SUPREME COURT OF NOVA SCOTIA

Citation: 3081169 Nova Scotia Ltd. v. Lunar Fishing (New Brunswick) Inc. 2010 NSSC 147

Date: 20100416
Docket: Hfx. No. 303682
Registry: Halifax

Between:

3081169 Nova Scotia Limited

Plaintiff

v.

Lunar Fishing (New Brunswick) Inc., a body corporate

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	November 12, 16-19, 2009, in Halifax, Nova Scotia
Written Decision:	April 16, 2010
Counsel:	Peter Coulthard for the plaintiff Peter Rumscheidt for the defendant

By the Court:

[1] 3081169 Nova Scotia Limited sues for payment under a consulting agreement entered into as part of a transaction for the sale of fishing businesses. The plaintiff says the condition precedent for payment was met. The defendant, Lunar Fishing (New Brunswick) Inc. ("Lunar"), says it acted in good faith under the consulting agreement in its efforts to meet the condition precedent or, alternatively, the agreement was frustrated.

ISSUES

1. Interpretation of consulting agreement;
2. Whether Lunar acted in good faith;
3. Alternatively, frustration of the agreement;
4. If Lunar was entitled to terminate the consulting agreement, entitlement of the plaintiff to payment for consulting services for six months.

FACTS

[2] The plaintiff is a company incorporated to receive payments pursuant to a consulting agreement arising from the sale of the shares of companies owned by the Newman family.

[3] Prior to 2002, Francis Newman, Carole Newman and their three sons were the shareholders of companies involved in the herring fishery in the Bay of Fundy and elsewhere. One of the companies owned a Herring Purse Seine licence and the fishing vessel, The Dual Venture. It had a four percent quota for herring.

[4] In 2002, a Scottish company, Lunar Fishing Company Limited, of Peterhead, Scotland (Lunar UK) having built a new fishing vessel had a surplus vessel, the Pathway, as a result. Lunar UK was interested in the possibility of developing a mackerel fishery by mid-water trawl in Canada.

[5] Sinclair Banks, the general manager of the Lunar group of companies, was in charge of onshore operations for Lunar UK. He contacted Canadian officials about the possibility of a mackerel fishery. In the fall of 2002 and early in 2003,

he was in contact with officials at the federal Department of Fisheries and Oceans (DFO). He was advised of the requirements that had to be met for Lunar UK to enter the mackerel fishery. In order for Lunar to obtain a licence to mid-water trawl for mackerel it was necessary to have a Herring Purse Seine licence. Furthermore, that licence could not be placed on a foreign vessel. Any vessel to be used had to be registered in Canada and meet the requirements of the Canadian Steamships Inspection Services. Accordingly, Sinclair Banks began to look for a Herring Purse Seine licence and a Canadian vessel.

[6] Francis and Carole Newman met with Lunar representatives in 2003 with respect to the possibility of the sale of their Herring Purse Seine licence and the Dual Venture. The Newmans testified that they were interested as long as they could keep their crew employed including one of their sons who worked in the Nova Scotia fishery.

[7] As a result of their meeting with Lunar representatives, the Newmans sought bids for their businesses and received three, of which Lunar's was the best. During the spring and summer of 2003, the parties negotiated for the purchase of the Newmans' businesses. At the same time, Lunar was having discussions with DFO

about the requirements for entering into the fishery. To meet one of the requirements, the defendant, Lunar, was incorporated.

[8] On June 13, 2003, a Letter of Intent was sent to the Newmans which Letter of Intent included provision for a consulting agreement. The first Letter of Intent was not acceptable to the Newmans and a revised Letter of Intent was sent on June 25, 2003. The Newmans signed it with a closing date of July 18, 2003.

[9] That Letter of Intent as well included a provision for a consulting agreement. Either or both Francis Newman and Joel Newman were to provide consulting services to Lunar. The consulting agreement provided a fee of $100,000.00 per year for 5 years. Clause 3.1 provided that payment would be made "unless Consulting Fees are terminated as provided herein." The fee was to be paid annually on the anniversary date of the agreement with the first payment being made on June 30, 2004. Conditions were set for payment of the consulting fee as follows:

> 4.1 This Agreement and the payment of the Consulting Fee are conditional upon the following terms being fulfilled:

(a) The Consultant shall engage the services of either or both of Francis Newman or Joel Newman during the Term of this Agreement to carry out the Consultant's services. Failure to do so will result in termination of the Agreement at the option of the Company and the termination of the payment of the Consulting Fee;

(b) By the end of the third year of this Agreement the Company shall have received permission for a replacement of the existing vessel, Dual Venture, with another vessel to be supplied by Lunar, if this does not happen, the Agreement shall be terminated at the end of the third year and fourth and fifth years' Consulting Fee will not be paid it being acknowledged by the Parties that prior payments for years one, two and three shall not be affected by the termination;

(c) The Company shall secure an exploratory licence by the end of the third year to allow for the fishing of mackerel with mid-water trawl failing which the Company may terminate this Agreement and Consulting Fees in the fourth and fifth year will not be paid.

[10] The Scotia-Fundy Herring Advisory Committee (SFHAC) is made up of representatives of fishing associations, the processing industry and DFO. Claire MacDonald is senior advisor at DFO. She normally attended the meetings of the SFHAC. She said her job was to coordinate and liaise with industry and other stakeholders to ensure policies are met. She said a major part of her job was to re-write the Management Plan for the Scotia-Fundy Fisheries, the Integrated Herring

Management Plan. She said that the SFHAC does not take formal votes and its terms of reference refer to working by consensus. She testified that in late 2002 and into 2003 the Plan was being rewritten. She said that, in the existing Plan, vessels over 65 feet required ministerial approval.

