even then, unless it is shown that such would be the better mode of trial. The Court or a Judge may, if it appears desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act, 1873, could, without out any consent of parties, have been tried without a jury. . . . the Court would not exercise its discretion so as to deprive a party of his right to a trial by jury . . . unless the action belonged to that class of actions which a jury was not as a rule competent to deal with, either from their great complexity as regards facts, or from fact and law being so intermingled that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions as regards to law were of such a delicate nature, and required a knowledge of such refined law, that they could not be conveniently presented to a jury."

[57] Fundamental to one of the issues raised by Geophysical in this application is the interpretation of those Nova Scotia statutes, and the extent to which they modified the procedural rights that existed in the courts of common law and equity before these statutes.

D.4 Acts Respecting Juries in Nova Scotia

[58] The status of courts of law and equity, and of the distinct procedures for trials of legal and equitable issues, before the merger of the English courts of law and equity is reflected in the *Revised Statutes of Nova Scotia*, 1851. Part III, Chapters 126 to 154: "*Of Courts and Judicial Officers, and Proceedings in Special Cases*".

[59] They contain the following relevant provisions:

- "The supreme court shall have within this province the same powers as are exercised by the courts of queen's bench, common pleas, chancery and exchequer in England." (Chapter 126, Section 1).

- "In all proceedings in the court of chancery, not regulated by the practice thereof, the practice of the high court of chancery in England shall be adopted." (Chapter 127, Section 1).

[60] Separate courts were established to deal with marriage and divorce (Chapter 128) and probate (Chapter 130). By Chapter 131, jurisdiction was given to Justices of the Peace in civil cases involving small claims.

[61] Section 1 of Chapter 134: "*Of Pleadings and Practice*", contains the 123 rules of the Supreme Court. None of those 123 rules contains an express statement as to when questions of fact may be determined by judge alone or by a judge with a jury.

[62] Section 2 reads: "In all cases not provided in this chapter, nor in any rule. . . , the practice and proceedings of the supreme court shall conform, as nearly as may be, to the practice and proceedings of the superior courts of common law in England . . ., and in all cases where the proceedings and practice of the superior courts of common law in England differ from each other, those of the court of queen's bench shall be followed."

[63] The practice and proceedings in the superior courts of common law in England provided for trial in which juries determined facts.

[64] As noted in c. 127, s.1, in the proceedings in the court of chancery, the practice of the High Court of Chancery in England, where issues of law and fact were determined by judges alone, applied. Juries played no part in this court, and therefore in determining issues of equity - facts, remedies, or in the exercise of discretion.

[65] Section 20 of "*The Nova Scotia Judicature Act*, 1884", the first statute after the merger of the English courts, reads in part:

> "20. Subject to Rules of Court, the trials and procedure in all causes, whether of a legal or equitable nature, shall be as nearly as possible the same, and the following provisions shall prevail:-
> In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment, all questions which might heretofore have been tried by a jury, shall, subject to the other provisions of this Act, be tried by a jury, unless the parties ... waive such trial. **All other issues of fact in any civil action in the Supreme Court, and the assessment on enquiry of damages in every such action**, may, and (subject to the provisions hereinafter contained) in the absence of such notice as in sub-section one of this section mentioned, **shall be heard, tried and assessed by a judge without the intervention of a jury**:
>
> > ... (subsections 1 to 3 provide for trials by judge with a jury where either party gives notice, or where the judge in his discretion so orders)
> >
> > (5.) **Where in any action both legal and equitable issues are raised, they shall be heard and tried at the same time, unless the Court or a**

Judge thereof, or the Judge presiding at the trial, otherwise directs."
[emphasis added]

[66] My interpretation is that ordinarily civil trials, and in an action with both legal and equitable issues, issues of fact and damages were tried by a judge without a jury, unless a jury was sought or the judge so ordered. Before merger of the English courts of law and equity, the Supreme Court of Nova Scotia appears to have had jurisdiction to try legal and equity issues, but the rules of procedure for issues of equity were the rules of the English Court of Chancery, and the rules of procedure for legal issues were the English rules of the English Court of Queen's Bench. Nothing in the 1884 statute changed that.

[67] The *Revised Statutes of Nova Scotia*, 1900, Chapters 154 to 186, contain a more complete consolidation of the jurisdiction and practice of the courts of Nova Scotia.

[68] Chapter 155, *The Judicature Act*, provided:

a) "The Supreme Court of Nova Scotia as constituted before this Chapter a Court of common law and equity, possessing original and appellate jurisdiction in civil and criminal cases, shall continue under the aforesaid name to constitute one Supreme Court of Judicature for Nova Scotia." (Section 3)

b) "The Supreme Court shall have within this province the same powers as were formerly exercised by Her Majesty's Courts of Queen's Bench, Common Pleas, Exchequer and Chancery, in England; . . ." (Section 15)

c) Section 18 provided for the procedure in civil causes or matters in the Supreme Court in respect of law and equity. Subsections 1 to 5 basically provide that, in respect of equitable claims or remedies, the Supreme Court shall have the jurisdiction to consider and apply equitable principles in the same manner as the High Court of Chancery in England before the merger. Subsection 6 and 7 provided that the Supreme Court shall recognize and give effect to all legal claims, rights, duties, obligations and liabilities existing by the common law or created by any statute, in the same manner as recognized by the Supreme Court, either at law or in equity, before October 1st, 1884.

