SUPREME COURT OF NOVA SCOTIA

Citation: Little Island Fisheries Ltd. v. Royal Harbour Seafoods Inc., 2009 NSSC 301

Date: 20091102
Docket: Hfx. No. 312627
Registry: Halifax

Between:

Little Island Fisheries Limited, Allot Fisheries Limited, Black Knight Fisheries Limited, Valley Princess Fisheries Limited, Lady Marielle Fisheries Limited, Steven P. Fisheries Limited, 1883811 Nova Scotia Limited (formerly known as Seaman's Toy Fisheries Limited), Kelly Lynn Fisheries Limited, Derek D'Ent Fisheries Limited and C&B Fisheries Limited, each being a body corporate with its head office at Lower West Pubnico, Yarmouth County, Nova Scotia (hereinafter referred to as "Little Island" or "Little Island Group")

Plaintiffs/Moving Party

- and -

Royal Harbour Seafoods Inc., a company established under the laws of Canada with head office in the Province of Quebec, Royal Harbour Seafoods LP, a limited partnership established under the laws of the Province of New Brunswick, and registered to carry on business pursuant to a Certificate of Registration issued by the Province of Nova Scotia on the 15th day of April, 2009, Royal Harbour Seafoods General Partner Inc., a corporation established under the laws of the Province of New Brunswick, in its capacity as the general partner of Royal Harbour Seafoods LP, (hereinafter collectively referred to as "Royal Harbour"), Joel Comeau and Howard d'Entremont

Defendants/Respondents

- and -

Derek d'Entremont, Michael d'Entremont, Arnold d'Entremont, Roseanne Fiorello, Gilbert d'Entremont, Nova's Finest Fisheries Inc., Charlesville Fisheries Ltd., and Inshore Fisheries Limited

Third Parties

Judge: The Honourable Justice Frank Edwards

Heard: September 30 and October 1, 2009, in Halifax, Nova Scotia

Counsel: Peter Rogers, Q.C. & Ian Dunbar, for the moving party
R. Gary Faloon, Q.C., for the respondents

By the Court:

[1] Little Island has made a motion for partial summary judgment on its claim against Royal Harbour.

[2] Little Island seeks summary judgment for $1,021,595.70 on account of a debt owed to it by the Defendant Royal Harbour. The majority of the debt consists of the following:

> 1) Royal Harbour purchased $584,828.37 in product from Little Island in April and June, 2009 and has failed to pay for it;
>
> 2) In May and June, 2009, Royal Harbour took control of $495,324.09 in inventory from Little Island and has sold, kept or used almost all of it; and
>
> 3) Little Island incurred $93,938.24 in operating expenses during May and June, 2009. Royal Harbour has failed to pay those expenses.

[3] From November 24, 2008 onward, Royal Harbour has received revenue from the sales of Little Island's product to third parties and made money using Little Island's facilities and quota. Yet Royal Harbour has not paid Little Island.

[4] Royal Harbour must pay Little Island for the debts it has incurred. The debts are not owed as a consequence of the Sale Agreements in dispute between the

parties, but arise from other agreements between the parties which have not been rescinded.

[5] ***Facts:*** The material facts of this matter (which I accept as accurate) are set out in the Moving Party's brief which references the Affidavits of Derek d'Entremont and Roseanne Fiorello, CA. The Respondent has filed the affidavit of Joel Comeau, President of Royal Harbour Seafoods Inc. and Royal Harbour Seafoods General Partner. He is also a principal in Royal Harbour Limited Partnership Inc. I have interjected some additional findings and analysis as required (e.g. para. 13 below).

[6] Little Island is owned by four shareholders, Derek d'Entremont, Arnold d'Entremont, Howard d'Entremont and Michael d'Entremont.

d'Entremont Affidavit, Exhibit "K", para. 6

[7] On October 3rd, 2007, Little Island entered into an exclusive Processing and Marketing Agreement with Royal Harbour.

d'Entremont Affidavit, Exhibit "K", para. 6

[8] On August 1st, 2008, Little Island entered into a Memorandum of Understanding to sell its assets to Royal Harbour. On November 24th, 2008, Little Island and Royal Harbour entered into a Management Agreement whereby Royal Harbour was to manage Little Island's business, pending an anticipated closing date for the purchase of Little Island's assets, of January 1st, 2008.

d'Entremont Affidavit, paras. 12-16

[9] The Management Agreement between the parties was intended as a short-term arrangement and contemplated the purchase of Little Island's assets and quota by Royal Harbour within a matter of weeks.

d'Entremont Affidavit, Exhibit "D"

[10] On March 27th, 2009, the parties entered into Purchase and Sale Agreements for the assets and quota of Little Island.

d'Entremont Affidavit, para. 18

[11] Although Royal Harbour managed Little Island under the Management Agreement from November 24th, 2008 to April 30th, 2009, the companies maintained separate accounts, assets, employees, inventory and equipment. Little

Island continued to process for Royal Harbour under the Processing Agreement as it had before.

d'Entremont Affidavit, para. 20

[12] On April 29th, 2009, Little Island, Royal Harbour and Little Island's accountants had a conference call. On that call, Royal Harbour agreed to pay Little Island's receivables when Royal Harbour's own line of credit was activated on April 30th, 2009. Mr. Comeau also agreed to pay Little Island's expenses beginning May 1st, 2009. Royal Harbour and Little Island also agreed that customers would pay Royal Harbour for all purchases made from May 1st, 2009 onward, instead of Little Island. Effectively, Royal Harbour was to take full control of Little Island, and receive all of its revenue, and pay all of its expenses, as of May 1st, 2009. Comeau disputes this interpretation saying that Royal Harbour paid Little Island’s expenses only in contemplation of the intended closing and would not have paid them otherwise (Comeau para. 25).

d'Entremont Affidavit, para. 27
Fiorello Affidavit, para. 7
d'Entremont Affidavit, Exhibit "K", para. 6

[13] That claim ignores the fact that Royal Harbour was paying the expenses of processing Little Island’s product which Royal Harbour was then selling,

presumably at a profit, to third parties. Royal Harbour has submitted no evidence regarding its revenue from Little Island product. Its failure to do so turns its plea about expenses into a red herring. One can only infer that Royal Harbour benefited by paying Little Island's expenses because that enabled Royal Harbour to realize a profit from the processed product.

