

SUPREME COURT OF NOVA SCOTIA

Citation: 3099376 Nova Scotia Ltd. v. V.P.S. Fisheries Company, 2013 NSSC 72

Date: 20130220

SYDJC284214

Registry: Sydney

Between:

3099376 Nova Scotia Limited, a body corporate, with Head Office
situate at 15 MacKay Street, Sydney Mines, in the Cape Breton Regional
Municipality, Province of Nova Scotia

Plaintiff/

Defendant by Counter-Claim

v.

V.P.S. Fisheries Company Limited, a body corporate, with Head
Office situate at 1415 Leitches Creek Road, Leitches Creek, in the Cape Breton
Regional Municipality, Province of Nova Scotia, and Ricky Rideout, of 1415
Leitches Creek Road, Leitches Creek, in the Cape Breton Regional Municipality,
Province of Nova Scotia

Defendants/

Plaintiffs by Counter-Claim

Judge: The Honourable Justice Frank Edwards

Heard: February 18th, 19th, & 20, Sydney, Nova Scotia

Written Decision: April 24, 2013

Counsel: Nash Brogan, for the plaintiff
Joseph Wall, for the defendant

By the Court:

[1] **Introduction:** This case concerns the lucrative snow crab fishery and the consequences, for one group of fishermen, of the bankruptcy of Han Beck Sea Products Inc.

[2] In early 2005, the Department of Fisheries (D.F.O.) instituted a new policy which required individuals having quotas to catch snow crab to combine in a corporate entity. DFO would then issue one license to fish the combined quota to that entity. The entity would then hire one person/company to catch the combined quota.

[3] The Defendants VPS Fisheries Co. Ltd. (VPS) and Ricky Rideout (Ricky) had been engaged in the crab fishery since 2000. VPS is solely owned by Ricky. Between May and August, 2005, Ricky got fifteen quota holders (including himself) to sign agreements to join a legal entity to be formed and to allow Ricky/VPS to catch their combined quotas. At the time, crab fishing season was from June 1st until September 30th.

[4] DFO initially required 22 signatures but eventually, in the summer of 2005, approved the fifteen signed up by Ricky. Consequently, the 15 met at the law offices of Sampson MacDougall in Sydney on August 11, 2005. At that time, Robert Cartright was elected President and Ricky was elected Secretary Treasurer of the numbered company which is now the corporate Plaintiff. The meeting agreed that the new entity would pay Ricky/VPS \$.80 per lb. to catch its entire quota.

[5] Between August 13 and August 29, 2005 Ricky caught the total quota of 119,321 lbs. which he sold for \$2.25 lb. to Han Beck Sea Products Inc. (Han Beck) of Louisbourg. Han Beck was offering more per lb. than any of the other buyers. This case arose because Han Beck paid only \$41,128.40 of the \$268,472.25 it was supposed to pay. The issue in this case is whether Ricky had personally guaranteed payment to the Plaintiff in the event of Han Beck's default. Ricky's counterclaim involves his demand to be paid for catching both the 2005 and 2006 quotas for the Plaintiff. As well, Ricky is seeking his share (as a shareholder of the Plaintiff) of the money received by the Plaintiff for the 2007 catch (which was caught by someone other than Ricky).

[6] **The Witnesses:** Kevin Capstick has been a fisherman for 40 years. He also had his own company to buy and sell lobster, crab and groundfish. Kevin says that in 2002 or 2003 he sold product to Han Beck. Because he knew Han Beck's financial position was precarious, he required payment by certified cheque for each load of product at the time of each delivery.

[7] Kevin also had a crab quota. He says he signed an agreement with Ricky (as one of the previously mentioned 15) after they had a discussion at the wharf. Kevin insists that he signed on the sixth day of the tenth month (Oct. 6/05). He is mistaken. Kevin signed on the tenth day of the sixth month (June 10/05). Ricky needed the fifteen signatures prior to DFO approval which came in July/August '05. By October '05, the crab season was closed. I do not accept that Kevin signed on that date.

