SUPREME COURT OF NOVA SCOTIA

Citation: *The Jeanery Limited v. Dartmouth Crossing Limited*, 2020 NSSC 297

Date: 20201022
Docket: Hfx 424979
Registry: Halifax

Between:

The Jeanery Limited

Applicant

v.

Dartmouth Crossing Limited and Dartmouth Crossing 2 Limited

Respondents

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	September 3, 2020, in Halifax, Nova Scotia
Counsel:	Cory J. Withrow, for the Applicant Colin D. Piercey and Andrew J. Hill, for the Respondents

By the Court:

Introduction

[1] I have heard three contested motions in this proceeding. The first two are brought by the Respondents, Dartmouth Crossing Limited and Dartmouth Crossing 2 Limited (hereinafter collectively referred to either as "Dartmouth Crossing" or "the Respondents"). They seek an order converting the within application into an action, and also security for costs.

[2] The Applicant brings the third, seeking an order severing the issues of liability and damages.

[3] All three were heard on September 3, 2020.

[4] I have granted the first two motions, and denied the third. My explanation follows.

Background

i) Style of cause

[5] The Jeanery, which had been controlled by Gary Fullerton, became insolvent in 2014. It ceased operations at its leased premises in Dartmouth Crossing, and at its other locations in the Province. Its corporate registration was revoked for nonpayment on October 6, 2014. Its status has not changed to date.

[6] Later in 2014, The Jeanery's Trustee/Receiver (“the Trustee”) assigned the claim which is the subject matter of this proceeding to another company controlled by Mr. Fullerton. That company is 3067610 Nova Scotia Limited. I will hereinafter refer to it as either "306 NSL" or "the Applicant".

[7] However, nothing was done to change the style of cause as of September 3, 2020. The Court was advised prior to this hearing that a Consent Order effecting that amendment had been signed by counsel and would be filed forthwith upon its conclusion.

[8] Counsel for Dartmouth Crossing stipulated that the Respondents’ consent to the amendment (to the Applicant’s pleadings) is without prejudice to any of its rights or the defences that it could have otherwise brought, including its right to contest the

validity of the assignment of The Jeanery's claim to 306 NSL, to raise any limitations defence(s), or to move for dismissal for want of prosecution.

ii) The nature of the Application

[9] The origins of this Application are dated. It began life in 2014 as an "Application in Chambers" brought by The Jeanery, one which was subsequently amended on March 21, 2014 to an Application in Court. The Amended Notice of Application in Court filed on that date specifies the relief sought:

1. An order declaring a lease for retail premises between the Applicant as tenant and the Respondents as landlord to have been entered into on a misrepresentation and the Applicant to be entitled to an order for rescission of the lease;
2. An order rescinding the lease;
3. General damages;
4. Special damages;
5. Costs of this proceeding, including enhanced costs; and
6. Such further relief as this Court may deem just and the circumstances require.

iii) General background

[10] Mr. Fullerton and his former wife each own 50% of the shares in The Jeanery, of which he was the sole director and officer. He is the sole shareholder, director and officer of 306 NSL. The only assets presently owned by that company are its interest in the proceeds of this litigation, and another one. The latter suit is not currently being pursued.

[11] Mr. Fullerton has an identical relationship to another numbered company, which I will refer to as 305 NSL (or "305"). He is the sole shareholder, director, and officer of 305 as well.

[12] 305 owns the home (in Chester, Nova Scotia) in which Mr. Fullerton currently resides. He pays rent to that company for the premises. The only cash receipts available to 306 NSL are those which are provided to it by either 305, or Mr. Fullerton personally.

[13] In his personal capacity, Mr. Fullerton testified that he is employed by "OSL Services" and that he earned approximately $83,000.00 in 2019, but "expects to earn less" during the current year.

[14] The only real property beneficially held by Mr. Fullerton is a piece of land left to him as a bequest in his late father's Last Will and Testament, some years ago. No steps have been taken by him to transfer title to this land into his own name. He said that the land has been in his family for generations, but otherwise did not explain why he has left the records at the Registry of Deeds as they are.

[15] The financial statements with respect to 306 NSL disclose a debt to Canada Revenue Agency ("CRA") in excess of $80,000.00. At paragraph 28 of his Affidavit of August 19, 2020 ("Fullerton Affidavit"), Mr. Fullerton indicated that he was awaiting confirmation of that indebtedness.

[16] At Tab "1" of Exhibit "A" to his Supplementary Affidavit sworn August 27, 2020 ("Fullerton Supplementary Affidavit"), there is reference to a liability in the amount of $61,757.00. It appears that this is the actual CRA debt. Mr. Fullerton testified that it relates to employee deductions not remitted to CRA. He further indicated that he was of the understanding that he is personally responsible for these monies to CRA in the event that 306 NSL fails to pay them.