[69] The most relevant provision in respect of the issue before this Court is Section 42, which read in part:

"42. Subject to rules of court, the trials and procedure in all causes, whether of a legal or equitable nature, shall be as nearly as possible the same, and the following provisions shall apply:-
(1.) In civil actions, unless the parties in person or by their counsel or solicitor consent to a trial of the issues of fact or the assessment or inquiry of damages

without a jury, the issues of fact shall be tried and the damages assessed or inquired of **by a judge with a jury** in the following cases, that is to say-

...

(b.) Where either of the parties in an action, **other than an equitable action**, requires the issues of fact to be tried, or the damages to be assessed or inquired of with a jury, and files with the prothonotary and leaves with the other party or his solicitor a notice to that effect at least twenty days before the first day of the sittings at which the issues are to be tried or the damages assessed or inquired of: Provided that upon an application to the court or to a judge made before the trial or by the direction of the judge at the trial, such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice.

...

(3.) If in any action both legal and equitable issues are raised, they shall be heard and determined at the same time, unless the court or a judge, or the judge at the trial, otherwise directs, or unless under the foregoing provisions of this section either of the parties requires that **the legal issues of fact** be tried with a jury." [emphasis added]

[70] This section appears to have reversed the procedure in s. 20 of the 1884 statute in that, in the ordinary case, issues of fact and damages were determined by a judge with a jury, except in an equitable action. This provision clarified that in equitable actions, the trial was by judge without a jury. In actions raising both legal and equitable issues, they are heard together without a jury unless either party required the "**legal issues of fact**" to be tried by a jury. I read this to mean that the jury did not determine any issues of equity, including equitable issues of fact.

[71] Section 34 of the present *Judicature Act*, R.S.N.S. 1989, c. 240, (identical to s. 31 of the *Judicature Act*, c. 2 of S.N.S. 1972) read in part:

"34. Subject to rules of Court, the trials and procedure in all cases, whether of a legal or equitable nature, shall be as nearly as possible the same and the following provisions shall apply:

a) in civil proceedings, unless the parties in person or by their counsel or solicitors consent to a trial of the issues of fact or the assessment or inquiry of damages without a jury, the issues of fact shall be tried **with a jury** in the following cases:

...

(ii) where either of the parties in a proceeding requires the issues of fact to be tried or the damages to be assessed or inquired

> of with a jury and files . . . a notice to that effect . . . , except that, upon an application to the Supreme Court . . . , such issues may be tried or such damages assessed or inquired of by a judge without a jury, notwithstanding such notice,
> ...
>
> b) in all other cases the issues of fact or inquiry of damages in civil proceedings shall be tried . . . by a judge without a jury;
>
> c) if in any proceeding **both legal and equitable issues are raised**, they shall be heard and determined at the same time, unless the Supreme Court or a judge, or the judge at trial, otherwise directs or unless under the foregoing provisions of this Section either of the parties requires that **the legal issues of fact** be tried with a jury;" [emphasis added]

[72] The significant change from the 1900 provision is the omission of the phrase: "other than an equitable action" which was in s. 42(1)(b) of the 1900 *Act*.

[73] The Plaintiff argued that the wording in Section 34, taken in the context of the history of the relevant preceding statutory language, makes it clear that where legal and equitable issues are combined in the same action, a jury only determines the "legal issues of facts", and not the equitable issues, which issues, both prior to the merger of the courts of law with the courts of equity, and in accordance with the prior versions of the *Judicature Act* (after merger of the courts) - were determined both as to facts, and as to the exercise of discretion in granting relief, by judges alone.

D.5 Application of Equitable Principles to the Law of Contract and Tort

[74] Probably the most significant equitable principle is the equitable concept of unjust enrichment (**Peter v. Beblow** [1993] 1 SCR 980). An early application of the principle in Canada was the Supreme Court of Canada's decision in **Deglman v. Guaranty Trust Company and Constantineau** [1954] SCR 725, a case involving a claim to enforce an oral contract that did not meet the requisites of the Statute of Frauds. While refusing to give effect to the contract, the court awarded compensation on the basis of *quantum meruit*. The text, ***Restitution***, by G.H.L. Fridman, 2nd Edition (1992: Carswell) Chapters 1, 2, and 12 sets out scope and evolution of equitable principles and remedies in their application to claims formerly analysed in the context of contract and/or tort law to 1992.

[75] Successful litigants are entitled to legal remedies. The principal legal remedy is damages. ***McGregor On Damages***, 15th Edition, by Harvey McGregor (London: Sweet & Maxwell, 1988), c. 1.

[76] There is no entitlement to equitable remedies. They are granted by the discretion of court. By the very nature of equity, the remedies are unlimited. The principal equitable remedies are declaratory judgments, injunctions, specific performance or contract modification, accounting, rescission, estoppel, proprietary remedies such as constructive trusts and tracing, subrogation, and equitable liens.