[14] Royal Harbour paid Little Island's receivables posted as of April 30th, 2009, however, at that time Royal Harbour had not issued POs for the majority of its purchases from Little Island in April, 2009 so those purchases did not appear as receivables on Little Island's books on April 30th, 2009.

Fiorello Affidavit, para. 8

[15] Royal Harbour purchased $545,120.11 in fish from Little Island in April, 2009 (the "April Fish"). Once Royal Harbour had paid the receivables posted as due to Little Island as of April 30th, 2009, it then issued all of the POs for the April Fish. Royal Harbour has not paid for the April Fish, in whole or in part.

Fiorello Affidavit, para. 5 - 10

[16] Royal Harbour also did not pay all of Little Island's expenses from May 1st, 2009 onward as it had agreed to do in the conference call of April 29th. In particular, it has not reimbursed Little Island for certain payroll and remittances, and other operating expenses, incurred between May 1st, 2009 and June 30th, 2009.

d'Entremont Affidavit, para. 48
Fiorello Affidavit, para. 50 - 71

[17] Little Island had a substantial inventory of frozen fish, fresh fish, lobster and fish and lobster packaging when Royal Harbour took complete control of its operations on May 1st, 2009. During May and June, 2009, Royal Harbour sold most of this product or moved it out of Little Island's facility, without paying Little Island.

d'Entremont Affidavit, para. 47
Fiorello Affidavit, para. 15 - 49

[18] On May 22nd, 2009, Little Island notified Royal Harbour that the Quota Lease and Purchase Agreement was rescinded, which had the effect of terminating the Asset Purchase Agreement, which released Little Island of any further obligations under the Management Agreement and Processing Agreement. The Quota Lease and Purchase Agreement was rescinded due to certain alleged fraudulent representations by Joel Comeau, President of Royal Harbour.

d'Entremont Affidavit, para. 30

[19] Royal Harbour commenced an Application for specific performance of the Sale Agreements. On June 15th, 2009 it sought an injunction in Chambers before the Honourable Justice LeBlanc. The injunction sought by Royal Harbour would prevent Little Island's rescission and would maintain the Management Agreement pending a full hearing on the merits. Royal Harbour's motion was originally commenced as an emergency hearing, but was adjourned following the agreement of the parties to maintain the Management Agreement pending the outcome of the Injunction motion (the "Standstill Agreement").

d'Entremont Affidavit, para. 32

[20] At the hearing before Justice LeBlanc, Mr. Comeau testified to the following on cross-examination:

> -Prior to May, 2009, Little Island was paid on an ongoing basis for fish sold by Royal Harbour (Q. 364).
>
> - Royal Harbour was supposed to pay for the April Fish at the end of May, but had not done so at the time of the hearing on June 15th, 2009 (Q. 332/3)
>
> - Royal Harbour sold the fish it obtained from Little Island to third parties (Q. 346/7)

- Royal Harbour had agreed to reimburse Little Island for its employees' wages under the Management Agreement (Q. 444)

- The amount of money owing by Royal Harbour to Little Island at the time of the Injunction motion, per Exhibit "A" to Ms. Fiorello's Affidavit, was approximately $1.1 million (Q. 334/5)

- That Mr. Comeau assumes that Ms. Fiorello's calculations of the amount owing up to May 21, 2009 are correct (Q. 394/5) (Though he now says that he believes she is mistaken.)

- That Royal Harbour had purchase orders and was in a position to confirm the full amount owing to Little Island, but had not done so as of June 15, 2009, despite having had Little Island's summary of accounts for some time (Q. 396/7)

- Mr. Comeau said Royal Harbour had not paid Little Island because the Sales agreements had not closed (Q. 336). However, Mr. Comeau also admitted that if those agreements did not close, Royal Harbour would not get the fish it took from Little Island for free (Q. 381). Mr. Comeau further said that Royal Harbour would pay Little Island the amount it was owed, but only when ordered to do so by the Court (Q. 380-82)

[21] On June 18, 2009, the Honourable Justice LeBlanc decided that Royal Harbour was entitled to an Injunction. However, his Lordship's grant of the Injunction was subject to certain conditions, most notably that Royal Harbour must keep its accounts current with Little Island.

d'Entremont Affidavit, para. 36

[22] Hearings were held to finalize the terms of the Injunction Order during the week of June 22, 2009. In the interim, Little Island continued to operate under the Standstill Agreement and Management Agreement.

d'Entremont Affidavit, para. 37-38

[23] The Injunction Order issued by the Learned Chambers Justice on June 26, 2009 required Royal Harbour to pay the following sums:

> - $450,000.00 within three (3) calendar days of the Order
>
> - $178,500.11 within fifteen (15) calendar days of the Order
>
> - $73,622.58 within seven (7) calendar days from the date Little Island assigned a certain quota to Chester Basin Seafoods
>
> - ***$135,000 within ten (10) calendar days from the date Little Island assigned its remaining frozen fish inventory to Royal Harbour*** (Emphasis mine)
>
> - $150,000.00 within thirty (30) calendar days from the date Little Island assigned a certain quota to Royal Harbour
>
> - Payroll and other expenses on an ongoing basis

d'Entremont Affidavit, Exhibit "J"

[24] Little Island assigned the remainder of its inventory to Royal Harbour on June 26th, 2009. On June 26 and 27, 2009, Royal Harbour took the remainder of

Little Island's saleable inventory from Little Island's Pubnico facility and shipped it offsite to cold storage.