[17] At paragraph 29 of his Affidavit, he indicated that the TD Visa account of 306 NSL was overdrawn. He was unable to point to a corresponding indication of that indebtedness on the balance sheet. Mr. Fullerton adverted to the possibility that the Visa had been used for purposes other than corporate ones over time, and suggested that was likely why it is not included in the corporate data listed.

[18] Other long-term debt was reflected on 306 NSL's April 15, 2020 (*Fullerton Supplementary Affidavit, Tab 1*) balance sheet. Over the last two fiscal years that indebtedness has been reduced (from $117,050.00) to $73,744.00, to its present balance of $0. Mr. Fullerton's testimony was that this represented money owed to him by 306 NSL. It consisted of infusions of cash which he said that he had made available to the company "many times in many different ways". When asked where the company obtained the money to retire that indebtedness, he said that the amount owed "may have been moved into something else", that it may therefore still be extant, and that he would need to speak to his accountant in order to get further clarification.

[19] As to the professional fees noted in the most current financial statements for 306 NSL, Mr. Fullerton explained that they amount to $11,236.00 in the current year, that they represented accounting fees, and that he had paid them himself in order to have the accountant bring the company's books up-to-date, since this had to be done in order for the Applicant to continue with this litigation. He agreed that there had been no expense for such professional fees in previous years, and that he personally had sold a piece of real estate to pay this expense on behalf of the Applicant.

[20] Returning to the other company (305 NSL), another "current asset" (besides Mr. Fullerton's home) which is reflected on its most recent financial statement (*Fullerton Supplementary Affidavit, Tab 5*) is a "vendor takeback receivable". Mr. Fullerton explained that it relates to the sale of certain real property by 305. The purchaser assumed the (then existing) balance of the mortgage on the property, and the vendor takeback amount was reflective of the difference in value between the balance of that mortgage and the sale price, after adjustments had been made for the deposit and other costs and fees associated with the transaction. 305 currently receives monthly payments on this "vendor takeback receivable", which it reflects as income. Some of these funds have been provided by 305 to 306 NSL to enable it to carry on with this litigation.

iv) Overview of the competing arguments in the case

[21] The case itself relates to a lease into which the Applicant's assignor, The Jeanery, entered with the Respondents on October 23, 2012 ("the lease"). At the time, The Jeanery operated multiple clothing store outlets. Including the location at Dartmouth Crossing, there would be seven different locations in the Province by 2014.

[22] Misrepresentations are alleged to have been made by the Respondents' representative, Tony Fazari to Gary Fullerton, principal of The Jeanery. They are alleged to consist of emails sent to him by Mr. Fazari, as well as oral representations which are alleged to have been made during a telephone call. They appear to primarily relate to the annual sales figures of a (then) tenant of the Respondent at Dartmouth Crossing. This other tenant was a competitor of The Jeanery.

[23] The statements are alleged by the Applicant to have induced The Jeanery to enter into the lease. Although none of the alleged misrepresentations are reproduced in the lease itself, and although the document contains a merger clause, the Applicant

claims that its assignor's location in the Respondents' premises was not viable, and that it would have known this to be the case before the lease was executed, had it been given accurate information beforehand.

[24] The Applicant also alleges that losses sustained at its Dartmouth Crossing location ultimately led to the failure of not only its location there, but of all of its other locations across the Province as well.

[25] The Respondent denies that the misrepresentations were ever made. Alternatively, it contests reasonable reliance, causation, and quantum of damages.

[26] I will deal with each of the types of relief sought, which is to say, an order converting the within Application in Court to an Action, an order for security for costs, and an order bifurcating the issues of liability and damages, sequentially.

(A) Is it appropriate to convert the present Application in Court into an Action?

i) the appliable principles

[27] Of course, *Civil Procedure Rule* 6.02 is the appropriate place at which to begin the analysis. It reads as follows:

> 6.02(1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application
>
> (3) An application is presumed to be preferable to an action if either of the following is established:
>
> > (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights, and the erosion will be significantly lessened if the dispute is resolved by application;
> >
> > (b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.
>
> (4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:
>
> > (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

> (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.
>
> (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:
>
> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.
>
> (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[28] Preliminarily, *Rule* 6.03 outlines the steps to be undertaken by a party seeking to convert an application to an action:

> 6.03(1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:
>
> (a) a description of the evidence the party would seek to introduce;
>
> (b) the party's position on all issues raised by the application;
>
> (c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.
>
> (2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[29] Appropriately, the Applicant did not argue that Dartmouth Crossing had failed to comply with the criteria specified in *Rule* 6.03.