[77] In an address on October 1st, 1997 to a National Judicial Institute conference of Justices of the Ontario Superior Court of Justice on the application and impact of judicial discretion in commercial litigation, Ontario Court of Appeal Justice Robert J. Sharpe made the following observation:

> "In recent years, there has been a marked trend away from strict rules and towards flexibility and importing into the law what can be described as broad moral principles of reasonableness, fair dealing and good conscience. These principles point the judge deciding a case in a certain way, but they lack the precision and certainty of black letter rules of law. Most of these doctrines spring from the tradition of equity. Historically, the common law was characterized by its relatively rigid rule-based approach, while equity, the "court of conscience", came along to relieve against the rigours of the common law. But it was never quite as simple as that because the common law method of developing rules in a case by case fashion has an inherent flexibility. The common law has gone through periods characterized by strict adherence to black letter doctrine and rigid application of rules, while at other times, it has emphasized the need for flexibility, growth and renewal. Equity as well has moved back and forth along the continuum. In its origins, equity was based on broad principles of morality and good conscience, but as experience was gained with the application of those principles, they tended to crystallize into rules and equity itself became rigid. By the late nineteenth century and early twentieth century, both the common law and equity appear to have reached this point. . . .
>
> In the latter part of the twentieth century, there has been something of a resurgence of the spirit of equity.
>
> . . .
>
> The Supreme Court has elaborated the unjust enrichment principle in broad terms, calling for the exercise of considerable interpretation and judgment to arrive at a result in any particular case: an unjust enrichment occurs when there has been a benefit conferred, a corresponding deprivation on the part of the party asserting the claim and the absence of any juristic reason, such as contract or disposition of law, which entitles the other party to retain the benefit.

> The Court has used similarly sweeping language to describe the equitable remedy of constructive trust, describing it as a "third head of obligation, quite distinct from contract and tort [. . .] an obligation of great elasticity and generality".
>
> . . .
>
> Reliance on broad statements of principle rather than strict rules arises not only from the desire for flexibility and the need to ensure justice in the particular case. It is also characteristic of the first step in a fundamental change in the law. When a new doctrine emerges, it may only be possible to sketch out in general terms. Over time, cases are decided, gaps are filled and there develops a body of doctrine. The good neighbour duty of care principle in negligence law pronounced by Lord Atkin in **Donohue v. Stephenson** provides an example of common law rule which began as a broad statement of principle. . . . I would suggest that the modern principles relating to fiduciary, unjust enrichment and constructive trust fall into a similar category."

[78] To similar affect is an address "Reflections on the Common Law" given by Supreme Court Justice Charles D. Gonthier to Dalhousie Law School on January 13th, 2001. He said in part:

> "An even clearer example of a trend toward reliance on broad principles as the basis of obligations in the common law can be found in the domain of restitution. Restitution or unjust enrichment has been touted by many doctrinal authors as the third logic of private law in addition to contract and tort.
>
> The notions of trust and fiduciary obligations and the remedies pertaining to them are the creatures of equity; they were developed by the Courts of Chancery to fill gaps in the common law and remedy perceived injustice. They constitute a distinct category of rights and obligations in addition to those arising in tort and contract.
>
> . . . I perceive . . . a movement in the common law to follow up the fusion of courts of law and equity with a tendency to look to both these systems to determine the most appropriate remedy and indeed for them to borrow from each other."

D.6 Civil Juries

[79] As noted above, in the pre-merger English courts of common law, all civil cases were tried by juries. The codification of civil procedure in Nova Scotia has clearly enabled litigants to continue to chose to have legal issues of fact tried by juries. Justice John C. Bouck noted in "*Civil Jury Trials - Assessing Non-pecuniary Damages - Civil Jury Reform*", 81 Canadian Bar

Review 494 (November 2002), that, at common law, the measure of damages has always been a question of fact. Harvey McGregor wrote in **McGregor on Damages**, at para.1792: “Where an action is heard by a judge and jury, it is the general rule that matters of law are for the judge and matters of fact for the jury. This rule applies equally to the issue of damages: the only difficulty lies in ascertaining when an issue of damages presents a question of law and when a question of fact.” To exemplify the confusion on this point, he suggests different courts have held that:

(a) the question of remoteness of damage are questions of law for the judge not the jury;

(b) the question of remoteness is for the judge and assessment of damages is for the jury; and,

(c) the question of remoteness is one of fact (para.1792A). Generally however he states that the assessment of damages is for the jury.

D.7 Nova Scotia Case Law

[80] The following is a summary of the Nova Scotia case law to which counsel have referred the court. A few of these decisions declare that Nova Scotia differs from other jurisdictions in its jealous protection of the *prima facie* right of litigants to have facts determined by juries. The analyses were quite brief. None of the decisions contained an analysis of:

(a) the history of the history of the role of juries in the courts of common law, or absence of any role in the court of equity (and after merger of the courts in respect of equitable issues by the unified courts); or

(b) the past and present legislation relating to juries and equitable claims and remedies; or

(c) the objects of the Civil Procedure Rules reflected in CPR 1.03.

A few of them cite section 34 of the Judicature Act, but even those that do, do not cite subsection 34(c), or its predecessor sections.

[81] Courts in other Canadian, English, and Commonwealth jurisdictions have analysed the right to a civil jury trial in the context of the objectives of rules similar to CPR 1.03 - to secure speedy, inexpensive and just (that is, fair) trials. Examples of the criticism of the effectiveness of civil juries in some circumstances (similar to those stated by Lord Denning in **James v. Ward**) include the 1973 Ontario Law Reform Commission “Report on Administration of Ontario Courts”, and the Report of the Royal Commission, Inquiry into Civil Rights (“McRuer Report”).