[11] Francis Newman and Alex Buchan and Lloyd Cain of Lunar attended the April 29, 2004 meeting of the SFHAC. Mid-water trawl licensing was discussed and the Committee was told there were four successful candidates for licences including Lunar. There was a further meeting of the SFHAC on August 18, 2003, after the agreements between the Newmans and Lunar were signed. On behalf of Lunar, Sinclair Banks, Alex Buchan, John Wells and Lloyd Cain attended. Sinclair Banks made a presentation about Lunar and its plans for the fishery including use of the Pathway, a vessel of approximately 190 feet (57 meters). The response of the industry to Lunar was unfavourable. Sinclair Banks testified that, among other things, they were told “It’s our fish” and “Sell your boat and go home.” The concerns were both with respect to the size of the vessel and with Lunar being a foreign company.

[12] There was a further meeting on September 25, 2003 which Lunar representatives did not attend. At that meeting, Tony Hooper "presented a draft vessel restriction proposal." The minutes of a meeting of the Scotia-Fundy Herring Purse Seine Monitoring Committee on October 10, 2003 disclose the details of the proposed vessel restriction. The minutes say "T. Hooper requested that there be a limitation of 125' LOA and 1500 BHP placed on all mobile gear vessels." Ultimately, it was agreed that all members should be polled. When the final Scotia-Fundy Fisheries Integrated Herring Management Plan was approved on December 8, 2003, it included that restriction.

[13] At the end of October, 2003, the transaction for the sale of the shares of the Newmans' companies closed and, in November 2003, payment pursuant to that agreement was made.

[14] In the 2004 fishing season, Lunar used the Dual Venture to fish in the Bay of Fundy. In addition, in July 2004 Lunar acquired a second Herring Purse Seine licence. Also in the summer of 2004, Lunar decided to have a vessel built to fish mackerel which would meet the new size requirements.

[15] In the fall of 2005, the Julianne III, the newly built vessel, arrived from Europe with Francis Newman as part of its crew. Between then and 2007, it fished mackerel although unsuccessfully. Eventually, the exploratory licence for mackerel which it held was cancelled and the Julianne III was returned to Scotland and ultimately sold.

[16] The payments pursuant to the consulting agreement were made for the first three years, albeit late. The payment for year 4 was not made on June 30, 2006. On December 21, 2006 Lunar faxed a letter to the plaintiff company and to Francis and Joel Newman to advise that the consulting agreement was terminated as of the end of year 3. Francis Newman was away at the time and responded to Lloyd Cain of Lunar on February 28, 2007.

ANALYSIS

1. Contract Interpretation

[17] The parties do not dispute the rules for interpretation of contracts. They dispute whether the parol evidence rule should be invoked.

[18] In *Arnoldin Construction & Forms Ltd. v. Alta Surety Co.*, [1995] N.S.J. No. 43 (C.A.), Hallett, J.A. at para. 37 quoted from Estey, J. in *Consolidated-Bathurst Export Limited. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at p. 901:

> 37 ... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. ...

[19] The issue here is with the words “received permission for a replacement of the existing vessel, Dual Venture, with another vessel to be supplied by Lunar ... .” Lunar says that it was always intended that the Pathway be the replacement vessel. It says it was the Pathway that was surplus to its needs in Scotland and a vessel which was already paid for. Lunar says the Newmans knew this when they signed the consulting agreement. In Lunar’s view, “another vessel” meant the Pathway.

[20] The first Letter of Intent from Lunar did not specify the Pathway in clause 7(c), nor did the draft consulting agreement attached to it. The second Letter of Intent, which was signed, did not specifically mention the Pathway either nor did the consulting agreement executed by the parties.

[21] The principal issue with respect to the consulting agreement is whether it is ambiguous. The plaintiff says it is not and Lunar says it is ambiguous and therefore the parol evidence rule should be invoked. I must determine if the wording is unclear or ambiguous.

[22] If the words are not ambiguous, I must not resort to the parol evidence rule. It has been defined in the Canadian Law Dictionary (5th ed. 2003) by John A. Yogis, Q.C. as:

> ... A rule of substantive law that operates to prevent parties to a contract from altering, contradicting or varying the terms of a written document considered to be the final expression of their agreement.

[23] In *Clelland v. eCRM Networks Inc.*, 2006 NSSC 337, Smith, A.C.J. said at para. 20:

> [20] In general, when a transaction has been reduced to writing, extrinsic evidence is inadmissible to contradict, vary, add to or subtract from the terms of the document (see: *Schofield v. Ward* (1988), 84 N.S.R. (2d) 404 (C.A.) at ¶25). This is particularly so when the parties have agreed as a term of the contract that the written document is to constitute evidence of their entire agreement. One exception to this rule is when the contract itself is unclear or ambiguous. In those circumstances Courts have the discretion to permit parol evidence to clarify an otherwise ambiguous or unclear contract.

[24] In *Hardman v. Alexander*, 2004 NSSC 122, the court at paras. 1 and 2 referred to *RJB Investments Ltd. v. Ladco* (2000), 154 Man. R. (2d) 183 (Q.B.) as follows:

> A fundamental rule of interpretation is that if the language in the written contract is clear and unambiguous then no extrinsic parol evidence may be admitted to alter, vary or interpret in any way the words used in the writing ...
>
> ...
>
> Where the language is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. The court should not strain to create an ambiguity that does not exist. It must be ambiguity that exists in the language as it stands, not one that is created by evidence that is sought to be adduced. Parol evidence may not be adduced where the effect of such evidence would be to contradict the written contract. Where the true intentions of the parties are not clear from the documents, then such evidence may be admitted assist in the interpreting the true intentions of the parties. The parol evidence rule is intended to avoid injustice.