[30] Returning to *Civil Procedure Rule* 6.02, in *Roué v. Nova Scotia*, 2013 NSCA 94, the Court gave detailed consideration to this provision, and reasoned that the *Rule* was constructed in such a way as to favour applications in court over actions (para. 20). MacDonald, CJNS (as he then was) elaborated upon some of the advantages of such a method of procedure:

17. In reviewing these provisions, I note several key features that serve to make this process more efficient than the traditional action. They include:

> - early case management by way of the mandatory motion for directions [*Rule* 5.07(3)].
>
> - dates for the hearing proper being set from the outset [*Rule* 5.09(2)(l)].
>
> - flexibility regarding the extent of pre-hearing disclosure [*Rule* 5.09(2)(c)].
>
> - flexibility regarding the extent of discovery hearings [*Rule* 5.09(2)(d)].
>
> - flexibility regarding the extent of cross-examination [*Rule* 5.09(2)(f) and (g)].
>
> - evidence-in-chief proceeding by way of affidavit [*Rule* 5.09(2)(e)].
>
> - deadlines for the filing of affidavits [*Rule* 5.09(2)(k)].

18. In short, this process commands aggressive case management where all pre-hearing procedures are tailored to meet predetermined pre-hearing dates. In *Guest v. MacDonald*, 2012 NSSC 452, Moir J. made similar observations:

> para.23 The application provides judicial management, and assignment of dates for the hearing, at the beginning. The action, with some exceptions such as case management, leaves the litigation in the hands of the parties until one of them calls for trial dates. Judges who give directions at the beginning of applications, and judges who set trial dates, need as much information as can be given to measure the amount of time required for the hearing or trial and when the parties will be ready. But, the judge who gives directions also needs to be able to set a path over a short distance for disclosure, production of affidavit evidence, discovery, out-of-court cross-examination, and so on. The presumption in this Rule recognizes that an application has a problem with a party who legitimately holds cards close to the chest.

[31] However, the Court was also careful to point out that:

19. ... when considering... [the virtues of an application] we must also be mindful that enhancements have been made to the action process. Murphy J. makes this point in *Monk v. Wallace*, 2009 NSSC 425:

> …Although the expanded application route under the *Rules* is intended offer prompt and more economical relief to the parties who qualify for application procedure, the *Rules* now also provide a more streamlined action procedure... The action procedure now allows parties to identify trial dates much earlier in the process, involves less discovery examination, and facilitates the parties' cooperation to exchange information and have matters determined promptly. This case raises many disputed issues, and if the parties are unable to resolve their dispute by out-of-court settlement, I'm

> convinced that the Respondents are entitled to the safeguards and benefits provided by trial procedures, which the Court also needs to fully assess all the issues.

[32] In *Jeffrie v. Hendriksen*, 2011 NSSC 292, it was noted that *Civil Procedure Rule* 6.02 contemplates a tripartite analysis:

> 13. Under *Rule* 6.02 there are three stages to the court's analysis as to whether a matter proceeds by application or action:
>
> > a) first, the court must assess whether any of the presumptions in favour of an application are applicable under *Rule* 6.02(3);
> >
> > b) second, if the court determines that no presumptions apply in favour of an application, it must assess whether any presumptions in favour of an action apply under *Rule* 6.02(4);
> >
> > c) third, the court must determine the extent to which each of the four factors favouring an application are present under *Rule* 6.02(5) and determine the relative cost and delay as between an action and an application under *Rule* 6.02(6).

[33] Equally concise was Van den Eynden, J.A. in *Elfreda Freeman Alter Ego Trust v. Payne et al.*, 2019 NSCA 28:

> 26. *Rule* 6.02 is straightforward. There is no dispute over what the *Rule* requires. It mandates a judge to assess whether any of the presumptions are in play and to consider other enumerated factors. It is a stepped process that works like this:
>
> > *First, assess whether any of the presumptions in favour of an application are applicable under *Rule* 6.02(3);
> >
> > *Second, if no presumptions apply in favour of an application, assess whether any presumptions in favour of an action apply under *Rule* 6.02(4);
> >
> > *Third, regardless of whether there is a presumption in favour of an application or an action or neither, determine the extent to which each of the (non-exhaustive) list of factors favouring an application are present under *Rule* 6.02(5) and determine the relative cost and delay as between an action and an application under *Rule* 6.02(6).
>
> 27. Everything is then "placed in the deliberation hopper" for consideration by the judge (see *Nova Scotia v. Roué*, 2013 NSCA 94 at para. 31).
>
> 28. As further noted in *Roué, supra* at para. 47, the role of the motion judge under *Rule* 6.02 is *"*to achieve a balance that shortens time and lessens cost, while ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process*"*.
>
> [Emphasis added]

ii) Presumption in favour of an application?