[82] Many of these jurisdictions have enabled legislation that is more explicit in enumerating the factors that are applicable to applications to strike civil juries, and in some cases limiting availability of jury trials. My reading of those decisions suggests that the factors considered by most courts, which included in some cases a review of the history of entitlement to civil jury trials under the common law, are essentially the same as are applicable to an analysis of s. 34 of the *Judicature Act* in the context of the statutory history of amendments to the procedures in the courts of common law and Court of Chancery, and objects of the Civil Procedure Rules as reflected in CPR 1.03.

[83] **"**The right of trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons." So wrote the Supreme Court of Canada in a motor vehicle negligence action (a legal, not equitable, claim): **King** v. **Colonial Homes Ltd.** [1956] S.C.R. 528.

[84] In Nova Scotia a party has a *prima facie* right to a trial by jury by virtue of the *Judicature Act*. This *prima facie* right should not be taken away lightly. (**MacNeil** v. **Hill the Mover (Can.) Ltd.** (1961) 27 D.L.R. (2d) 734 (N.S.C.A.).

[85] In the following decisions, the applications to strike the jury notice were dismissed:

a) **Isaac** v. **Harnacek**, 1974 CarswellNS 238 (NSSC). The claim was for specific performance of an Agreement of Purchase and Sale. Chief Justice Cowan wrote: "I agree with the proposition that the question as to whether or not specific performance should be granted is a question of law and it is one in which there is an element of discretion in the court. There are, however, issues of fact to be decided before the question of law arises, and before the discretion is to be exercised. Such issues of fact can be submitted to the consideration of a jury."

b) **Electrical Distributors Ltd.** v. **W.C.I. Canada Inc.**, 1992 CarswellNS 92 (NSSC). This was an action for breach of contract and misrepresentation. The Court of Appeal overturned the first jury trial results. In the Appeal Decision, Chipman, J.A. noted: "the lengthy and complicated contract dispute does not easily lend itself to resolution of trial with a jury." Based on this the Defendant applied to strike the jury. Justice MacAdam dismissed the application on the basis that Justice Chipman's observation did not mean that, merely because it is difficult to explain to a jury the law to be applied to the facts, a party should not be entitled to its substantive right to have a jury determine the facts.

c) **MacIntyre** v. **Nova Scotia Power Corp.**, 1995 CarswellNS 155 (NSSC). This case involved a claim for damages for negligence resulting in a fire. The Defendant sought to strike the jury on the basis that the engineering reports were complex with regard to the electrical theory and the causes of the fire. Justice Tidman held that acceptance of the cause of the fire would depend less on the extensive study of the reports than upon the ability of the experts to explain their reports and reduce technical

language and theory to understandable terms. An educated jury may be as capable as a single judge in understanding the evidence.

d) **Killorn** v. **Healthvision Corp**., 1996 CarswellNS 44 (NSSC). The Defendants applied to strike the jury in this wrongful dismissal action on the basis that the issue of the reasonableness of the notice was an issue of legal entitlement not suitable for a jury. Justice Goodfellow found no general rule that wrongful dismissal actions should be generally tried without juries. While entitlement was a legal issue, the factors that determined the reasonableness of the notice were factual. He was concerned because the application to dismiss the jury was not timely. He confirmed that a jury notice will be set aside where issues are primarily ones of law and the issues of facts are inseparable from issues of law.

e) **Wentzell** v. **Kydd**, 1997 CarswellNS 453. This was a claim for damages resulting from negligent medical treatment. Justice Hall disagreed with Justice Hallett's analysis in **Leadbetter** v. **Brand** (1979) 37 N.S.R. (2d) 660 to the effect that the expert evidence with regard to the cause of a cardiac arrest was too complex and scientific to be determined by a jury. Justice Hall concluded that the issues in **Wentzell** were not more complex than in most medical malpractice cases, and while at the beginning of a trial there may appear many and complex, by the conclusion of the trial the issues have been reduced to very few key and uncomplicated issues.

f) **Fickes** v. **Lamey**, 1999 CarswellNS 126 (NSSC). This was an action for negligent legal advice and representation. Justice Goodfellow dismissed the application on the conclusion that there were several factual issues that needed to be determined that could quite properly be addressed by a jury. The legal issues were easily separated from factual issues, and the jury could be easily instructed in the law respecting the jury's factual findings.

[86] A unique decision is **Tansley** v. **Gorman**, 1999 CarswellNS 188 (NSSC). The Plaintiff sued a lawyer for negligence in two (2) respects: (1) whether he should have retained a land surveyor; and, (2) whether he had a duty to advise the Plaintiffs to seek independent legal advice regarding an action against the Vendors. The Defendant's application to strike the jury was partially granted. MacAdam J. refused to strike the jury notice with respect to the first issue (retaining a land surveyor) on the basis that the issue was what instructions were given to the Defendant with respect to the survey - primarily an issue of credibility. He held that the second issue (the duty to seek independent legal advice) was primarily an issue of law or mixed law and fact that was more appropriate for a judge alone to determine; if the trial judge determined that an actionable claim existed, then the jury should determine what damages flowed from that claim.

[87] Because the action involved claims for damages for negligence, breach of contract and breach of fiduciary duty, the latter being an equitable claim, the Defendant claimed that this relief was barred from determination by a jury. The Defendant relied upon an Ontario decision.

MacAdam J. commented that there was no equivalent section to the Nova Scotia *Judicature Act* that would preclude equitable matters from being determined by a jury.