[25] Warner, J. in *B.C. Rail Partnership v. Standard Car Truck Co.*, 2009 NSSC 240, dealt with contract interpretation. In para. 23, he referred to *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 54 and 56:

> 54 ... The contractual intention of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> ...
>
> 56 ... to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in *Joy Oil Co. v. R.*, [1951] S.C.R. 624 (S.C.C.).
>
> > ... in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

[26] Warner, J. also referred in para. 24 to the definition of "ambiguity" in the *Canadian Encyclopedic Digest Contracts IX.2(a)*:

> 24. § 562 'Ambiguity is a term of art, which refers neither to uncertain breadth of language, nor to an inaccuracy, a novel result, or a difficulty in interpretation, nor to clear contractual wording that does not say what one of the parties intended it to say. An ambiguous contractual provision is one that is reasonably capable of more than one meaning ... 'ambiguity' implies that the parties knew fundamentally what they were contracting for or about, bud did not express it clearly. ...

> § 563 Correspondingly, a cardinal principle of contractual interpretation is that, if the language of a contract is capable of only one meaning, read objectively in the context of the contract as a whole and its surrounding circumstances, the court is required to give effect to that meaning. A court will not resort to subsidiary rules of construction or interpretation unless the words used by the parties are reasonably capable of more than one meaning.

[27] In *Chase v. East Wind Construction Ltd.*, [1987] N.S.J. No. 99 (C.A.), Macdonald, J.A. quoted from Phipson on Evidence (13 Ed.) p. 934, paras. 3801-3802 on the subject of the parol evidence rule as follows:

> When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document.

[28] Macdonald, J.A. discussed exceptions to the general rule, including where the words are ambiguous. He gave as an example *Imperial Oil Limited v. Nova Scotia Light and Power Co. Ltd.* (1976), 16 N.S.R. (2d) 488 (C.A.) where the parties disagreed about the meaning of the words “production” and “manufacture.” Macdonald, J.A. quoted Coffin, J.A. in that case who, in turn, quoted Chitty on Contracts, General Provisions, (23rd ed) at pp. 661-62:

> ... The extrinsic evidence does no more than assist its operation, by assigning a definite meaning to terms capable of such explanation or by pointing out and connecting them with the proper subject-matter.

[29] In my view, the words “another vessel to be supplied by Lunar” are not ambiguous. Lunar says that phrase had a narrower meaning, that it meant not any vessel but a specific one, the Pathway. The plaintiff points to the fact that the Dual Venture was specifically named and there was no reason why the Pathway could not have been named if the intent was that it be the other vessel.

[30] The general rule with respect to contract interpretation applies because there is no ambiguity. The phrase is not capable of two meanings: the words “another vessel” are broad. To substitute the words “the Pathway” would narrow and contradict the clear wording used. As the court said in *Eli Lilly*, I am not to consider “one party’s subjective intention.” As the court also said in that case, I am to presume the parties intended the legal consequences of their words.

[31] Giving the words their literal meaning does not, in my view, give an unrealistic result. It is not unrealistic that Lunar wanted to keep its options open. In an email from Gregory Peacock, Regional Director of Resource Management for DFO to Sinclair Banks as early as January 17, 2003, before any contact was made with the Newmans, Gregory Peacock had cautioned:

> ... At 6 million GBP it is very expensive by our vessel standards which are mostly vessels under 30 meters including our mid-water trawl vessel. In fact 95% of the domestic fleet is under 19.8 meters so it is a coastal based fleet which ventures far a field up to 300km from shore for harvesting. The only real area where large vessels operate in N. Shrimp off of Newfoundland and to a very limited degree in groundfish. I think we do need to talk but not sure what you have proposed with the government is doable even in the short term.

[32] Gregory Peacock testified Lunar had also been told that, although the vessel did not have to be Canadian owned, it had to meet Canadian standards. He said he had concerns from the outset about "people not from the area" and told the Lunar officials they should move carefully. He said he understood they were committed to the idea of fishing for mackerel and that it would be ideal if they could use the Pathway, otherwise it would have to be sold. He said it appeared that preference was to use their own vessel, preferably the Pathway. He said he believed they would still proceed even if they could not use the Pathway. In my view, Lunar was keen on entering the mackerel fishery and it would be an advantage if they could do so using the Pathway.

[33] On March 25, 2003, Gregory Peacock emailed Roger Stirling, the Executive Director of the Seafood Producers Association of Nova Scotia. He said it was one

of his first efforts to “engage the industry.” He said Stirling would “spread the word.”

[34] On April 1, 2003, Gregory Peacock emailed Sinclair Banks and referred to the need for “industry support.” He told Sinclair Banks that “I think before anything gets done we need to see industry comments and look at possibilities.” He concluded his email with:

> I know this is soft but it is the best I can do at this time. Remember there are no promises at this time, in most cases, this type of approach i.e. bringing in a foreign bottom is a no no and these are getting to be difficult times for some industry.

At that time, Lunar had not begun any negotiations with the Newmans.

[35] Lunar says the Pathway was mentioned in the meeting by Lunar officials with Francis and Carole Newman on June 1, 2003. Accordingly, it says that Newmans knew the only vessel with which Lunar intended to replace the Dual Venture was the Pathway. Francis Newman and Carole Newman in their testimony said they did not recall that being discussed at the meeting. Even if it was, in my view the best evidence of Lunar’s intent is the words used

subsequently. After the meeting with the Newmans, Lunar sent its first Letter of Intent on June 13. It referred to a "replacement Lunar vessel" in clause 7(a). In clause 7(c), it referred to a consulting agreement conditional on "receipt of permission for replacement of the existing vessel by another vessel to be supplied by Lunar." Thereafter, Sinclair Banks wrote to Carole Newman on June 23 and in that letter referred to "entry of a replacement vessel." That wording did not change in Lunar's subsequent Letter of Intent and the final consulting agreement. The Pathway was never mentioned in writing.