[8] Kevin attended the August 11/05 meeting at Sampson MacDougall. He says it was there that he learned that Ricky intended to sell to Han Beck. During the meeting, Kevin voiced his concerns about selling to Han Beck. He says that Ricky stated "I'll guarantee you, you'll get your money." Kevin continued, "I put up my

hands and sat down.” He says that with that guarantee he felt he could not lose and that, without the guarantee, he would have taken his quota elsewhere.

[9] For his part, Ricky flatly denies that there was any discussion of Han Beck at the August meeting. Ricky believes he did say he would guarantee payment during a meeting in October, 2005. Ricky called that meeting in order to discuss Han Beck’s failure to pay. At that point, Ricky was still very confident that Han Beck would pay. In fact, Ricky was tacitly supported at the time by Kevin who stated to the meeting that he believed Mr. Kim (the principal in Han Beck) to be an honorable man. It is common ground between the parties that any guarantee made in October (after the crab had been caught) would not be enforceable. The Plaintiff’s case rests on proving that Ricky made the guarantee statement in August.

[10] William Arsenault’s (William) evidence is vague and contradictory. In direct, William says the issue of selling to Han Beck came up during the August meeting. In cross, he agreed that Han Beck first came up during the October meeting. In redirect, he went back to the August meeting as being the first

mention of Han Beck. William did his best to recall what was said over seven years ago. It is not surprising that he, or anyone, would have difficulty doing so.

[11] Travis Forest (Travis) testified that he vividly remembered Ricky at the August meeting saying ‘I guarantee you the money’ or ‘I’ll guarantee you’ll be paid’. He admits that he does not remember the exact words. Travis’ memory is vague about everything else. He is not even sure whether he attended the October meeting. I am satisfied that Travis likely did attend the October meeting and it was there that he heard Ricky utter the guarantee. Like William, it is likely that Travis is trying to recall what was said over seven years ago. The significance of the discussions at the August and October 2005 meetings likely became apparent to him years later. I do not believe his recollection is accurate.

[12] Emanuel Leeman (Emanuel) was at the August meeting. He recalls Han Beck being discussed but could not say what was said.

[13] Paul Tremblett (Paul) says there was a general discussion about Han Beck at the August meeting. He says Ricky “assured everyone he would get paid for it.” Even if I were to accept Paul’s recollection, the words he heard do not qualify as a

guarantee by Ricky that he would be personally liable for up to a quarter million dollars.

[14] **The Law**: During his submission, Plaintiff's counsel quoted the following:

328 The interpretation of oral contracts turns on the same essential principles. If the alleged agreement has not been reduced to writing, the Court must consider what the parties said and did and assess objectively whether, in context, their words and actions establish an intention to be bound. The genesis and aim of the transaction is an aspect of the relevant context for consideration. The credibility of witnesses will be particularly important and differing versions of events will increase the difficulty of establishing that an enforceable bargain was made. (Singh v. Nicholson, 2011 BCSC 449 at para. 26)

See also: Niagara Structural Steel Ltd. v. Bellows et al [1964] O.J. No. 807 [1965] 1 O.R. 89, 46 D.L.R. (2d) 705; Regulvar Canada Inc. v. Her Majesty in Right of Ontario, 70 O.R. (3d) 649 (Ont.C.A.); Villeneuve v. Turner [1990] O.J. No. 385.

[15] **Analysis**: I accept the foregoing as an accurate statement of the law. I do not accept Ricky's evidence that there was no discussion of Han Beck at the August meeting. He is mistaken. I do not believe that the Plaintiff's witnesses are lying. I am satisfied that there was discussion about Han Beck at the August meeting. Ricky may even have voiced his confidence that Han Beck would pay. However, I am convinced that Ricky never said anything which would oblige him to be personally bound should Han Beck default. I reject any of the evidence of any of the Plaintiff's witnesses which would suggest otherwise.

[16] In particular, I am satisfied that Kevin is mistaken in his recollection of what was said at the August meeting. I believe Kevin is an honest person and is not deliberately attempting to deceive the Court. I have no doubt but that he now believes his recollection is accurate. I am sure that it is not. The passage of time can distort the memory.