Fiorello Affidavit, para. 21

[25] Just three days later, Royal Harbour notified Little Island on June 30th, 2009 that it would agree to vacate the Injunction. It did not pay Little Island any of the sums it was ordered to pay by the Learned Chambers Justice, nor has it paid any of Little Island's outstanding accounts. In particular, it did not pay Little Island the $135,000.00 for the inventory it had taken just three days earlier. On June 26 and 27, I am satisfied that Royal Harbour took product (which it has since sold) with no intention of paying for it. Royal Harbour had to have known that it would likely be abandoning the injunction (and therefore its intention to buy Little Island).

[26] As outlined in the Affidavit of Ms. Fiorello, Royal Harbour currently owes Little Island the following debts:

> - $584,828.37 for product Royal Harbour purchased from Little Island in April and June, 2009 and has failed to pay for.
>
> - $495,324.09 for fish, lobster, and fish and lobster packaging which was in Little Island's possession on April 30, 2009. This

> figure represents the agreed upon value of the inventory less approximately $29,000.00 in handling fees.
>
> - $93,938.24 for operating expenses, including payroll, electricity, and remittances, incurred by Little Island under Royal Harbour's management during May and June, 2009. Royal Harbour has failed to pay those expenses, despite having agreed to do so on the April 29th, 2009 conference call.
>
> Fiorello Affidavit, Exhibit "A"

[27] The above debts have been offset by a credit of $152,505.00 to Royal Harbour. The total Royal Harbour owes Little Island, net of debits and credits, is $1,021,595.70 as of August 31st, 2009.

Fiorello Affidavit, Exhibit “A”

[28] ***Law and Argument***: This application is brought pursuant to Rule 13.04 of the Nova Scotia Civil Procedure Rules. That rule says:

> 13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and

> the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[29] Rules 13.05 and 13.06(1) are also relevant to this matter. Those rules say:

> 13.05 (1) A judge hearing a motion for summary judgment on evidence must grant judgment for an amount to be determined, if the only genuine issue for trial is the amount to be paid on the claim.
>
> (2) The judge may determine the amount, or order an assessment, accounting or reference.
>
> 13.06 (1) An order for summary judgment may provide any remedy the court provides on the trial or hearing of a proceeding.

[30] ***Test for Summary Judgment:*** Recent decisions of Canadian Courts have clearly articulated the test applicable to an application for summary judgment. In ***Hercules Managements Ltd v. Ernst & Young***, [1997] 2 S.C.R. 165, the Supreme Court of Canada discussed the test at paragraph 15:

> The question to be decided on a Rule 20 motion ***is whether there is a genuine issue for trial***. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the Rule, establish his claim as being one with a real chance of success. [emphasis added]

[31] Justice Cromwell affirmed the above test at paragraph 8 of ***Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)***, 2007 NSCA 38:

> Summary judgment is appropriate when a defendant shows that there is no genuine issue of material fact requiring a trial and a responding plaintiff fails to show that its claim is one with a real chance of success: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27.

[32] Applying the Hercules test, Little Island must first establish that there is no genuine issue of material fact requiring a trial of this matter. Royal Harbour must then establish that its defence has a real chance of success.

[33] If the material facts are undisputed on an application for summary judgment, the Court must apply the law to those undisputed facts. In ***Eikelenboom v. Holstein Assn. of Canada*** (2004), 226 N.S.R. (2d) 235 (C.A.) our Court of Appeal considered a case where the Learned Chambers Judge found that the material facts of the case were clear and undisputed but refused to apply the law to

those undisputed facts. Our Court of Appeal decided the application in her stead, and said the following at paragraph 30:

> ***For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered would it be possible to decide if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute.*** The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. ***This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred***. This is precisely what occurred in Gordon Capital, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > ***The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding***.
>
> For the reasons stated, this motion is one that required an application of the law to the undisputed facts. The Chambers judge erred in declining to resolve the matter before her by way of summary judgment. As cases like Hercules and Gordon have shown, while such an analysis may well be difficult and contentious, neither complexity nor controversy will exclude a proper case from the rigours of summary judgment. [emphasis added]

[34] Similarly, in ***Papaschase Indian Band No. 136 v. Canada (Attorney General)***, [2008] 1 S.C.R. 372 the Supreme Court of Canada said the following regarding summary judgment applications at paras 11 & 19:

> ... ***Each side must 'put its best foot forward' with respect to the existence or non-existence of material issues to be tried***…
> The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts…
>
> [...]
>
> In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. ***A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed***. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future.... [emphasis added]

[35] The new Civil Procedure Rules have not altered the test for summary judgment. However, the additions made to the summary judgment process reflect the primary objective of the Court; to advance the just, speedy and efficient resolution of disputes. In particular, the existence of Rule 13.07 indicates that the

purpose of a summary judgment application is to narrow the issues requiring a trial:

> 13.07 (1) A judge who dismisses a motion for summary judgment on evidence brought in an action must, as soon as is practical after the dismissal, arrange to give directions, unless all parties waive this requirement.
>
> (2) The judge may provide directions for the conduct of the proceeding, including directions that do any of the following:
>
> (a) restrict discovery in view of disclosure made through an affidavit or cross examination on an affidavit;
>
> (b) narrow the issues to be tried by identifying facts not in dispute;
>
> (c) regulate disclosure or production of documents, electronic information, or other evidence;
>
> (d) permit evidence on the motion for summary judgment to stand as evidence at trial;
>
> (e) provide for a speedy trial;
>
> (f) provide for a hearing, rather than a trial, under Rule 6 - Choosing Between Action and Application.