[36] Furthermore, the contract documents were prepared by counsel for Lunar. Lunar says the principle of *contra proferentem* does not apply here because the plaintiff had a lawyer who reviewed the documents as well. Lunar refers to *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* [1986] S.C.J. No. 9. In that case, Le Dain, J. said at para. 17:

> **17** ... The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. ...

He quoted Estey, J. in *McClelland and Stewart v. Mutual Life Assurance Co. of Canada* [1981] 2 S.C.R. 6 at p. 15:

> That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

[37] Based upon these authorities, Lunar says the principle does not apply. However, one must consider for whose benefit the provision was inserted. The provision was inserted by Lunar and provided Lunar with the benefit of the expertise of Francis Newman and Joel Newman for a period of time. This was not a provision demanded by the Newmans. Francis Newman said Lunar put it in their offer and there had been no prior discussion about it. The clause provided that Lunar would not have to continue to pay for that expertise if it could not get a replacement vessel for the Dual Venture. Lunar would have the court believe the payment of the consulting agreement fees hinged on the Pathway but did not put its name in that agreement. The Newmans, on the other hand, did not request the consulting agreement but, once proposed, it was in their interests to have fees paid pursuant to that agreement for the full five years. The best way to ensure that was to have the condition precedent as broad as possible.

[38] Because of word spreading in the industry, according to Gregory Peacock, it is possible that, by the time the agreement was being negotiated, the Newmans had the same knowledge the Lunar officials did about possible difficulties in securing approval for the Pathway. Even if that was not the case, it was in Lunar's interest to protect itself from that possibility and the possibility of having to continue to pay the consulting fees, if that was of real concern to them. One could hardly expect the Newmans to say to Lunar "That's a very broad condition precedent, are you sure you want it worded that way?"

[39] There were minor changes proposed by the lawyer for the Newmans and, in an email to his clients, Lunar's lawyer said "I do not see any difficulty with the changes."

[40] Since there was some input by the Newmans' lawyer, I conclude that the principle of *contra proferentem* does not apply. However, it was in the interests of Lunar to have the condition precedent carefully worded or run the risk of paying consulting fees in years four and five. The agreement is short, only 7 articles on 4 pages plus the signature page.

[41] At the time Lunar sent the Letter of Intent in June 2003 and executed the consulting agreement, it was interested in pursuing the mackerel fishery and was buying the shares of the Newmans' companies which included the Dual Venture and a Herring Purse Seine licence. Lunar wanted the expertise of Frances Newman and his son. Lunar had been cautioned by DFO officials that there might be resistence to a foreign company entering the fishery and that the vessels already in the fishery were much smaller. Lunar had also been told any vessel entering the fishery would have to meet Canadian standards.

[42] This was the commercial context within which Lunar was operating when it signed the consulting agreement. I cannot conclude, based upon the context of the entire consulting agreement and the surrounding circumstances, that the words used, interpreted in their literal meaning, do not represent the intent of the parties. That intent was that "another vessel supplied by Lunar," not just the Pathway, was the condition precedent to payment of the consulting fees in years four and five.

[43] I conclude there is no ambiguity in the contract wording.

2. Good Faith

[44] Lunar says that it was a condition precedent to the payment of the fourth and fifth years' consulting fees that the Dual Venture be replaced. There is no dispute that the Dual Venture was not in fact replaced at that time, that is, by June 30, 2006. In fact, at the date of trial in 2009, it was still fishing in the Bay of Fundy with its original Herring Purse Seine licence.

[45] Lunar agrees that where a condition precedent is within the control of one party that party must make reasonable and good faith efforts to fulfill the condition. It says it has done so. The plaintiff, on the other hand, says it did not. The plaintiff says in its Memorandum of Law:

> 1) Lunar did not ever request the Herring Purse Seine Monitoring Committee for a 'review and recommendation' of its alleged intention to replace the Dual Venture with the Pathway, as contemplated by the Limitation Condition.
>
> 2) Lunar did not submit its proposal to replace the Dual Venture with the Pathway to any other administrative body having authority in the matter, including the Department of Fisheries and Oceans, or the Canada Steamship Inspection Service.

> 3) The Julianne III engaged in mid-water trawl fishing under an exploratory licence which was obtained within the 3-year time period provided for in the Licensing Condition.
>
> 4) Lunar built the Julianne III and brought her to Canada. That vessel met all of the CSI requirements for registration of a foreign built vessel in Canada, and also met the parameters of the Limitation Condition. Had permission been requested by Lunar to have that vessel replace the Dual Venture, it could have done so within the 3 year period provided for in the Replacement Condition.

[46] In *Gateway Realty Ltd. v. Arton Holdings Ltd. and LaHave Developments Ltd.* (No. 3) (1991), 106 N.S.R. (2d) 180 (T.D.), Kelly, J. considered what constitutes good faith in the context of exercising discretion pursuant to a lease. I find the authorities cited by the defendant to be more helpful since they consider the issue of good faith and reasonable efforts in the context of conditions precedent.