[88] On this issue, Kimball directed the Court to **Stuart** v. **Mott**, [1894] 23 S.C.R. 384. In that case, the plaintiff claimed a one-eighth share in the proceeds of the sale of a gold mine and payment on the principle of *quantum meruit*. The Appeal was from a trial without a jury. The Supreme Court noted that the question of inferring a contract was a question of evidence for the trial judge and the Supreme Court overturned the Court of Appeal which had overturned the trial judge on the basis that it was an issue of law. At Paragraph 5 the Court said:

> "It was therefore perfectly reasonable and quite in accordance with what is done every day by juries to imply from this that the Plaintiff was to be paid or in some way remunerated. The ordinary implication would of course be that payment upon the principle of a *quantum meruit* was what the Plaintiff was entitled to." [emphasis added]

[89] The following cases are examples where Courts in Nova Scotia have struck jury notices:

a) **Lintaman** v. **Goodman**, 1983 CarswellNS 100 (NSSC). At Paragraph 4, Justice Burchell wrote:

> "It is clear from the pleadings and from the submissions of counsel that a very considerable volume of evidence will be presented at trial. It appears, however, that the evidence will consist, for the most part, of documents, and that neither their existence nor the circumstances of their preparation and execution are really in dispute. What is disputed is the legal effect of the documents and transactions to be reviewed and, with one possible exception (a question of what may have been a reasonable notice period under a debenture), the questions that arise are question of law rather than questions of fact. Even the one possible exception I have mentioned seems at most to be a mixed question of law and fact. . . .where possible, questions of fact should be separated from purely legal issues and such questions of fact should be left for the jury. . . . In the present case I do not see how such a separation can be made in any useful or practical way."

b) **Barrow** v. **Keating** (No. 2), 1985 CarswellNS 71 (NSSC). The essence of Justice Nunn's decision is contained in Paragraphs 12 to 16. At Paragraph 12 he found the essential issues of fact to be:

i) was the verbal agreement a moral commitment and did include a cash equivalent term;

ii) the authenticity of a document bearing the signature of the Defendant (which the Defendant denied); and,

iii) whether the holding of a secret interest in a company was a wrong or illegal act.

In Paragraph 14 he states the action involved a number of major issues of law concerning a complex and well-documented contractual relationship in a specialized and complicated area that would involve prolonged examination of documents, income tax consideration and other technical rules. At Paragraph 16, he said:

> ". . . any issues of pure fact are negligible in contrast to the whole of the action. Even though the determination of a particular fact may be important, as is alleged by the Defendant here, that does not detract from its being a negligible part of the whole case. Negligible here is used in the sense of a small part of the Defendant's case rather than the degree of importance."

c) **A. D. Smith Lumber Ltd.** v. **General Homes Systems Ltd.**, 1986 CarswellNS 186 (NSSC). An action was brought for breach of contract. Justice Grant noted that Nova Scotia courts jealously guard a litigant's right to have issues of fact and/or damages assessed by a jury. He found that from the materials before him the issues to be determined primarily related to the interpretation of various documents including a letter and as such were questions of law. He concluded that any questions of fact were difficult to isolate and were very clearly interwoven with the issues of law and he could not see how such a separation of the issues of the fact in that case could be made in any practical or useful way.

d) **Roby Estate** v. **Buley**, 1989 CarswellNS 399 (NSSC). In this action an estate claimed that the defendant held an interest in property upon a resulting trust or constructive trust in favour of the defendant and was unjustly enriched, for which restitution and a declaration were sought as remedies. At Paragraphs 25 and 26, Justice Tidman found that the factual issues to be decided by a jury were limited and that after determining these factual issues, the legal or equitable effects of these facts must then be determined. He stated:

> "If the action is tried by a jury the equitable concepts of resulting trust, constructive trust, and unjust enrichment, all difficult concepts for legally trained minds to understand, must be explained to the jury who must first understand then apply those concepts to the facts." (Paragraph 25)

> "It would, in my view, indeed be a difficult exercise for counsel and a judge to finally settle on proper questions to be put to a jury on all of the issues set out in the plaintiff's statement of claim. It would be an even

> more difficult intellectual exercise for a judge to properly instruct a jury on the law applicable to all of the issues to enable a jury to fully understand and then properly apply the law to the facts of the case."
> (Paragraph 26)

e) **Begg** v. **Halifax (County)**, 1997 CarswellNS 123 (NSCA). The Court of Appeal declined to interfere with the exercise of discretion of the Chambers judge who held that the issues in that case (a claim for breach of contract, negligent misrepresentation and unjust enrichment) concerned primarily the interpretation of tender documents in the contract, and would involve questions of law that were inappropriate for consideration by a jury.

E. Analysis

[90] Only three of these Nova Scotia decisions quote Section 34 of the *Judicature Act* (**MacNeil**, **Isaac**, and **Roby Estate**). None of these decisions explore the history of the wording of Section 34, or quote (or analyse) subsection 34 (c), which subsection contains the limitation on issues to be tried by a jury, in actions with both legal and equitable claims, to legal issues of fact.

[91] Only four (4) of these cases involved an equitable issue, or contain comments about the relationship between equitable actions and juries. These were **Barrow**, **Roby Estate**, **Behune** and **Tansley**.