[34] To begin with, neither of the factors specified in 6.02(3) (which favour an application as the preferable method by which to proceed) applies. The first criterion (6.02(3)(a)) references "substantive rights" being asserted by a party, that these rights "will be eroded over time", that the parties have expeditiously brought a proceeding asserting these rights, and "the erosion will be significantly lessened if the dispute is resolved by application".

[35] I consider that this application was initiated in 2014 and, notwithstanding the assignment of the cause of action to 306 NSL that same year, the fact that little if anything was done to move it along until the Prothonotary (in 2019) initiated a motion to dismiss the application. This was done because a five year delay had been incurred (at the time) since the last steps had been taken.

[36] I also observe that The Jeanery has become insolvent, a Trustee was appointed, its corporate registration was revoked for non-payment, and this cause of action was assigned by the Trustee to 306 NSL, all in 2014. Further damages do not continue to accrue.

[37] Justice Pickup's comments in *Atlantic Spark Professional Services Inc*. v. *Hryshyna*, 2016 NSSC 114 are apposite:

> 17. I am not satisfied that the presumption in *Rule* 6.02(3)(a) has been established. Any damages that would flow from this allegation would be monetary and, therefore, be compensated in damages regardless of whether the matter proceeds by application or action.
>
> 18. I am not persuaded that the erosion will be significantly lessened if the dispute is resolved by way of application.

[38] The second factor (in *Civil Procedure Rule* 6.02(3)(b)) deals with a proceeding in which several hearings are requested or necessary "such as with some proceedings for corporate reorganization". It is certainly the case that the Court has been requested to bifurcate the issues of liability and damages. That request has been denied for reasons upon which I will elaborate later in these reasons. No other anticipated hearing related to these proceedings has been referenced.

iii) Presumption in favour of an action?

[39] Moving to the next stage of the analysis, *Rule* 6.02(4) outlines those factors which trigger a presumption in favour of an action as opposed to an application in Court. The first (6.02(4)(a)) references a situation in which a party has requested a trial by jury, and has a right to one, in circumstances where "it is unreasonable to deprive the party of that right". The fact that neither party has mentioned in any of its materials or in argument that it is even contemplating the assertion of such a right is dispositive for the purposes of this consideration.

[40] The second factor in 6.02(4) involves a situation where:

> It is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[41] Dartmouth Crossing argues, in part, that this factor is applicable to the circumstances of this case. They point to the fact that there may be former employees of The Jeanery who can speak to "its investigations (if any) prior to deciding on the Dartmouth Crossing lease and also third-party competitors who can speak to sales at Dartmouth Crossing and the business model of The Jeanery".

[42] This information is expected to come to light, at least in part, through the discovery process, and through additional investigations "as Dartmouth Crossing learns more about the employees, consultants and competitors of The Jeanery who were involved in the matters underlying the Applicant's claim". Neither the witnesses to be called, nor the identities of any who might be withheld for the purposes of impeachment (the argument continues) can be determined without going through the document disclosure and discovery processes.

[43] It is true that in *Payne v. Elfreda Freeman Alter Ego Trust (2015),* 2018 NSSC 160 (aff'd 2019 NSCA 28), I permitted a matter to proceed by way of application in Court in circumstances where not all of the witnesses could be identified by the time of the motion. One of the differences, however, between that case and this one lies in the fact that the pool of potential witnesses in the former instance was extremely narrow. It consisted of the surrounding landowners.

[44] For the purposes of this motion, that pool cannot be so neatly circumscribed. To provide just a few examples, it consists of the former employees of The Jeanery, present and former employees of the Respondents, and potentially those of the present and former tenants of the Respondents, as well as a cadre of analysts who will provide expert opinion with respect to the evidence that they provide. It would

be unreasonable to expect the Respondents, under the circumstances, to have much of an idea as to the identifies of potential witnesses, at this point in the proceeding. It follows there is also no way that an assessment could be made about witnesses that may be withheld and called only to impeach credibility.

[45] *Civil Procedure Rule* 6.02 (4)(b) is therefore triggered. I conclude that an action is presumed to be preferable to an application, in these circumstances, as a consequence.

[46] This is simply a presumption, however. A presumption may be rebutted. To begin to determine whether it has been rebutted, I engage the third part of the analysis. I start with a consideration of those (non-exhaustive) factors set forth in *Civil Procedure Rules* 6.02(5) and (6). There are five of them:

a) can the parties quickly ascertain who their important witnesses will be?

b) can the parties be ready to be heard in a matter of months, rather than years?

c) is the hearing of predictable length and content?

d) can credibility be satisfactorily assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination?

e) the relative cost and delay of an action or an application in the circumstances of this case.

