

SUPREME COURT OF NOVA SCOTIA

Citation: *Three Ports Fisheries Ltd. v. Jeffrie*, 2013 NSSC 224

Date: 2013-07-11

Docket: Hfx No. 354159

Registry: Halifax

Between:

Three Ports Fisheries Limited, a body corporate

Applicant

v.

*Roderick Jeffrie and
H. Hopkins Limited, a body corporate*

Respondents

Judge: The Honourable Justice Gregory M. Warner

Heard: July 2, 2013, in Halifax, Nova Scotia

**Final Written
Submissions:** July 9, 2013

Counsel: **Ezra B. van Gelder**, for the Applicant
Vincent A. Gillis Q.C., for the Respondents

By the Court:

[1] On June 27, 2013, the Respondents filed a motion to adjourn an Application in Court, scheduled to begin on July 2, 2013, and continue for five days. The motion was contested, heard on July 2 and granted. A condition of the adjournment was that the Respondents pay the Applicant his throw-away costs on a solicitor / client basis. The parties are unable to agree on the amount of those costs.

Background

[2] Roderick Jeffrie (“Jeffrie”) and Anthony Hendriksen (“Hendriksen”) are equal owners of Three Ports Fisheries Limited (“Three Port”), a fish broker. They have had disputes, such that Hendriksen has continued to operate Three Ports and Jeffrie has purchased, and begun brokering fish in competition with Three Ports through, H. Hopkins Limited.

[3] In this Application, Three Ports claims that Jeffrie breached his fiduciary obligation as an officer and director of the company.

[4] In a separate application, Jeffrie sought to enforce an agreement entered into between himself and Hendriksen, whereby Hendriksen agreed to buy him out of Three Port. That Application had been heard and decided against Jeffrie. Justice Wood released a decision February 26, 2013, and a costs decision May 15, 2013. Jeffrie has appealed that decision.

[5] This related Application was set for a five-day hearing commencing July 2.

[6] Deadlines were set for the filing of affidavits and expert reports, for discoveries and for pre-trial briefs. The Applicant had filed its affidavits and expert report by the February 1, 2013, deadline. In early March, then counsel for the Respondent (William L. Ryan Q.C.) requested, and the parties agreed to a short extension to April 1, 2013, for the filing of the Respondent’s expert report and affidavits and to April 26, 2013, for the Applicant’s rebuttal affidavits. This left May for discoveries.

[7] On March 27, 2013, William L. Ryan Q.C., counsel for the Respondents, filed a Notice with the Court, copied to Applicant’s counsel, that his retainer had been terminated and Jeffrie was in the process of obtaining new counsel.

[8] On April 14, 2013, Respondents' counsel forwarded to the Applicant Jeffrie's Notice of Intention to Act on His Own and on April 17 a Notice that he intended to act on behalf of his company H. Hopkins Limited.

[9] Jeffrie did not file any affidavits or expert reports by the April 1 deadline. On April 29 the Applicant advised the Court with a copy to Jeffrie (from whom it had heard nothing), that it intended to proceed with the hearing of the application on July 2.

[10] On June 17, Applicant's counsel wrote to Jeffrie to confirm which, if any, of the Applicant's affiants he wished to have attending at the hearing for cross-examination and giving him until June 24 to reply.

[11] On June 26 Vincent Gillis Q.C. called the Applicant's counsel, advised of his very recent retention by the Respondents and of his intention to request an adjournment of the hearing on July 2. Gillis filed his motion, affidavit and brief on June 27.

[12] Mr. van Gelder advised Mr. Gillis that he intended to have Hendriksen and the Applicant's bookkeeper testify at the hearing as well as his expert, a business valuator, would be available to answer questions.

[13] Mr. van Gelder filed an affidavit and brief opposing the adjournment.

[14] Based on the factors in *CPR 4.20* and *Caterpillar v Secunda Marine*, 2010 NSCA 105, the Court made an oral decision on July 2 determining that the only prejudice to the Applicant by granting an adjournment was the costs of preparing for the hearing, which was less prejudice than to the Respondent an adjournment was not granted. The motion for adjournment was granted. The Applicant's prejudice was mitigated by an order that the Applicant's throw-away costs on a solicitor – client basis would be paid by the Respondent, regardless of the outcome of the adjourned Application.

[15] The Application was adjourned to November 2013, with new deadlines for the filing by the Respondents of their affidavits and expert report, and of rebuttal affidavits, discoveries, and briefs.

Costs Submission

[16] The Applicant claims fees for 42.7 hours of wasted preparation in the amount of the \$8,659 plus HST, and seeks payment of an invoice from its expert,

Paul Bradley, of PricewaterhouseCoopers, a business valuer, in the amount of \$4,950.75.