[36] ***No Genuine Issue for Trial:*** I am satisfied that the Moving Party has shown that there is no genuine issue for trial regarding the $1,021,595.70 owed to it by Royal Harbour.

[37] ***a) Amounts Supported by Purchase Order:*** $584,828.37 of Little Island's claim relates to product Royal Harbour purchased from Little Island in April and June, 2009 and has failed to pay for. This entire amount consists of purchases supported by Royal Harbour purchase orders.

[38] Royal Harbour cannot dispute the price charged for these purchases, as it set the price itself when it issued the purchase orders. All purchase orders issued by Royal Harbour as Exhibit "C" of Ms. Fiorello's Affidavit indicate that payment is to be made net of 30 days. Clause 14 of the Processing Agreement also contemplates payment to Little Island in 30 days.

[39] The purchase orders are supported by bills of lading showing that the fish were delivered. All of the invoices issued by Little Island in respect of this fish are overdue. The fish was purchased by Royal Harbour, and presumably sold to third parties. Little Island is entitled to be paid for its product.

[40] ***b) Inventory:*** During May and June, 2009, Royal Harbour took control of $521,133.28 in fish, lobster, and fish and lobster packaging in Little Island's possession on April 30, 2009. Royal Harbour has taken, sold or used almost that

entire inventory. Only $15,160 remains in fish inventory. No lobster inventory remains from April 30, 2009. Approximately half of the packaging inventory remains. (As noted earlier, when credit for handling fees is deducted, the figure is $495,324.09.)

[41] Under the Management Agreement, Royal Harbour agreed to the following terms of payment for product purchased from Little Island:

> In the interim of operation, meaning until such time as the legal and financial obligations required to complete the acquisition of LIF by RHS, all sales that were past accounts of LIF shall be payable to LIF. … In the cases, that due to no entry of new supplies to the current sales accounts of RHS, RHS will collect the receivable and pay LIF for the raw materials, but doing so with the profit margin of LIF included in the raw material cost…
>
> d'Entremont Affidavit, Exhibit "D"

[42] Clause 14 of the Processing Agreement provides the time for payment:

> RHS will pay LIF within 30 days of delivery unless other terms are established in writing.
>
> d'Entremont Affidavit, Exhibit "A"

[43] Having taken the inventory from Little Island, Royal Harbour is obligated to pay for it according to the terms of the Processing and Management Agreements.

Its failure to do so is a *prima facie* breach of contract, or in the alternative a *prima facie* case of conversion for which Little Island claims for restitutionary damages.

[44] Little Island assigned its entire inventory to Royal Harbour on June 26, 2009. Following the assignment, Royal Harbour took the remainder of Little Island's valuable fish inventory and moved it to cold storage. Little Island allowed it to do so, relying on the Order from Justice LeBlanc issued that day, requiring Royal Harbour to pay for the inventory 10 days after the assignment. Having acted on the assignment, Royal Harbour is estopped from disputing its validity, or that it is required to pay for the inventory it took.

[45] The principles of estoppel were set out in ***Cumberland County (Municipality) v. Cumberland District Planning Commission*** (1997), 163 N.S.R. (2d) 16 (S.C.), where J.M. MacDonald J. (as he then was) said at para. 54:

> The basic principles of the concept of estoppel are enunciated in S.M. Waddams' text *The Law of Contracts* (2nd Ed.), 1984 (Toronto-Canada Law Book) wherein the following analysis can be found at p. 143:
>
> > The basic concept of estoppel is that a person is precluded from retracting a statement upon which another has relied. A definition that has been judicially approved is as follows:

> Where one person ("the representor") has made a representation to another person ("the representee") in words, or by acts and conduct or (being under a duty to the representee to speak or act) by silence or in action, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

[46] ***c) Expenses and Payroll:*** On an April 29, 2009 conference call, Royal Harbour agreed to pay all of Little Island's operating expenses from May 1, 2009 forward. It has paid the majority of those expenses, but currently owes Little Island $93,938.24 for operating expenses incurred between May 1, 2009 and June 30, 2009, including payroll, electricity, and remittances. It has given no reason why the outstanding expenses have not been paid, but the other expenses were.

[47] Royal Harbour had full control of Little Island from May 1, 2009 to June 30, 2009 under the Management Agreement, including the period governed by the Standstill Agreement. During that time Royal Harbour earned revenue from Little

Island's processing and product, which it has kept and paid Little Island nothing for. In return for control of Little Island, Royal Harbour agreed to pay all expenses incurred by Little Island. Its failure to pay those expenses is a prima facie breach of contract.

[48] Also, again based on estoppel, Royal Harbour has taken its revenue and is therefore estopped from claiming that Little Island's expenses are not its responsibility.

[49] ***Real Chance of Success:*** I must now consider whether Royal Harbour has established that its defence to the alleged indebtedness has a real chance of success.

[50] Royal Harbour has defended Little Island's claim for the debt on the following grounds, which appear at paras. 38 - 40 of the Defence and Counterclaim (Royal Harbour takes issue with this summary, but I am satisfied that, for the purposes of this motion; it is fair):

> - That any payments were only owed on closing;
>
> - That the assets and liabilities of Little Island were not transferred to Royal Harbour;

- That Royal Harbour did not obtain the "benefit" of closing;

- That payment was not intended to be made entirely in cash;

- That Royal Harbour requires access to complete records to complete its accounting;

- That Ms. Fiorello's calculations include errors.