[47] All of the above will be put "in the hopper", and analysed. I will consider whether at the same time, any other factors have been established which would militate either for or against an application or an action.

a) Can the parties quickly ascertain who their important witnesses will be? (Civil Procedure Rule 6.02(5)(a))

[48] It will be recalled that a consideration tangential to 6.02(4)(b) involved the potential breadth of the witness pool. This is not the same thing. This criterion involves whether, notwithstanding the size of the potential pool of witnesses, the important witnesses are nonetheless identifiable.

[49] It is fair to say that at least a couple of them are. Gary Fullerton is one, on behalf of the Applicant. Tony Fazari, the source of the alleged misrepresentations by the Respondents, is another.

[50] That said, a mere finding as to whether or not the alleged representations were made will not be even close to determinative of the merits of this case. Reasonable reliance, causation, and damages appear to be strongly contested as well. At a minimum, evidence with respect to the operations of The Jeanery at Dartmouth Crossing, and evidence from former employees, consultants and competitors of The Jeanery will be necessary in order that the Respondents may gain insight as to its business model and financial performance, whether reliance upon the alleged statements (if made) was reasonable, what led up to the execution of the lease agreement, and what precipitated its failure. As earlier noted, their identities will have to be ascertained through the documentary and oral discovery (process).

[51] I also bear in mind that the failure of The Jeanery's location at Dartmouth Crossing is alleged by the Applicant to have been the linchpin which precipitated the failure of all of its other locations as well. Expert evidence will be relevant to both causation and damages (including loss of future profit) as the factual evidence of The Jeanery's overall financial performance is analysed.

[52] A determination as to the identities of even the most important witnesses with respect to all of the issues noted above (beyond Messrs. Fullerton and Fazari) is next to impossible at this stage.

b) Can the parties be ready to be heard in a matter of months rather than years? (Civil Procedure Rule 6.02(5)(b))

[53] “Complexity” is often not a very helpful term upon which to focus when this factor is considered. The word may mean different things to different litigants. Rather, it is the apprehended length of time and cost involved in ascertaining the facts relevant to the merits of the matter that will often be the most important object of focus. The number of discoveries, the potential for the necessity of expert witnesses and the number of them as well as the nature of the evidence requiring their analyses, represent only a few of the considerations which impact upon this key question.

[54] The Respondents argue:

> ... it is anticipated that this matter will require the testimony of multiple witnesses and require discovery examination of each witness. Discovery examinations will likely lead to more witnesses being discovered and potentially put forward as witnesses at the hearing by Dartmouth Crossing. Although *Rule* 5.09 (1)(d) permits the Court to set parameters for discovery, it is submitted that the extent of discoveries necessary to properly try this action will push the preparation time beyond what is appropriate for an application.
>
> ...several issues that are central to this proceeding... will expand the scope of disclosure that will be required from both the applicant and the respondents and third parties. This type of disclosure is more consistent with an action than an application in court.
>
> (*Respondent's brief, August 12, 2020, paras. 71 – 72*)

[55] Mr. Fullerton's Affidavit of April 8, 2016 ("the initial Affidavit"), by way of example, contained 12 volumes of Exhibits, requiring two bankers boxes in which to house them. The filing of that affidavit was one of the only things done in relation to this proceeding from 2014 to 2019.

[56] The parties are essentially starting a process which could and should have been pursued with much more vigour on the part of the Applicant over six years ago. The length of time which will be expended as each of the parties attempts to get its' respective "ducks in a row" (so to speak) will take more than "a matter of months". As a consequence, this factor favours, in my view, an action rather than an application in Court.

c) Is the hearing of predictable length and content? (Civil Procedure Rule 6.02(5)(c))

[57] The answer to this question is implicit in the discussion above. Any attempt to ascertain the total number of even the lay witnesses required in this proceeding would be pure guesswork at this stage. The number of expert witnesses, and their fields of expertise, would be only marginally less difficult to estimate.

d) Can credibility be satisfactorily assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination?

[58] It is not sufficient for a party to merely assert that "credibility will be an issue" when this factor is considered. This accords with decided case law and, with respect, common sense.

[59] Consider *Citibank Canada v. Begg*, 2010 NSSC 56, where Bryson J. (as he was then) observed at para. 17:

> ... *Rule* 6.02(5) contemplates that credibility may be an issue. Moreover, the mere assertion that credibility will be important, without more, does not settle the question. Particularly in a case such as this, in which the suit is founded upon commercial documents, the court would need to understand specifically what the crucial credibility issues were, and how, for example impeachment played a critical role. Otherwise, the mere assertion of the importance of credibility would relegate all proceedings to an action.