[17] I accept that the August meeting lasted for approximately 1 - 1.5 hours. During that time, as noted, there was discussion about Han Beck which centered on the concern about its ability to pay. I am satisfied that there was discussion, as indicated by Kevin, about the desirability of getting paid for each trip at the time of delivery. I am also satisfied that this discussion never hardened into a direction to Ricky that he must get paid for each trip rather than wait until the total quota had been caught. The one direction Ricky did get from the meeting was that he should go to the buyer which offered to pay the highest price. That is exactly what he did and the Plaintiff is stuck with the consequences of that direction.

[18] The Plaintiff bears the burden of proof. The Plaintiff must prove the existence of Ricky's personal guarantee on a balance of probabilities. This, the

Plaintiff has failed to do. Ricky knew well before August 11, that he would be catching the Plaintiff's crab quota. Prior to August 11, Ricky had the signed agreements of the 15 shareholders and DFO approval. He had no reason to risk personal liability for so much money and I am satisfied that he did not do so.

[19] Ricky's counterclaim is allowed. Ricky caught both the 2005 and 2006 quotas for the Plaintiff. I am satisfied that he had authority to catch the '06 quota. Everyone assumed that Ricky would catch the '06 quota and no one objected. During submissions (on the basis of the Agreed Statement of Facts), Counsel agreed that the balance owing to VPS was \$15,330.04. Also, Ricky as a shareholder of the Plaintiff is entitled to \$10,317.00 for his share of the 2007 catch. He is also entitled to his share of the \$10,000.00 bonus the Plaintiff received from the buyer in 2007. I fix that share at \$800.00.

[20] The Plaintiff will therefore pay VPS/Ricky:

\$15,330.04
10,317.00
<u>800.00</u>
\$26,447.04

[21] The Plaintiff will also pay prejudgement interest on \$26,447.04 at the rate of 2.5% for 3 years. PJI is therefore \$1984.00.

[22] **Costs:** As the successful parties, Ricky and VPS are entitled to costs and reasonable disbursements. Mr. Wall should provide me with a memo re costs by March 8, 2013. Mr. Brogan should respond by March 15, 2013. Of course, if counsel can agree on costs, a joint submission would not be unwelcome.

[23] **Addendum Re Costs:** I have now reviewed Counsels' written post trial submissions on costs. I am satisfied that a formal Offer to Settle made by the Plaintiffs covered **all** claims by Ricky and VPS and not just those for the years 2005-2007. As such, it has no bearing on my decision re costs.

[24] As Ricky's counsel noted, I have a very broad discretion when assessing costs. Slavish adherence to the tariffs can sometimes result in an unfair assessment. This is one of those times. Were I to simply do an arithmetical tariff calculation, Ricky would get almost \$28,000.00 costs plus his disbursements. If a costs award was simply that mechanical, there would be no need for judicial oversight. CPR 77.06 gives a judge a discretion to depart from the tariff ("unless a

judge orders otherwise” costs must be fixed according to the tariff). CPR 77.07 provides “examples” (none of which are relevant here) but not a definitive list of factors justifying departure from the tariff.

[25] In my decision, I found that the Plaintiffs were responsible for having directed Ricky to sell to the highest bidder. While that is true, it is tempered by the fact that Ricky initially chose and promoted the sale to Han Beck. In addition, I have found that Ricky was mistaken in his recollection that there was no discussion of Han Beck at the August meeting. I am reluctant to award Ricky the maximum where everyone else lost in a deal that he encouraged. It is appropriate that Ricky share some of their pain.

[26] It is true that Ricky, as a shareholder in the Plaintiff Company, also lost his share of the 2005 catch. But Ricky still enjoyed significant benefit from the season because ultimately, as a result of this litigation he was paid to catch the combined quota. To his fellow shareholders in the Plaintiff Company, the 2005 season was a complete loss. Nor did they get paid for the 2006 season. Their loss was proportionately much greater than Ricky’s. I am not going to aggravate that imbalance by awarding Ricky tariff costs.

[27] In the result, I have determined that an award of tariff costs would be unfair. I am therefore fixing costs at \$15,000.00 plus disbursements of \$2,222.18. As VPS is solely owned by Ricky, I leave it to Ricky's counsel to apportion as he sees fit for both the award at trial and the costs award between Ricky and VPS.

Order Accordingly.

J.

Sydney, Nova Scotia