[51] ***a) Payments only owed on closing:*** The first three defences are identical for all intents and purposes. Royal Harbour says that it should not have to pay Little Island unless and until a closing occurs. Since a closing did not occur, it does not have to pay. As Royal Harbour has abandoned its claim for specific performance, Royal Harbour effectively argues that Little Island should never be paid.

[52] Joel Comeau admitted the contrary at his cross-examination on June 15, 2009:

> Q. So if there's no closing, do you get the fish for free, Mr. Comeau?
> A. No, we don't.
>
> d'Entremont Affidavit, Tab I, Q. 381

[53] Little Island did not agree that its accounts would only be paid on closing of the Sales Agreements. The Processing Agreement provides for payment in 30

days. The purchase orders at Exhibit "C" of Ms. Fiorello's Affidavit also provides for payment net 30 days.

[54] The Management Agreement contemplates that the parties may not complete the sale. There is no provision in the Management Agreement that would exempt Royal Harbour from paying Little Island's accounts should the sale not close. Royal Harbour also paid the majority of Little Island's payroll and expenses throughout May and June, 2009. This is inconsistent with the alleged agreement that Little Island would only be paid on closing.

[55] ***b) Payment would not be made entirely in cash:*** Royal Harbour takes the position that because the Sales Agreements contemplate a reconciliation of accounts between Royal Harbour and Little Island, no payment is due unless that accounting takes place.

[56] Royal Harbour did not purchase its fish under the Sales Agreements, but under the Processing and Management Agreements. As stated above, the Processing Agreement provides for payment 30 days after delivery.

[57] Even were a reconciliation required, it would not result in any further credit to Royal Harbour. In general terms, under the reconciliation Royal Harbour was to assume any unpaid accounts payable of Little Island predating April 30, 2009 and set off those amounts against its debt to Little Island. Royal Harbour has only agreed to assume one account payable of Little Island, the account of Acadian Fish Processors. Ms. Fiorello has credited Royal Harbour for that account already.

[58] Ms. Fiorello has given evidence that Little Island has no other accounts payable predating April 30, 2009. Therefore the debt owed by Royal Harbour is owed without setoff, other than the credits accounted for by Ms. Fiorello in her Affidavit.

[59] ***c) Royal Harbour requires access to complete records:*** Royal Harbour has alleged that it does not have sufficient records to complete an accounting of the intercompany accounts.

[60] On May 21, 2009, Rosanne Fiorello forwarded Joel Comeau certain spreadsheets that gave him the information necessary to reconcile the intercompany accounts between Royal Harbour and Little Island. On June 11,

2009, Mr. Comeau asked for additional records from Ms. Fiorello. Ms. Fiorello provided those records on June 17, 2009. Other than that request, Little Island has received no further requests for documentation from Royal Harbour.

Fiorello Affidavit, paras. 83 - 86

[61] On cross examination on June 15, 2009, Mr. Comeau admitted that he had the information necessary to complete his accounting, but had simply not done so:

> Q. And if you look at the third page, she summarizes the amounts due from Little Island to – sorry, from Royal Harbour to Little Island at 1.167 million dollars. Is that more or less the number you were thinking of earlier?
>
> A. These are dated June 3rd, these reports?
>
> Q. Yes, it is. Yes.
>
> …
>
> A. I would not have had access enough to reconcile these numbers of that period.
>
> Q. Mr. Comeau, the purchase orders are your purchase orders. Can't you check your own purchase orders?
>
> A. Yes.
>
> Q. Yeah. So it would be easy for you to confirm the accuracy of this document had you cared to do so before today.
>
> A. Yes, but it – my position in the company to run the company, I mean, I've looked at these. I assume that they are

> correct. Ms. Fiorello was the controller for Royal Harbour Seafoods, so before the – before May 21st I would assume the numbers would be correct.
>
> …
>
> Q. Alright. And again, the means of confirming these would be within your hands. You could look up the purchase orders. You know what you purchased, don't you?
>
> A. Yeah. We would have the – if the PO was issued, we would have POs on, on file.
>
> Q. Sure. So you could confirm that.
>
> A. Yeah.
>
> d'Entremont Affidavit, Tab I, Q. 391 - 397

[62] Royal Harbour has had nearly three months to request further information from Little Island if such was necessary to reconcile its accounts. Royal Harbour is not entitled to rely on its failure to request documentation as a defence to Little Island's claim for a debt.

[63] ***d) Errors by Ms. Fiorello:*** Royal Harbour has alleged that Ms. Fiorello's calculations include errors and for that reason it is entitled to withhold payment.

[64] Ms. Fiorello's affidavit of September 4, 2009 provides Royal Harbour with all of the detail it needs to examine her accounting and determine if it is correct. It waited until the eve of the motion hearing to take issue with her calculations. I am satisfied that Royal Harbour and Mr. Comeau would have been provided with the information he claims he needs to verify Ms. Fiorello's figures if he had asked for them. It is significant that, for the most part, Mr. Comeau is not saying that Ms. Fiorello's figures are wrong but that he has not been able to verify them. (See for example, paras. 107, 108 and 111 of Mr. Comeau's affidavit.)

[65] As I noted earlier, Mr. Comeau has had nearly three months to request additional documentation but he has failed to do so. Royal Harbour knew about Ms. Fiorello's basic calculation at the time of the June hearing. Her September 4 calculations in her affidavit could not have been a surprise. I am satisfied that Royal Harbour's objection to the Fiorello calculations with which it previously agreed is merely an attempt to muddy the water.

[66] Mr. Comeau also takes issue with the fact that Ms. Fiorello backdated the invoice for the inventory (Comeau para. 106). I am satisfied that there was nothing sinister about that. Ms. Fiorello was open about the fact of the backdating. The

reduction in the inventory noted in June was calculated and referenced back to the date the inventory had been counted, May 1, 2009.