[60] Likewise, in *Kings (County) v. Berwick (Town)*, 2009 NSSC 398, Warner J. pointed out:

> 40. Applications in court permit cross-examination, which can be unlimited. Cross-examination is the tool to test credibility in a trial and it is preserved in an application in court. Whether I suspect that direct examination in trials is overrated or not, it is my sense that the issues of facts in this proceeding relate more to reliability than credibility; in either event, the opportunity to cross-examine in the hearing of an application in court is more than enough to satisfactorily assess credibility.
>
> 41. There is no identification in the three affidavits of the Three Towns of a particular issue of credibility (as opposed to reliability) that could become so significant that it could not be satisfactorily dealt with by way of cross-examination. The issues in this case are focussed enough that the use of affidavits to present direct evidence will probably assist everyone in focussing on the relevant factual context and avoiding the irrelevant.

[61] However, there are cases in which the procedural safeguards inherent in an action are required in order to fully assess the positions which each party is putting forward. For example, it will be more difficult to gauge either Mr. Fullerton's credibility or reliability, or those features of Mr. Fazari's evidence, without hearing both how it is related at first instance during direct, and later as it is tested under cross-examination.

[62] Whether or not the representations alleged were made at all is a critical question. If they were made, the extent to which they were relied upon (if at all), and whether that reliance was reasonable under the circumstances, will also be key questions. Finally, the matter of causation, including whether the failure of The Jeanery's Dartmouth Crossing location (and the failure of all of its other locations) is attributable to these misrepresentations, must be determined.

[63] These will not engage merely pedestrian credibility assessments. Cross-examination on Affidavits prepared by counsel for each of the respective parties, in particular, would be an inadequate substitute for the benefits of being able to assess direct and cross-examination (*viva voce*) evidence.

> *e) The relative cost and delay of an action or an application in the circumstances of this case. (Civil Procedure Rule* 6.02(6)*)*

[64] In most cases an application will be less expensive than its counterpart. Hence, there may be less delay involved because it will often be quicker to obtain hearing dates when a smaller amount of time is required.

[65] The reason why less expense is often generated, and less time is often required for an application, is not mysterious. Evidence in chief may be presented much more quickly and efficiently in a comprehensive Affidavit, pursuant to the application process, than when it is elicited through *viva voce* testimony. This (generally) results in shorter hearings.

[66] As was pointed out by our Court of Appeal in *MacKean v. Royal & Sun Alliance Insurance Co. of Canada*, 2015 NSCA 33, this process also provides collateral benefits which transcend mere efficiency:

> 48. In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63, Associate Chief Justice Smith endorsed the comments in *Hryniak* and amplified them:
>
> > 34. During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). **While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada**.
> >
> > [Emphasis in original]
>
> 49. I agree. The principles of accessibility, proportionality, timeliness, and affordability are applicable to all civil cases in Canada.

[67] All of the above factors and collateral circumstances enter into my deliberations upon this issue. They are all "put in the hopper" so to speak.

f) Application versus action – Conclusion

[68] In *Fana (DCD) Holdings Inc. v. Dartmouth Cove Developments Inc.*, 2017 NSSC 157, Chipman, J. helpfully canvassed the authorities, and extracted those factors which, when present, have tended to favour applications as opposed to actions:

> 20. *CPR* 6 and the cases considering the *Rule* demonstrate that on a [motion to covert] the matters that remain as or become applications tend to feature most of these factors:
>
> *fewer parties
>
> *discreet, clearly detailed issues, sometimes narrowed by agreement
>
> *reasonable hearing estimates of relatively short duration (often five days or less)
>
> *readily available key documents and the like, central to the dispute
>
> *the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
>
> *situations involving comparatively little time to conduct investigative work
>
> *agreement on admissible extrinsic evidence
>
> *limited, if any, discovery required
>
> *time being of the essence in bringing the matter forward to a hearing
>
> *identifiable (typically party) witnesses with evidence conducive to affidavit form
>
> *an absence of "unfriendly" witnesses, who might well be disinclined to swear affidavits
>
> *generally, an uncomplicated proceeding

[69] It is a convenient checklist against which to measure the results garnered via a *Rule* 6.02 analysis. In this case, *Fana* reinforces my conclusion with respect to the application of the criteria in 6.02 to the circumstances of this case.

[70] At the risk of stating the obvious, it does not suffice to merely observe that the factors in favour of an action outnumber those favouring an application, and

declare the former the winner as a consequence. In every case, each individual factor will vary in the amount of weight which must be assigned to it.

[71] However, in this case, the contest is not even close. I have concluded that virtually all of the factors which I must consider pursuant to *Civil Procedure Rule* 6.02(5) favour an action. While it is possible that those issues relative to cost and delay noted in 6.02(6) might favour an application in Court, even this is probably not so, in the circumstances of this case.

[72] For the reasons set forth above, the issues favouring an action (both cumulatively and individually) are much weightier than those favouring an application. The Respondents' motion to convert this proceeding from an application in Court to an action is granted.