[47] Burchell, J. in *Norfolk Motor Hotel (1974) Ltd. v. Graves*, [1988] N.S.J. No. 298 (S.C.) thoroughly canvassed the subject, quoting extensively from the pre-trial memorandum of one of the parties. He said on p. 5 of the decision:

> As to the legal principles that support the foregoing views, I shall not attempt to improve upon the summary set out in the pre-trial memorandum filed on behalf of the third party which deserves to be quoted in full:

> There is much authority for the proposition that where the parties to a contract agree 'subject to' a certain event, then the party who has the onus of arranging the event must use reasonable efforts to make it happen.

[48] The memorandum quoted in the decision on p. 6 also said:

> In Chitty on Contracts (24th Ed.), General Principles, in Paragraph 1492 the authors state the foregoing proposition in slightly different words as follows:
>
> > It is open to the parties expressly to agree that a contract made between them shall become void on the happening of a named event; but such a provision is subject to the principle that no man can take advantage of his own wrong, so that one party will not be allowed to avoid the contract where the occurrence of the event is attributable to his own act or default.

[49] The memorandum also referred to the decision of Hallett, J. (as he then was) in *Mishra v. Metledge* (1978), 37 N.S.R. (2d) 541 T.D. At p. 7 of the *Norfolk* decision, the memorandum quoted Hallett, J. (at p. 561) as follows:

> The plaintiff was entitled to have the defendant act in good faith; ... Where the obtaining of an approval requires an effort on behalf of a party to the contract, that party must make reasonable efforts to obtain the approval and the failure to do so cannot justify his failure to perform the contract.

Burchell, J. concluded at p. 9 of the decision:

> ... the main onus is clearly upon the purchaser. Here again the defendant was under a duty to make reasonable efforts and did nothing. He cannot set up his own default to excuse his refusal to complete the transaction.

[50] In *Bruce v. Region of Waterloo Swim Club*, [1990] O. J. No. 1191 (H.C.J.), Lane, J. set out the elements of good faith in para. 45:

> **45** The cases cited earlier show that best efforts means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving 'no stone unturned'. The element of good faith speaks, of course, to the actual intentions and mind-set of the defendant at the relevant time. The standard of reasonableness, however, is objective, not subjective. A contract requiring 'best endeavours' imports a duty to do all that can reasonably be done in the circumstances and the standard of reasonableness is that of a reasonable and prudent board of directors acting properly in the interests of their company and applying their minds to their contractual obligations.

[51] In *Marleau v. Savage*, [2000] O.J. No. 2399 (S.C.J.), Lalonde, J. referred to a number of authorities on the subject. He said in para. 48:

> **48** Where provisions in a contract are subject to a condition precedent, such as the approval of a third party, the court can readily find, by inference that a party to the contract had undertaken to apply for the approval.

He continued in paras. 57 and 57a:

> **57** Where a condition is inserted in an agreement for the benefit of one party, that party cannot take advantage of the condition unless it satisfies the court that it took all reasonable steps or used its best efforts to fulfil the condition. The law

> implies a duty on the part of the person for whose benefit the condition was inserted to take such steps. I do not think that it makes much difference what words are used to describe the duty, i.e. 'best efforts' or 'all reasonable steps' because what is required is that the party act in good faith in his or her efforts to have the condition fulfilled.
>
> **57a** In hindsight, one might ask whether the defendants could have done something in addition or done some things differently but perfection is not demanded in these cases. The defendants had acted reasonably, in good faith and used their best efforts. They were hurt and disappointed when rejected. They were not to be faulted.

[52] With respect to discretion, he said in para. 59a:

> **59a** The use of the phrase 'suitable to the purchaser' in the condition introduced a discretion in favour of the purchaser which allowed the purchaser to consider its own economic self interest, provided that discretion was exercised honestly, in good faith, reasonably when viewed objectively in the circumstances of the case and not capriciously or arbitrarily.

[53] In *Eastern Canada Coal Gas Venture Ltd. v. Cape Breton Development Corp.*, 2001 NSSC 196, Edwards, J. referred to *Marleau*. He said in para. 285:

> **[285]** ... The Court held that signing an agreement of purchase and sale situations obligated the purchaser to use her 'best efforts' to obtain the licence transfer. The Court held that the parties to an agreement of purchase and sale are under a duty to act in good faith and to use 'best efforts' to complete the transaction contemplated in the agreement. As the agreement of purchase and sale was subject to a condition precedent requiring approval of a third party (prior written approval by the Director approving the transfer of title), the Court held that the law requires a party to act in good faith and to use best efforts to seek satisfaction of the condition precedent. ...

[54] The onus is on Lunar to establish that it made good faith and reasonable efforts, viewed objectively, to secure the replacement of the Dual Venture by "another vessel to be supplied by Lunar."

[55] In its evidence and submissions, Lunar dealt with the condition precedent as if it meant replacing the Dual Venture with the Pathway. I have concluded above that the consulting agreement does not refer only to the Pathway. I must therefore consider whether there was "another vessel" for which Lunar received permission to replace the Dual Venture. In the context of the authorities cited above, since Lunar did not replace the Dual Venture, I must determine if Lunar acted in good faith and reasonably to try to fulfill the condition precedent with respect to other vessels. One of the other vessels was, of course, the Pathway. There were other possibilities as well: the purchase of a vessel or building a vessel. I will consider each in turn.

a) The Pathway

[56] The restrictions on vessel size included in the Scotia-Fundy Fisheries Integrated Herring Management Plan, which came into effect on December 8, 2003, provided that:

> 5. Any proposed vessel replacement greater than 125 ft. LOA or greater than 1500 BHP is required to be presented to the Herring Purse Seine Monitoring Committee for review and recommendation.