[92] **Re Fraser**, 1981 CarswellNS 112 (NSSC), cited in **Barrow** and **Roby Estate,** involved a plaintiff's application to strike a jury notice in an action under the *Matrimonial Property Act*. Chief Justice Cowan acknowledged the *prima facie* right of the defendant to a jury trial, per **MacNeil** v. **Hill The Mover (Canada) Ltd.** and **Cannon**, and **King** v. **Colonial Homes Ltd.** He reviewed the authority given to Courts in Sections 10 to 13, 15 and 18 of the *Matrimonial Property Act*. He concluded at Paragraph 18:

> "It will be seen that the various sections of the *Act* give wide powers to a court and, in many cases, these powers are discretionary in nature and that discretion is to be exercised on the basis of certain determinations made by the court. In my opinion, the determination of these questions and the exercise of the various discretionary powers conferred on the court by the *Act*, are not appropriate for determination or exercise by a jury."

[93] In **Barrow**, Justice Nunn struck a jury notice in an action respecting ownership of shares. The Plaintiff sought a declaration of ownership based on a secret trust, specific performance (that is an order transferring the shares), and an accounting of profits and dividends to the Defendant. There were a few factual issues including an allegation of a verbal agreement (which was denied) and a denial that a document contained a party's signature (Paragraph 12). The case

also involved a prolonged examination of documents (Paragraph 14). The claim and the remedies sought were clearly equitable in nature. Justice Nunn held (Paragraph 16) that it was unnecessary to consider at length whether the issues were severable so that a jury could determine the facts, because any determination of all but one of the facts in issue necessarily involved an understanding of a number of major issues of law concerning a complex contractual relationship involving a prolonged examination of documents. On that basis he struck the jury notice.

[94] At paragraph 18, in discussing the Plaintiff's submission that the notice should be struck on the basis of the equitable issues, he said:

> "Having reached this conclusion it is unnecessary for me to consider the additional ground submitted by the plaintiff which contends that, because the remedies sought here are equitable thereby involving the exercise of judicial discretion, it is appropriate for the Judge alone to determine the facts upon which that discretion is based. While this principle seems to be accepted in other jurisdictions, where the right to a jury trial is different from Nova Scotia, it has never been given general application here. Cowan C.J.T.D. in Re Fraser; Fraser v Fraser (1981), 44 N.S.R. (2d) 150, 83 A.P.R. 150 (N.S.T.D.) did apply that principle when considering whether a person was entitled to a jury trial concerning matters to be determined in an action under the Matrimonial Property Act, S.N.S. 1980, c. 9. Since I have decided to strike out the jury notice for other reasons, I decline to deal further with whether or not this principle should apply in this case."

[95] In **Roby Estate**, an estate claimed ownership of an interest in a home owned in joint tenancy by the deceased and her husband on the basis of resulting trust, constructive trust or unjust enrichment. Justice Tidman struck the jury notice. He acknowledged the *prima facie* right to a jury trial which should not be taken away lightly and only if the case was not suitable for a jury trial. He noted **Barrow**, **Fraser** (citing specifically paragraph 18), and the unreported appeal of **Fraser**. His conclusions relevant to this issue are contained in Paragraphs 25, 26 and 34:

> "In this case the factual issues which may be decided by the jury are limited to what the defendant and deceased did or did not do. After having decided those factual issues the legal or equitable effect of those facts must then be determined. The law must be extensively canvassed and judicial discretion exercised in order to make such determinations. If the action is tried by a jury the equitable concepts of resulting trust, constructive trust, and unjust enrichment, all difficult concepts for legally trained minds to understand, must be explained to the jury who must first understand and then apply those concepts to the facts. Additionally, the legal questions of joint tenancy and tenancy-in-common must be dealt with as well as the questions under the provisions of the *Matrimonial Property Act*.

> It would, in my view, indeed be a difficult exercise for counsel and a judge to finally settle on proper questions to be put to a jury on all of the issues set out in the plaintiffs' statement of claim. It would be an even more difficult intellectual exercise for a judge to properly instruct a jury on the law applicable to all of the issues to enable a jury to fully understand and then properly apply the law to the facts of the case.
>
> . . .
>
> Even if that were not so, the major issues to be decided in this case other than those under the *Matrimonial Property Act* are of a legal and equitable nature far outweighing the factual matters to be decided. That, in combination with the court's decision in *Fraser*, justifies the striking of a jury notice in this case and I would so order."

[96] In **Behune**, the issue was the validity of a deed allegedly signed by the Respondent because of undue influence by the Appellant. The Appellant argued that nine (9) factual questions asked of and answered by the jury were not such as to enable the trial judge to set aside the Deed on a finding of undue influence. In dismissing the Appeal on the basis that it raised no reversible error of law, the Court wrote at Paragraph 12:

> "Equitable issues such as those that arise in the application of the doctrine of undue influence are permitted to be placed before a jury in Nova Scotia (see *Judicature Act*, R.S.N.S. 1989, c. 240, s. 34). This jury was entitled to make findings of fact upon which Justice Edward was in turn entitled to apply the law. Where there is evidence in support, the reasons and conclusions reached by a jury are to be given every reasonable breadth of interpretation and application."

[97] It is not apparent from the decision that the Appellant challenged the right of the jury to make factual findings upon which the trial judge reached a legal conclusion.