(B) Security for Costs

[73] I begin with *Civil Procedure Rule* 45, the relevant portions of which provide as follows:

> 45.01(1) This *Rule* provides a remedy for a party who defends or contests a claim and will experience undue difficulty realizing on a judgment for costs if the defence or contest is successful.
>
> (2) A party against whom a claim is made may make a motion for security for costs, in accordance with this Rule.

[74] Given the Applicant's corporate status, s. 152 of the *Companies Act*, RSNS 1989, c. 81 is also relevant:

> Where a limited company is a Plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is a reason to believe that the company will be unable to pay the costs of the Defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given.

[75] Case law is replete with statements of the competing principles that are in play. On the one hand, it is necessary to ensure that people of modest means are not prevented from having access to the Court as a result of their financial situation. On the other, the prospect of a costs award is one of the principal means by which the Courts incentivize reasonable conduct. It is obvious that the interests of justice are not served if the Plaintiff is insulated from the risk of a costs award (see for example

Emmanuel v. Simpson Enterprises Limited, 2007 NSSC 278, and *Ellph.com Solutions Inc. v. Alliant Inc*., 2011 NSSC 316, aff'd 2012 NSCA 89).

[76] As Moir, J. pointed out in *Ellph.com* (trial decision):

> 21. The need remains for a balance between access to justice and artificial insolation from an award of costs. On the more detailed principles:
>
> > 1. *Rule* 45.02 provides a broad discretion. The limit on discretion commented on by Justice Goodfellow in *Flewelling v. Scotia Island Property Ltd.*, 2009 NSSC 94 at para. 19 is not severe. The judge has a free hand to do what is just, so long as the defendant files a defence, shows undue difficulty, and either shows that security would not be unfair, see *Rule* 45.02(1), or establishes special grounds under *Rule* 45.02(4).
> >
> > 2.The new rule does not change the principle that the court should be reluctant to order security for costs if the plaintiff establishes that doing so will prevent the claim from going forward.
> >
> > 3.The principles that courts should avoid security for costs being used as a means test for access to justice and that the discretion should not be used to exclude persons of modest means from court are reinforced by the ground prescribed by *Rule* 45.02(1)(c).
> >
> > 4.The new rule does modify the principles about impecuniosity. Now, the burden is on the defendant under *Rule* 45.02(c) if the plaintiff is an ordinary individual rather than a nominal plaintiff or a corporation under *Rule* 45.02(3)(c). For nominal plaintiffs and corporations, the burden remains as stated by the Associate Chief Justice.
> >
> > 5.The principle about foreclosing the suit, that an order should not be made that prevents the plaintiff from proceeding unless the claim obviously has no merit, remains unchanged. Indeed, it is enhanced by *Rule* 45.02(1)(d).
> >
> > 6.The principle that the judge must be satisfied about the justice of ordering security for costs is reflected specifically in the new rule by the express requirement for fairness. The requirement for a circumstantial inquiry into fairness is expressly ("in all the circumstances") preserved.
>
> [Emphasis added]

[77] Further elaboration was provided by the Court of Appeal as it upheld the trial decision in *Ellph*:

> 59. *Civil Procedure Rule 45*.02 is an example of what I would characterize as the hybrid approach. It directs that while the judge retains the discretion ("may order") to oblige a party to put up security, such an order will only be granted if certain

> thresholds are all met ("if all of the following are established"). The grant of discretion is paired with a list of factors meant to guide the judge in its application. Among the listed criteria is included a final basket clause which obliges the judge to ultimately consider fairness in all of the circumstances.

[78] Having stated the general principles in play, the merits of the Respondents' motion may now be addressed.

i) Is the claim defended or contested?

[79] Yes, the Respondents have filed a Notice of Contest.

ii) Will the Respondents have undue difficulty realizing on a judgement for costs, if the claim is dismissed and costs are awarded to them?

[80] Yes. The Applicant concedes that this is the case:

> ... The Applicant, 3067610 Nova Scotia Limited, is a corporation that does not have sufficient assets to satisfy a judgement for cost if the Respondents are successful. The evidence provided by Mr. Fullerton on behalf of 3067610 Nova Scotia Limited illustrates that the company does not have any significant income or any assets (save for the within application), and it will not be in a position to contribute to the Respondents' costs should such an order be made in the future.
>
> (*306 NSL brief, August 19, 2020, para. 91*)

[81] Merely to review the facts antecedent to this motion (some of which have been earlier mentioned in these reasons) is to note that this is an appropriate concession.

iii) Does the undue difficulty arise only from the Applicant's lack of means?

[82] *Civil Procedure Rule* 45.02(1)(c) is inextricably connected to 45.02(3), in that it lists a number of circumstances which will give rise to a "rebuttable presumption that the party against whom the claim is made will have undue difficulty realizing on a judgement for costs and that the difficulty does not arise only from the claiming party's lack of means". One of those circumstances arises when the "party making the claim" also happens to be a corporation.