[57] As noted above, the plaintiff says that Lunar did not request the Herring Purse Seine Monitoring Committee to consider the Pathway. However, I conclude that it was not unreasonable for Lunar to have failed do this. From all the evidence, it is clear to me that it was the possibility that the Pathway would enter the fishery that prompted the restriction on vessel size.

[58] In *737985 Ontario Ltd. v. Essex Sanitary Plumbing and Heating Co.*, [1993] O.J. No. 1041 (C.J.-Gen. Div.), Hockin, J. concluded the plaintiff had "taken all reasonable steps" to obtain a re-zoning "in good faith and with due diligence." (p. 7): He said on p. 7:

> Although the plaintiff was obliged to take all reasonable steps to obtain suitable re-zoning that obligation does not include, in my view, a duty to submit a formal application to council after Caruso had made such a clear declaration to Boire that any application of a sort then contemplated by the plaintiff - increased housing densities and a greater concentration of townhouses would certainly have failed.

[59] In my view, Lunar's proposal to bring in the Pathway would not have succeeded before the Herring Purse Seine Monitoring Committee and there was no failure of Lunar's duty of good faith by not making that presentation to the Committee.

[60] Claire MacDonald and Gregory Peacock testified if the Committee refused to allow a vessel replacement, there was an opportunity for appeal to the Federal Minister of Fisheries. DFO tried to work with the industry and operate by consensus. Gregory Peacock was asked what would happen if there was an appeal to the Minister. He said the Minister would ask the opinion of the local DFO officials. He said they would likely have advised that the guidelines be followed. He said the Pathway was well outside the guidelines in the Management Plan.

[61] I therefore conclude that any appeal would have been futile. Accordingly, Lunar cannot be faulted for not trying to have the Pathway replace the Dual Venture.

b) The Purchase of "another vessel"

[62] Lunar made some inquiries about buying a vessel to replace the Dual Venture. Francis Newman testified he was asked to look into this for Lunar. He said there were three vessels he told them about: the Jennifer Jean and another in Lunenburg and the Nancy Jillian in Newfoundland. He said that Lunar representatives, who he believes were Alex Buchan, Sr. and Sinclair Banks, went with him to Lunenburg to look at the two vessels there. They had been changed for scalloping and not the herring fishery. Sinclair Banks testified these vessels were not suitable. Francis Newman said he discussed with them the Newfoundland vessel and Alex Buchan, Sr. said he did not like its engine. Francis Newman said the sizes of the three vessels where: 102-104 feet (the Nancy Jillian) and the other two were approximately 125 feet in length.

[63] Francis Newman said he contacted a broker with respect to the availability of vessels. The first document at Tab 18 is a letter from Maritime Marine Consultants (2003) Inc. confirming work it had done in the May to July period of 2004. The letter refers to the Astrid Marie and the Shemara. The letter says that, before further investigatory work was done with respect to the Astrid Marie, the owner advised he was not going to sell the vessel.

[64] At Tab 7, p. 1, there is a copy of an offer from Lunar dated April 19, 2004, to buy the Astrid Marie for 3.9 million pounds or approximately 8.5 million dollars Canadian. At p. 20 of Tab 7, there is an email from Sinclair Banks to Lloyd Cain saying:

> The owners of the Astrid Marie were beginning to make things ackward *(sic)* and difficult, therefore we terminated our pursuit of the vessel.

[65] The email continues:

> However, we have an interest in another vessel, the M/V Shemara. She is older and less flexible, but has the dual benefits of being perfect for mid-water trawl (although incapable of pursing, which limits her long term usefulness) and is much cheaper. For this season anyway, the vessel would be good for Georges Bank, and maybe suitable for conversion to pursing for next season anon. Her length and BHP are also perfect.

> I have already spoken to Don Bremner who has all the relevant contact details to assess her suitability, and so he will be continuing to work for us.

[66] The Shemara was inspected on Lunar's behalf. Three inspectors travelled to Aberdeen, Scotland for this purpose. In the letter from Maritime Marine Consultants' President, Don Bremner, he says:

> On return to Canada, an estimate of costs was made and this along with the cost of the vessel was found not to be economically viable.

The estimate to upgrade the Shemara to Canadian standards was $650,000.00. Its price is not in evidence, but in the email quoted above, Sinclair Banks says it is "much cheaper," presumably meaning much cheaper than the 8.5 million dollars Canadian for the Astrid Marie.

[67] Sinclair Banks testified the total refit costs would be $750,000.00 for a vessel that was not new. (The document at p. 32 of Tab 9 indicates the vessel was rebuilt in 1991.) Sinclair Banks said Lunar decided it was a "ridiculous expense" and therefore the vessel was unsuitable.

[68] Before the estimates were received and before that decision was made, Sinclair Banks emailed Gregory Peacock on June 25, 2004 as follows:

> We were trying to bring in a vessel for the MWT on Georges Bank. Shortly this vessel will be available for inspection by the Canadian transport officials. ...
>
> In addition we are planning for next year to possibly replace the Dual Venture with the vessel we are hoping to introduce this year for MWT (MV Shemara). The Shemara would fish the Bay of Fundy herring quota by purse seine (to which she would be converted after the Georges Bank fishing this year). At the same time we are planning to build a new vessel to have dual functionality to pursue the Georges Bank and Scotian Shelf herring, and hopefully also pursue some mackerel.
>
> This is our current position, which has changed significantly due to the sale of the Pathway. The emphasis on a vessel of 125 feet hopefully reduces the concerns of the industry and helps our position, especially in relation to mackerel.

[69] Up to that time, Lunar was making efforts to replace the Dual Venture as contemplated by the consulting agreement. Lunar was also at that time planning to build a new vessel.