[67] Royal Harbour also attempted an eleventh hour introduction of expert evidence from its accountant Mr. Paul Bradley. The affidavit and report was given to the Moving Party on September 22, 2009 for a hearing scheduled for September 30, 2009. I refused to admit the report because it was too late, it did not comply with the Rules, and because I felt I did not need it to decide this motion. Further, I am in agreement with the three pronged objection to the admissibility of the Bradley Affidavit and Report contained in Moving Party's rebuttal brief which reads:

> 5. Little Island objects to the admission of Mr. Bradley's Affidavit and Report. The objection is taken on three grounds:
>
> (a) The Report does not comply with the Rules
>
> Rule 55.04(1) which states:
>
> > (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
> >
> > > (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

> (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
>
> (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
>
> (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
>
> (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

None of these required representations are included in the Report or in the accompanying Affidavit.

6. There is no Statement of Qualifications identifying whether the witness is sought to be quantified as an accountant, or as a business valuator, or in some other capacity, contrary to Rule 55.09.

7. Rule 55 is silent as to whether expert opinion can even be offered on a motion. Rule 55.11 contemplates the recipient of an expert report having 30 days in which to deliver questions to an expert. In this instance the report was provided on September 22, 2009, for a hearing on September 30, 2009. It is submitted that the Rules do not contemplate the use of an expert report in these circumstances.

(b) The Report is a Submission

8. The Report is a thinly disguised brief or argument on behalf of the Defendants on matters relating to the interpretation of agreements between the parties: See for example the two paragraphs of "PwC Comment" on page 4, which concerns contract interpretation, which comments on the intention of the parties, and which does not contain accounting or business valuation analysis. The same is true of the "PwC Comment" section under Issue 3, which argues about the intent of the Agreement of Purchase and Sale. The "PwC Comment" under Issue 6, on page 8, is likewise a commentary on the text of the Management Agreement.

9. Legal argument is not the proper subject matter for expert reports. This report was included in an affidavit. This is contrary to the proscription in Rule 39.04(2)(a) against irrelevant statements, submissions or pleas in affidavits. That Rule codifies the decision of this Court in *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, [1993] NSJ. No. 151, in that regard.

(c) The Report is Not Relevant or Necessary

10. The Bradley Report does not meet the criteria for admission of expert opinion evidence identified in the Supreme Court of Canada decision, *R v. Mohan*, [1994] 2 S.C.R. 9 ("Mohan"). That case was considered in *Lunenburg Industrial Foundry and Engineering Limited v. Commercial Union Assurance Co. Of Canada (2004)*, NSJ No. 525 ("Lunenburg"). In *Lunenburg*, the Court comments on the four preconditions to the admissibility outlined in Mohan:

(1) Relevance,
(2) Necessity,
(3) Absence of an exclusionary rule, and
(4) A properly qualified expert.

11. At paragraph 9 in *Lunenburg*, the Court makes reference to the relevance test as including a component as to whether the evidence is sufficiently probative to warrant its admission:

> (I) to what extent is the opinion founded on unproven facts?
>
> (ii) to what extent does the proposed expert opinion evidence support the inference sought to be made from it?
>
> ...
>
> (iv) to what extent is the evidence reliable?

12. In *Lunenburg*, the Court rejected an attempt to call as an expert a semi-retired insurance executive as to whether a Boiler and Machinery policy covered damage caused to a marine railway. In paragraph 011, the Court noted that the Court was required first to decipher the words in the insurance policy according to their common meaning and only in the event of ambiguity to apply aids to interpretation or resort to technical terms that are special to Boiler and Machinery policies. The Court noted that these rules of interpretation marginalized the relevance of the insurance industry expert's opinion.

13. Likewise, it is submitted that Mr. Bradley's interpretation of the legal agreement is simply not relevant or admissible. The Court needs no assistance from an accountant to interpret a contract. Mr. Bradley has no interpretive expertise.

14. In discussing the second requirement of 'necessity', the Court noted that *Mohan* had deliberately increased the standard from one of 'helpfulness' in prior jurisprudence. A report must provide information which is likely to be outside the experience and knowledge of a judge or jury. The evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. It is submitted that there is nothing in Mr. Bradley's Report that touches on these matters. His position in suggesting interpretations of a contract is more

> tenuous even than that of the insurance expert in the *Lunenburg* case, in which at least there was a foundation laid regarding his expertise in interpreting insurance policies. There is no evidence before the court that the contracts referenced by the parties in this case were drafted by accountants or business valuators.

[68] At paragraph 49 of its brief, Counsel for Royal Harbour states the following:

> 49. If this Honourable Court should determine that there are no material facts in dispute in these proceedings, then the inquiry turns to whether Royal Harbour is able to demonstrate that it raises an arguable defence that has a real chance of success. Royal Harbour draws the attention of this Honourable Court again to the language of the trial judge in *Eikelenboom (c.o.b. Eiklyn Farms) v. Holstein Assn. Of Canada*, *supra,* at paragraph 10, which language was not overturned on appeal:
>
> > A real chance of success means the possibility of their success is not illusory or unrealistic. ***It is no more than saying they could succeed and the determination of whether they will or not should be left for the trial***. [emphasis added]

[69] It also noted that the burden is not a heavy one. With those principles in mind, I have no difficulty in concluding that Royal Harbour defences to the quantification of Little Island's claim have no real chance of success.

[70] ***Set Off:*** As I have accepted, the quantification of the claims of Little Island are properly supported, and that there is no arguable issue of fact for trial in

relation to them (and that the defences canvassed have no real chance of success), the only remaining defence available to Royal Harbour is the defence of set-off. The defence of set-off would have to relate to a claim for which an arguable basis has been put forward in response to the Summary Judgment Motion.