[98] **Tansley** is summarized in paragraph 86 of this decision. Justice MacAdam cited Grant J.'s statement in **A.D. Smith** that Nova Scotia was unique in that trial by jury was a right, and not a privilege as in other jurisdictions. He acknowledged that in **Roby Estate** Justice Tidman determined the issues to be of a legal and equitable nature as opposed to a factual nature. In effect, MacAdam J. severed the issues, allowing the jury to hear all of the evidence in order to answer the first negligence issue and in order to be able, if the trial judge determined liability against the defendant on the second issue, to assess the damages.

[99] At Paragraph 38 and 39 he dealt with the defendant's argument that because equitable relief was sought, the trial should be by judge alone. This argument was based on **Kaufman** v. **Nesbitt Burns Inc.** (1998) 72 O.T.C. 147. Justice MacAdam noted:

> “. . . it is evident he makes specific reference to *Section 108(2)* and says it precludes trial by jury in respect of twelve enumerated kinds of relief, “all of which are rooted either in equity or in statute.” It is clear that in respect to the claim for equitable relief the decision of Justice Sills was founded on the existence of *Section 108(2)* of the *Courts of Justice Act of Ontario*. For reasons relating to the complexity and nature of the issues, in respect to alleged breaches of regulatory, professional and industry standards, Justice Sills struck the jury. However, in respect to the claim for equitable relief, his decision is founded on the existence of a statutory provision that does not exist in Nova Scotia and therefore the decision has no application in these circumstances.”

[100] The analysis in other provinces is made easier because of the clarity of their legislation respecting the common law right to a jury, but this does not remove the obligation to analyse the modification of the practice and procedure respecting the right to a jury trial on equitable issues in Nova Scotia. This appears not to have occurred in any of the decisions cited by the parties.

[101] Section 34 of the *Judicature Act* is not as clear as section 108(3) of the Ontario legislation referred to in **Kaufman**; however, Section 34, specifically subsection (3), states that in proceedings raising legal and equitable issues they shall be heard and determined at the same time, unless the Court directs otherwise, or either party requires the <u>legal issues of fact</u> to be tried by a jury. The right to a jury trial in Nova Scotia depends upon the interpretation of ‘the words in the Act read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of [the Legislature].’ **Re Rizzo and Rizzo Shoes Ltd** [1998] 1 SCR 27.

[102] The plain meaning of subsection 34(3), is that equitable issues, including equitable issues of fact, are not for juries - only legal issues of fact are for juries, in any proceeding where both legal and equitable issues are raised. This plain meaning is reinforced when one looks at the history of the right to trial by jury in civil actions in Nova Scotia, and in England beforehand. There never existed a right to have equitable issues, including equitable issues of fact, determined by a jury. As noted by Ruth Sullivan in ***Sullivan and Dreidger on the Construction of Statutes***, 4th Edition (Butterworths, 2002), c. 13, an existing common law rule, remedy or jurisdiction may be changed, added to or abrogated but the resulting legislation is meant to be integrated into the evolving common law (page 339). Furthermore, although legislation is paramount, it is presumed that legislatures respect the common law (page 341). While the few decisions cited above contain cursory statements, mostly as obiter, suggesting that equitable issues are and have always been appropriate for civil jury trials, none of these decisions contain an analysis of Section 34(3) or any of the modifications of the practices and proceedings in relation to civil juries in Nova Scotia or their origins in English practice.

[103] On that basis it is appropriate to analyse whether, pursuant to Section 34, it is appropriate on the evidence before this Court for a jury to determine:

A. In respect of Geophysical’s claim:

A.1 What the contract between the parties was; and,
A.2 Which of the equitable remedies claimed might be appropriate for a jury as opposed to a judge to determine.

B. In respect of Kimball's counterclaim:
B.1 Whether it is appropriate for a jury to determine what conversations and documents relating to profit sharing occurred;
B.2 Whether these conversations and documents created a legally binding contract; and,
B.3 If so, what profit sharing arrangement, as a matter of discretion, should be imposed on the Plaintiff.

[104] With respect to A.1, the determination of what the contract was will include both an assessment of the credibility of Mr. Einarsson and Mr. Kimball respecting their oral discussions, as well as a prolonged examination of huge volumes of documents including financial records.

[105] Credibility, an important element of the first aspect of A.1, is an appropriate issue for a jury. Prolonged examination of huge volumes of documents and financial documents, the second aspect of A.1, is a matter of concern. The court does not take issue with the defendants' position that Geophysical's forensic accounting report is not so complex as to overwhelm a jury; however, to date, there was been no agreement between the parties with respect to the boxes of production demanded and produced by the parties that are likely to be presented at the trial. The volume and nature of the documents and financial information, as described in the affidavit and supplementary affidavit filed with this application, is overwhelming. Unless there were an agreement, which has not yet occurred, the presentation of any significant portion of those documents would unreasonably prolong and complicate a judge alone trial, and to a much greater extent, a jury trial.

[106] In the context of *Civil Procedure Rule* 1.03, and based on a review of such Nova Scotia decisions as **Lintaman** (Paragraph 4) and **Barrow** (Paragraph 14), the potentially daunting volume of documents suggest that a jury trial would not be appropriate. In addition, it appears that many documents are likely to relate to the remedies, especially the equitable remedies, sought by the parties. It is not just, speedy or inexpensive, and would be inefficient and confusing to have a jury sit through prolonged evidence respecting matters of remedies that they will not determine.