[17] Mr. van Gelder has produced time sheets showing counsel's hours spent on the file from June 3, 2013, to and including the July 2 attendance at Court. The total is 78.30 hours. Mr. van Gelder claims recovery of 42.7 hours.

[18] Of this 42.7 hours, it appears that 21 hours was incurred from the time of Mr. Gillis' call on June 26 advising of his late retention and request for an adjournment. That means that about 22 hours is claimed for preparation between June 3 and June 26.

[19] Effectively, the Applicant's counsel has already reduced 57 hours to 22 hours for services before the Gillis phone call. A review of charges before June 26 shows that they relate to research, preparation of memorandums and preparation of the pre-trial brief. Of the 21 hours from Mr. Gillis' phone call on June 26 to and including July 2, it appears that about 10 hours was incurred consulting the client, deciding to oppose the adjournment motion, preparing his affidavit and brief; approximately 7 hours was incurred preparing two affiants and the expert for attendance at the July 2 hearing; and, approximately 4 hours was incurred on July 2 to prepare and attend for the motion to adjourn.

[20] The claim for throw-away costs regarding the Applicant's expert, Mr. Bradley is described in a very brief invoice as follows:

For professional services rendered in connection with trial preparation in the matter of Three Ports Fisheries Ltd. v Mr. Roderick Jeffrie and H. Hopkins Ltd., in accordance with our engagement letter dated March 27, 2012.

- Mark Halman – 2 hrs @ \$250
- Paul Bradley – 9 hrs @ \$400

Fees	4,100.00
Disbursements	
Administration fee	205.00
Total fees and disbursements	4,305.00
HST	645.75
Total due	4,950.75

[21] The PricewaterhouseCoopers invoice does not identify what, when and how these hours were incurred.

[22] The Respondents take issue with three aspects of the Applicant's costs claim.

[23] First, they submit that 20.7 hours to respond to his motion for adjournment is not reasonable. In response Mr. van Gelder notes that part of the 20 hours included preparing their affiants for cross-examination at the hearing on the basis that it was not a foregone conclusion that an adjournment would be granted. He says it was reasonable to contest the adjournment and necessary to prepare the affiants to testify.

[24] While the ten hours I estimate that was spent on the adjournment motion preparation might be on the high end of "reasonable" time to oppose, unsuccessfully, the adjournment request, it is not above the limit of what is reasonable. The adjournment request was made very late in the proceeding. Jeffrie's affidavit speaks of his personal problems from the time that he and his prior counsel separated. They do not explain or justify not contacting Applicant's counsel, or seeking alternate counsel until less than a week before the application was clearly going to commence.

[25] The Respondents' second submission is that the time spent preparing the Applicant's pre-trial brief (about 18 hours) is too much and is not wasted.

[26] I note that far more than 18 hours was spent before Mr. Gillis' phone call of June 26. The Applicant has already reduced time charged to slightly under 20 hours.

[27] This litigation involves a significant monetary claim. Part of the request for adjournment was to give time for the Respondents to file the affidavits and an expert report that was due in March.

[28] The extension of time to prepare and file them, and the fact of discovery examination, will not entirely negate time spent researching the legal issues. However, it is very likely that the factual issues will change upon receipt of the Respondents' affidavits and expert report, so that a new brief will likely focus on different and additional issues from those the Applicant would face when it was party producing evidence.

[29] I find that the Applicant's request for about 21 hours of about 57 hours spent preparing for the Application before Mr. Gillis' phone call, mostly spent in research and brief preparation, is not unreasonable.

[30] The Respondents' third issue is with the claim by the expert of 11 hours of preparation time for the hearing. The submission is that time is excessive and not wasted.

[31] I have several concerns with the invoice submitted to substantiate the PricewaterhouseCoopers claim for trial preparation.

[32] The claim is for two people and is not itemized. The report prepared by Mr. Bradley is not complex. At the time that Mr. Bradley prepared for the hearing, it would have been known that there was no expert report from the Respondents to deal with, nor any affidavits filed on behalf of the Respondents.

[33] My review of the expert report suggests that it should not have taken more than a couple hours to review the background materials that went into the report for the purposes of answering any questions at the hearing. It does not appear from Mr. van Gelder's time records that he interviewed Mr. Bradley for more than two hours.

[34] It has not been established that the invoice for Mr. Bradley's trial preparation time is reasonable. Based on the circumstances as they existed in June 2013, trial preparation time by Mr. Bradley of more than four hours is not reasonable. The Court is prepared to approve four hours preparation at his stated hourly rate (\$400.00) plus HST.

[35] The Court asks Mr. van Gelder to prepare the appropriate order.

Warner, J.