[71] The counterclaim for the alleged breach of the Purchase and Sale Agreement has no air of reality because of the failure by Royal Harbour to net out the revenues realized by Royal Harbour while they were operating Little Island's business.

[72] The unjust enrichment claim is tainted with the same insuperable problem: there is no evidence of deprivation having been experienced. Quite likely Royal Harbour has been enriched by the revenues it received, after deduction of the expenses. Royal Harbour acquired valuable fish and lobster inventory at Little Island's cost price without paying for the overhead or profit of Little Island. In May and June, 2009, Little Island did not pass on to Royal Harbour any non-cash expenses, such as the substantial depreciation to plant and equipment, caused by the handling and processing of the fish.

[73] In any event, there is a juristic reason for Little Island having its expenses assumed by Royal Harbour. The juristic reason is not the Purchase and Sale Agreement. It was the willingness of Royal Harbour to assume the operations at Little Island with a view to profiting from the sale of fish and lobster. The agreements could have, but did not, stipulate for compensation of Royal Harbour in the event it sustained losses during a pre-purchase management period, in the event of non-completion of the sale. It must be presumed that Royal Harbour was willing to accept the risk of loss in order to enjoy the rewards of any profits from operating the business, irrespective of whether the sale of the business claim to fruition.

[74] Legal set-off is inapplicable even on the authorities in Royal Harbour's brief. Paragraph 67 of that brief correctly notes that for legal set-off to apply both claims mush be debts, that is to say, sums payable in respect of a liquidated money demand. The claims by Royal Harbour are not liquidated demands as they relate to damages for alleged breach of a purchase and sale contract. Until the revenues realized by Royal Harbour are accounted for, there is not even an arguable basis for asserting the counterclaim to exist, let alone to be considered "liquidated".

[75] In respect of equitable set-off, the party relying on a set-off must show some equitable ground fo being protected against his adversaries' demands. It is submitted that the party seeking equitable set-off must come with "clean hands".

[76] The following case quotations clearly make this point:

a) ***Crown Life Insurance Co. v. Medipac International Inc***. (1996), 63 A.C.W.S. (3d) 279 (Ont. G.D.):

> 18 In short the defendant has not come to equity with clean hands and equity will not in such circumstances permit equitable set-off (see Palmer, *The Law of Set-off in Canada* at p. 66 et sequ. and the cases therein referred to).

b) ***P & D Holdings Ltd. v. Bradsil Ltd.*** (1996), 63 A.C.W.S. (3d) 426 (Ont. G.D.):

> 35 As the set off claim which is advanced is based in equity and as equity presumes clean hands, and as Bradsil's hands have not been clean, I reject the notion that Bradsil is entitled to set off the amount determined to be owing by the Lissaman Judgment dated October 18th, 1995, against the Bronte Creek Judgment.

c) ***Advocate General Insurance Co. of Canada (Provisional Liquidator of) v. Peter Rocca Insurance Brokers Inc.*** (1996), 60 A.C.W.S. (3d) 452 (Ont. G.D.)

> 28 The defendant submits that this is a situation where equitable set-off should prevail because it would be manifestly unjust not to allow set-off. The plaintiff submits that it is not inequitable, rather, it would be unjust to permit the defendant to have a set-off because it

> would then rank ahead of the policyholder in resorting to the trust for satisfaction. I agree with the Plaintiff's submission for if it were otherwise, the policyholders' status would be effectively bumped down. Equitable set-off requires 'clean hands' on the part of the defendant, which he clearly does not have in this case.

[77] In this instance, the conduct of Royal Harbour in seizing the remaining inventory of Little Island on June 26 and June 27 under the pretext that the injunction was still in effect, when it had, according to its counsel's brief submitted just prior to the Order, no prospect of paying the amount set out in the Order; and when it made no effort to pay any portion whatsoever of the debt incurred from before May 1, 2009, constitutes mis-conduct disentitling Royal Harbour to any equitable relief. Its conduct in this motion in frivolously disputing amounts previously agreed to by its principal, Joel Comeau, is likewise suspect.

[78] Even if the equities otherwise favoured it, the Defendant's equitable ground for relief must go to the "very root" of the Plaintiff's claim before a set-off will be allowed. The majority of the amount claimed by Little Island relates to fish purchased in the ordinary course of business by Royal Harbour from Little Island but not paid for. There is no evidence to indicate that the fish were bought in April

for any purpose other than the usual purpose of a wholesale purchaser intending to make a profit upon their resale.

[79] The same is true of the inventory which had accumulated in Little Island from its harvesting and purchasing activity before April 30, 2009. Again, one must presume that Royal Harbour acquired the inventory because it believed it would profit from selling it to the retail trade. The prospective purchase of the business would not have been defeated if Royal Harbour had allowed Little Island to maintain responsibility for the existing April 30 inventory, including responsibility to assume the risk and reward of resale. Royal Harbour did not ask for that. Royal Harbour ***wanted*** the inventory.

[80] Equitable set-off is only available if it "would be manifestly unjust to allow the Plaintiff to enforce payment without taking into consideration the cross claim". The claim of Little Island is fully explained, quantified and justified. There is nothing unjust in recognizing it and allowing Royal Harbour to continue to pursue its unrelated claim for alleged wrongful breach of the Purchase and Sale Agreement. To require Little Island to await years of drawn-out litigation by Royal Harbour before having any chance to enforce the sums owed to it would be

manifestly unjust. It would have the consequence of creating enormous incentives for additional delay activity on the part of Royal Harbour.