[70] I conclude Lunar made good faith reasonable efforts to replace the Dual Venture with "another vessel" which it would purchase. The vessels which it considered were unsuitable in Lunar's view and there is no evidence to contradict that conclusion.

c) The Julianne III

[71] At Tab 12 there is an email from Sinclair Banks to Lloyd Cain dated July 19, 2004 entitled “Future plans.” At that time, Lunar was still planning to purchase the Shemara and replace the Dual Venture with it. Lunar intended to “Introduce a new vessel next year ... .” Sinclair Banks testified that it was around the time of that email that Lunar committed to building the Julianne III. Lunar had also begun negotiations to buy a second Herring Purse Seine licence:

> So as not be dependent upon a third party for a licence to fish a second vessel, we are planning to make an offer to Little Island Fisheries for his purse seine licence and quota of 1.6%. This would give the Bay of Fundy fishery a total of 5.6%, which would be prosecuted by the MV Shemara.

Lunar planned to offer 1 million dollars Canadian or as much as 1.4 million dollars Canadian for that additional licence.

[72] Lunar’s plans apparently changed when it decided not to purchase the Shemara. There is no evidence Lunar continued to look for other vessels, but Lunar did purchase the second Herring Purse Seine licence. That meant the new

vessel would have its own Herring Purse Seine licence, the licence needed to do mid-water trawl. The Dual Venture therefore continued to have its original licence at the time of the trial and was still fishing with that licence.

[73] How do these facts fit with Lunar's obligation to make good faith and reasonable efforts to replace the Dual Venture "with another vessel?"

[74] Several things were required for Lunar to do mid-water trawl: 1) it had to have a Herring Purse Seine licence, which the Dual Venture had; and 2) it had to have a vessel suitable for mid-water trawl, which the Dual Venture was not. The purpose of the condition precedent in the consulting agreement was to protect Lunar from having to pay consulting fees for years 4 and 5 if they were unable to meet those requirements in order to do mid-water trawl. (In addition, Lunar had to obtain an "exploratory license" to fish for mackerel. There is no dispute that this licence was obtained.)

[75] When things changed and Lunar was able to do mid-water trawl without using the Dual Venture's Herring Purse Seine licence and without replacing the Dual Venture, Lunar did not seek permission to have the Julianne III replace the

Dual Venture. Sinclair Banks admitted that Lunar could have used the Herring Purse Seine licence from the Dual Venture on the Julianne III, but Lunar says there are reasons why it did not do so. First, Lunar said they tried to sell the Dual Venture but there was no interest in it. Sinclair Banks testified it was better to keep it fishing which would better retain its value rather than dry docking it.

[76] That was a risk for Lunar inherent in the consulting agreement. It is not, in my view, sufficient reason for Lunar to fail to meet its contractual obligations under the consulting agreement. The consulting agreement did not have a condition precedent concerning the sale or sale price of the Dual Venture. It would have been in Lunar's interest to insert such a further condition precedent but there is none in the agreement.

[77] Secondly, Lunar says there were issues of loyalty to the crew of the Dual Venture. If the Dual Venture was taken out of service, some of its crew would not have met the requirements to work on the Julianne III. Lunar says this is an indication of its good faith. It was admirable of Lunar to consider the crew of the Dual Venture but that is not a matter of good faith as between Lunar and the plaintiff. It does not go to Lunar's efforts to seek permission to replace the Dual

Venture but is a subjective reason why Lunar may have made the business decision it did. It is also something that could have or should have been within Lunar's contemplation at the time the consulting agreement was signed.

[78] Thirdly, Lunar says it was concerned about the industry reaction if it used the Dual Venture licence on the Julianne III. Sinclair Banks said Lunar was concerned that there would be fears that the Julianne III, a large vessel, would fish in the Bay of Fundy. However, he also admits that it was too big and clumsy for the tides in the Bay of Fundy. He testified that Lunar tried it on one occasion and almost lost all the gear. I therefore do not consider this to be a proper reason to fail to seek permission to replace the Dual Venture.

[79] The fourth reason Lunar gives is Lunar's economic realities, its obligations to its shareholders. In my view, this too is something that could have or should have been contemplated by Lunar when it entered the consulting agreement: "What if it is not economically viable to do this?" There was no condition precedent with respect to the financial success of Lunar's venture. It is not sufficient reason to fail to comply with the consulting agreement to say, after the fact, that its plan was not a good idea and, therefore, Lunar should not have to pay.

[80] Lunar had the ability, for its own business purposes, to change its plan when circumstances changed. However, in my view, it was still required to live up to its obligations under the consulting agreement. A reasonable board of directors would look not only at Lunar's interests but also address itself to its contractual obligations. In my view, Lunar's business interests do not trump its obligations pursuant to the agreement. Lunar had it within its power to replace the Dual Venture with the Julianne III. It chose not to do so for business reasons: it had a second Herring Purse Seine licence and no longer needed the Herring Purse Seine licence from the Dual Venture to do mid-water trawl. Although it had, by signing the consulting agreement, made a commitment to make good faith efforts to seek permission to have a vessel replace the Dual Venture, it chose not to make any effort to do so.

[81] Subjectively, Lunar may have had good reason to do as it did; these were business reasons. However, these actions must be viewed objectively in the context of the consulting agreement. I cannot conclude that Lunar made good faith efforts to meet the condition precedent. Having chosen not to even seek

permission, Lunar cannot rely on its failure to do so as reason for it to be relieved from its contractual obligation.

[82] I therefore conclude that Lunar breached the consulting agreement. Accordingly, it is required to pay the consulting fees for years 4 and 5 as set out in the consulting agreement. This is so unless I conclude that the contract was frustrated, which is Lunar's alternate argument.