[107] With respect to the remedies claimed by Geophysical (A.2), Geophysical seeks a determination of the extent to which they claim they were over-billed by and over-paid Kimball pursuant to a contract. On its face, this is a matter that is appropriate for a jury. However, Geophysical claims several equitable remedies in order to enforce its claims against the Defendant including restitution, a finding of a constructive trust, and an equitable tracing to third parties. All these remedies are of an equitable nature and require the exercise of judicial discretion not appropriately exercised by a jury. The exercise of such judicial discretion by juries has never existed in the English court system and is not in accord with my reading of the

past and present versions of the *Judicature Act*. The very basis of the court of equity in England, as reflected in the analytical approach of Chief Justice Cowan in **Fraser** - the exercise of judicial discretion, is the reason why it is not appropriate for a jury to determine the equitable remedies requested. The remedies in this case are not inconsequential. They are as, if not more, significant than the determination of the contents of the contract.

[108] Equitable remedies are not generally a matter of entitlement. They are discretionary, based on criteria of mixed law and fact that are more fairly and uniformly determined by judges than by juries. They are remedies for which reasons, a growing requisite for confidence in the court system, should be given.

[109] With respect to the counterclaim (B.1), it is appropriate for a jury to determine what conversations took place between the parties respecting profit sharing.

[110] Whether these conversations, taken together with the "letter agreements", constitute a legal agreement (B.2), in the absence of any agreement as to the terms for profit sharing, is primarily an issue at law, or at best, a complex issue of mixed law and fact. It is difficult to project any role for a jury in respect of this issue. I do not see how or what questions could properly be put to the jury that would not also involve the assessment of the law.

[111] My observation is the same as that expressed by Justice Grant in **A. D. Smith Lumber** at Paragraph 17:

> "I have reviewed the material before me in detail and I cannot see how such a separation can be made in any practical or useful way. It may be that there is an issue or issues of fact in this case. If there are, they are difficult to isolate and are very clearly interwoven with the issues of law."

[112] This observation is similar to that of Justice Burchell in **Lintaman** (Paragraph 4) and Justice Tidman in **Roby Estate** (Paragraph 25).

[113] With respect to B.3, the defendants say that, in the absence of any agreement as to the terms for profit sharing, the Court may award damages based on *quantum meruit* and not on any equitable principles. Based on the affidavits before the Court, assuming an legal agreement to share profits was reached, there is no evidence upon which a judge or jury could determine that a consensus was reached as to the terms of such profit sharing, such as when and on what basis profit sharing would occur. Whatever the wording in Paragraph 13(f) of the Amended Defence and Counterclaim, the only basis, on the uncontradicted facts in the affidavits, upon which a Court could grant a remedy to the defendants is on the equitable principle most commonly identified as unjust enrichment. By whatever description, in the absence of an agreement on the terms of any profit sharing, the relief is a discretionary or equitable remedy obtained under what Justice Gonthier, and other text writers call, the "third logic of private law".

[114] It is possible to sever the determination of issues as between judge and jury, as described in **Isaac** and **Tansley**. I have considered whether it would be appropriate on the facts of this case to dismiss the application to strike the jury on the basis that the first question to be answered in respect of both the claim and the counterclaim (A.1 and B.1) involve, in part, an assessment of credibility. Relevant to this question is Justice Nunn's analysis in **Barrow**:

> "Even though the determination of a particular fact may be important, as is alleged by the defendant here, that does not detract from its being a negligible part of the whole case. Negligible here is used in the sense of a small part of the defendant's case rather than the degree of importance." (Paragraph 15)

His observation applies to the circumstances of this case.

[115] Other factors suggesting that severance of the issues, so as to retain trial jury for the minor (in terms of time and evidence), limited, but important issue of fact (i.e. credibility), is not an appropriate remedy include:

a) All of the issues respecting remedy, which include, in respect of both the claim and counterclaim, very substantial and complex claims for relief, are claims of an equitable nature in which judicial discretion plays a significance role.

b) Whether the discussions between the parties resulted in a legal contract to profit share involve complex issues of mixed law and fact not easily explained to a jury.

c) The volume of documents and financial records, the admissibility, accuracy, relevance and meaning of which have not yet been agreed between the parties is so vast as to make a long trial without a jury, substantially longer with a jury. Much of this evidence would have little relevance to the two issues which are appropriate for a jury.

[116] In summary,

(a) the legal issues of fact (A.1 and B.1) are relatively small parts of the case in terms of all the evidence. The trial will involve prolonged examination of many documents and financial records of little relevance to the legal issues of fact.

(b) the significant remedies sought (especially in respect of the counterclaim) are of an equitable nature, for which judicial discretion and complex issues of mixed law and fact are central. They will involve prolonged examination of documents and financial records.

(c) recognizing that legislation respecting court practice and procedures since merger of the courts of common law and of equity has not been as explicit in Nova Scotia as elsewhere, the application of the rules of interpretation of statutes to the *Judicature Act*, and the whole of s. 34, both grammatically and in the context of the history of the Act and the origins of the practices of the courts of common law and equity, supports the conclusion that equitable issues of law, fact and remedy are not matters properly or historically for determination by juries.

[117] To this is added the objective of Civil Procedure Rules, the authority for which is found in section 47 of the *Judicature Act*, and the purpose of which are to implement the common law practices and procedures modified by the Act - to secure the just, speedy and inexpensive determination of every proceeding.

[118] For these reasons, the application to strike the jury notice is granted.

J.