[81] ***The Deposit:*** It is only ***after*** Justice LeBlanc's decision that Royal Harbour is setting up the separate corporate status of royal Harbour Seafoods Inc. and Royal Harbour Seafoods LP as a matter of legal consequence between the parties. Ms. Fiorello's Affidavit includes specific examples of invoices to Royal Harbour Seafoods Inc. which were paid by Royal Harbour Seafoods LP. Derek d'Entremont's Affidavit includes document from Royal Harbour's counsel indicating that he treated them for litigation purposes as a single entity. Royal Harbour's injunction application was brought on behalf of both entities, even though the formal party to the Purchase and Sale Agreement and the Quota Agreement was only Royal Harbour Seafoods LP. Royal Harbour urged the Court on behalf of ***both*** companies to allow the trust funds in Mr. Louis d'Entremont's account to be used to pay the same debts for which that same trust account is now argued to be unavailable by virtue of the separate corporate status of the Royal Harbour companies. To maintain the corporate veil, a corporation must conduct itself with notice to the public of its separate corporate status. Royal Harbour Seafoods LP is estopped from asserting that funds which it paid into trust cannot

be used to satisfy debts which were nominally incurred by Royal Harbour Seafoods Inc.

[82] Royal Harbour even now is prepared to ignore the distinction between the corporations when it suits their advantage. The party to the Purchase Agreements was Royal Harbour Seafoods LP, but Royal Harbour Seafoods Inc. is trying to use LP's counterclaim to assert a defence of set-off to the debts which Inc. incurred in April 2009.

[83] The situation is analogous to that in ***Lockharts Ltd. v. Excalibur Holdings Ltd. et al*** (1987) 83 NSR (2d) 181 (NSSC). There, according to the head note, the Court found that the sequence of events raised a strong *prima facie* inference that the conveyance to (a second corporate entity) was intended to defeat the rights of the plaintiff. It was incumbent on the defendants to rebut this inference, which they did not.

[84] Given the sequence of events I have just described, a similar inference arises against Royal Harbour and it has failed to rebut that inference. I will not permit Royal Harbour to use the corporate veil to shield the deposit.

[85] ***Conclusion:*** In its brief Little Island argued that the Royal Harbour debt is *res judicata,* the matter having been determined by Justice LeBlanc at the injunction hearing in June, 2009. Royal Harbour took the opposite position. In particular, it stated the following:

> 38. As a general rule, interlocutory injunctions such as the one granted by the Learned Chambers Judge should have no issue estoppel effect. In *Edmonton Catholic School District No 7 v. Edmonton (City)* (1977), 3 A.R. 151 (Alta. S.C. (T.D.)) [Tab 14], Miller J. Explained this rationale at paragraph 61:
>
> > ***An interlocutory injunction, if granted, is only designed to preserve the status quo, or to prevent further problems, until the court has a full opportunity to hear all sides to a dispute and render a decision***. [...] I am therefore of the opinion that the decision of a judge on an interlocutory injunction application does not and should [sic: not] prevent the trial judge from conducting a full inquiry into all aspects of the matter at the trial of the action and coming to a decision which might or might not agree with the position of the judge who granted or refused the interlocutory injunction application and propose the [sic] deal with the matter on that basis. [emphasis added]
>
> 39. That is what was intended in the hearing before the Learned Chambers Justice. No participant to those proceedings could reasonably have expected that an outcome would have been the final determination of a debt owing by Royal Harbour; the question that gave rise to the proceedings was, as stated previously, the determination of whether an injunction to 'preserve the status quo' of the agreements should be granted to Royal Harbour.

> 42. In *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50 (B.C.C.A.) [Tab 16], Finch J.A. wrote, at paragraph 32:
>
> > *It must always be remembered that although the three requirements for issue estoppel must be satisfied before I can apply, the fact that they may be satisfied does not automatically give rise to its application.* Issue estoppel is an equitable doctrine, and as can be seen from the cases, is closely related to abuse of process. The doctrine of issue estoppel is designed as an implement of justice, and a protection against injustice. It inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case. [emphasis added]
>
> 43. In arriving at the decision not to apply issue estoppel to the matter before him, Justice Finch had written, at paragraph 30:
>
> > In my respectful view the learned chambers judge was right in holding that issue estoppel did not apply in the circumstances of this case. There are two principal reasons for rejecting issue estoppel as a defence in this case. The first is that a final decision on the Crown's right to recover its losses was not within the reasonable expectation of either party at the time of those proceedings.

[86] I was persuaded by that argument (and those authorities) that this was not an appropriate situation in which to apply *res judicata*. In short, I was persuaded that Justice LeBlanc may not have been making a final determination of the amounts in question.

[87] On the other hand, I do not believe it would have been appropriate for me to ignore the injunction application entirely. That hearing gave Royal Harbour timely notice of the quantification of Little Island's claim. The calculation of those amounts was the subject of extensive testimony. In particular, Joel Comeau's cross-examination referenced specific aspects of Little Island's claim (as I have noted earlier). Mr. Comeau now has had sufficient opportunity to show why I should ignore his earlier admissions. For the reasons I have discussed, he has failed to take advantage of that opportunity.

[88] In closing, I want to acknowledge that granting ***partial*** summary judgment is not a frequent result in this Court. Nor is it unprecedented. [See, for example, ***United Gulf Developments Ltd. v. Iskander***, [2004] NSJ No. 66, 222 NSR (2d) 137 (N.S.C.A.).] But sometimes, as here, it is the appropriate and just remedy.

[89] For all the above reasons, the Motion for Partial Summary Judgment is granted in the amount of $1,021,595.70 (see paragraphs 26 & 27). I am also ordering that funds in Louis d'Entremont's trust account be used to satisfy the judgment. Costs of this motion shall be in the cause.

Order accordingly.

J.