3. Frustration

[83] Lunar says the consulting agreement was frustrated and therefore not enforceable against it. It says the circumstances changed so drastically after the execution of the consulting agreement that it should not be required to comply with it.

[84] In *Some Fine Investments Ltd. v. Ertolahti*, [1991] N.S.J. No. 226 (S.C.T.D.), MacIntosh, J. concluded an agreement of sale was frustrated. A barn, which was to be removed by the plaintiff, was subsequently designated by the

Heritage Property Act 1980, S.N.S. c. 8 and could not be removed. MacIntosh, J. said at p. 3:

> This is clearly a case of a contract being frustrated by an unexpected and unforseen event, over which neither of the parties had any control. By governmental decree, subsequent to the signing of the agreement, the removal of the barn became legally impossible.

> In S.M. Waddams, The Law of Contracts, Second Edition (Toronto: Canada Law Book Inc., 1984) at p. 271:

> > Where performance becomes illegal, relief has again been generally given.

> In Remedies and the Sale of Land, supra, at pp. 105-6:

> > Circumstances may arise after the creation of a contract that thwart the expectation under which the parties entered into the agreement. The classic case is the rental of a place to view a coronation parade that is cancelled because of the unexpected illness of the monarch. Other examples are the outbreak of war, the destruction of the physical means for performance by someone other than a contracting party and the introduction of new legislation that prohibits or prevents performance. These unexpected events are said to frustrate the contract and to free the parties form further performance.

[85] In *Teleflex Inc. v. I.M.P. Ltd.*, [1996] N.S.J. No. 136 (C.A.), the parties entered a contract for aircraft parts which the defendant was to provide to the

Brazilian government. Eventually, the negotiations with the government ended and the defendant told the plaintiff it no longer needed the material contracted for and produced to date. The defendant refused to pay and defended a summary judgment application on the basis that the contract was frustrated. Summary judgment was granted and the Court of Appeal agreed on appeal that the contract was not frustrated.

[86] Chipman, J.A. said in para. 47:

> **47** In Kismat Investments Inc. v. Industrial Machinery et al (1985), 70 N.S.R. (2d) 341 Macdonald, J.A. speaking for this Court said at p. 347:
>
> > The law appears clear that before an intervening event or change in circumstances can prematurely determine a contract by operation of the doctrine of frustration such event or change in circumstances must be of so catastrophic or fundamental a nature as to render performance of the contract impossible. ...
> >
> > There is, however, no uncertainty as to the materials upon which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred' (Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd., per Lord Wright).

[87] He continued in paras. 48 and 49:

> **48** ... The court will not apply the doctrine unless it considers that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract. Thus, where it appears that the continuing availability of some thing or person or state of affairs is essential to the performance of the contract, the contract is discharged at the time, but not before, that person, thing or other essential element disappears or fails to materialize.
>
> **49** As was put in Davis Contractors, supra, the question to be asked is whether the circumstances in which the performance is called for are such as to render the thing 'radically different' from that which was undertaken by the parties to the contract.

[88] Lunar says the change in the rules with respect to the size of vessels fundamentally changed the contract. Lunar says it made its performance of the contract a "radically different" thing than what was contemplated.

[89] In determining if the contract was frustrated, I must look at what was contemplated when the contract was signed. I have concluded above that it was not the Pathway which was the "vessel to be supplied." Accordingly, the rule change which affected the Pathway is not sufficient to frustrate the contract. That rule change did not prevent Lunar from supplying "another vessel." I have considered above the vessels with which Lunar contemplated replacing the Dual Venture and the ability of Lunar to replace it with the Julianne III.

[90] Alternatively, Lunar says "... the business realities and economics cannot be completely ignored" (quoting from the defendant's pre-trial submissions). Lunar says replacing the Dual Venture with the Julian III was not practical or economically viable. I have considered these submissions above.

[91] In *Teleflex*, *supra*, Chipman, J.A. said in para. 54:

> The parties did, I think clearly, contemplate the possibility of the Brazilian program never materializing.

[92] In paras. 59 and 60, he said:

> **59** As was said by Lord Simon in the House of Lords in National Carriers Limited v. Panalpina (Northern) Limited, [1981] A.C. 675, at p. 700:
>
> > Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.
>
> **60** I cannot conceive of the circumstances which ultimately developed in January of 1994 as not being contemplated by the parties in 1991 at the time they made their contract.

[93] Similarly, as I have said above, I cannot think that Lunar did not consider the possibility that it might be very expensive to replace the Dual Venture; that it might be difficult or impossible to sell the Dual Venture or sell it at a good price once the Herring Purse Seine licence was placed on a replacement vessel; that it might have difficulty using the Dual Venture's crew on a replacement vessel; that the mackerel fishery might not be successful; or that it could obtain a second Herring Purse Seine licence and not need the licence from the Dual Venture.

[94] In my view, these circumstances were foreseeable. These circumstances did not fundamentally alter the performance of the contract by Lunar. It may have made it more expensive or more onerous but that did not alter the nature of the contract. The contract was not made radically different. Lunar still had the opportunity to replace the Dual Venture and chose not to do so. Accordingly, the contract was not frustrated.

4. Plaintiff's Alternate Argument

[95] Since I have concluded that the plaintiff is entitled to be paid the consulting fees for years four and five, I do not need to deal with its alternate argument with respect to payment for part of year four.

CONCLUSION

[96] The plaintiff is entitled to be paid the consulting fees of $100,000.00 for each of years four and five. The parties have advised they would be able to agree on pre-judgment interest. The plaintiff is entitled to its costs. If the parties cannot agree, I will accept written submissions.

Hood, J.