[83] At the appellate level in *Ellph,* Saunders, J.A. characterized the significance of the interplay this way :

> 63. Thus, when the motion was argued, it was conceded that all of the other factors in *CPR* 45.02(1) were satisfied, such that the only issue for the motions judge to

> decide was fairness. As explained, both sides conceded that the conditions found in 45.02(1)(a) through (c) were met. To understand the process that followed, a brief explanation is required. *CPR* 45.02(1)(c) says that a prerequisite to any security is that the difficulty "does not arise only from the lack of means of the party making the claim". We know from Ellph.com's factum (quoted above) their admission that their companies "are insolvent ... (and) ... will not be in a position to contribute to Aliant's costs". On its face, therefore, the difficulty does "arise only from the lack of means of the party making the claim" which would then suggest that security is unavailable because of the wording of 45.02(1)(c). However, that conclusion is neutered by *CPR* 45.02(3)(c) which says that when the plaintiff is a corporation there is a rebuttable presumption that the difficulty does not arise solely from the plaintiff's lack of means. Ellph.com could have sought to rebut the presumption but, with its concession, chose not to do so. Accordingly, *CPR* 45.02(1)(c) is satisfied and we are left with 45.02(1)(d) -- unfairness -- as the only issue.

[84] As a consequence, a presumption arises that the difficulty which the Respondents will (admittedly) encounter in realizing upon an award of costs (if made) is not solely attributable to the lack of means of the Applicant. 306 NSL bears the burden of rebutting that presumption.

[85] As was pointed out in *Ocean v. Economical Mutual Insurance*, 2011 NSSC 408, this rebuttal process requires provision of "detailed evidence of [the Applicant's] financial position including not only [its] income, assets and liabilities, but also [with respect to its] capacity to raise security." It is a heavy onus.

[86] It is true that the materials submitted on behalf of the Applicant (which are largely contained in the Fullerton Affidavit) extend beyond a "blanket and empty assertion of impecuniosity" (per *Ocean*, para. 46). Some of the contents of these documents were discussed earlier in these reasons. The Applicant argues:

> 98. The Fullerton Affidavit provides the following financial information relating to the income, assets, liabilities, and ability to raise security of the Applicant:
>
> - 3067610 Nova Scotia Limited has no income to report;
> - 3067610 Nova Scotia Limited has no assets beyond the interest in the within application and an application in Hfx No 429358 transferred to it by The Jeanery Limited in 2014;
> - The cause of action in Hfx No. 429358, while still active, is not being pursued;
> - 3067610 Nova Scotia Limited owes a significant debt to the Canada Revenue Agency, and which 3067610 Nova Scotia Limited has thus far been unable to pay;

- 3067610 Nova Scotia Limited is a closely held limited with two shareholders, Mr. Fullerton and his ex-spouse Gale Fullerton. Each owns 50 shares of the company, purchased at an amount of $1.00 per share;
- Mr. Fullerton is not impecunious, but does not have significant assets;
- Mr. Fullerton is employed but has significant personal liabilities;
- Both 3067610 Nova Scotia Limited and Mr. Fullerton personally have incurred considerable expense in advancing the Application to date.

99. The information and supporting documents set out in the Fullerton Affidavit are of sufficient particularity to go well beyond the "blanket and empty assertion of impecuniosity" cautioned against in *Ocean v, Economical Mutual Insurance Company*, 2011 NSSC 408.

Reference: *Ocean v. Economical Mutual Insurance Company,* 2011 NSSC 408 at para. 46 – Applicant's Book of Authorities – Tab 9

[87] The Applicant submits that the Court should be satisfied that it is a company with little or no ability to raise further funds and a directing mind with little or no ability to fund the contingent liability for party and party costs. It points out that the Respondents have not offered any other rationale or potential source of the undue difficulty and that as a consequence the Court should conclude that "... the sole reason for the Respondents' potential undue difficulty is the lack of means of 3067610 Nova Scotia Limited". (*Brief, para. 103*)

[88] And yet, when the company required funds to pay down its indebtedness to Mr. Fullerton (at least, according to the financial statements provided), it apparently found the ability to do so. It was not an insignificant debt (approximately $117,050.00). How it managed to do this was not satisfactorily explained by Mr. Fullerton, who indicated that he would have to speak to his Accountant, or that he would "defer to his Accountant". He testified that his ex-wife, Gale Fullerton, was not prepared to provide funds to the Applicant (she is a 50% shareholder in The Jeanery) or assist so as to enable the Applicant to raise the funds.

[89] Mr. Fullerton testified that he has personally injected sufficient funds into 306 NSL on more than one occasion (to date) so that it could fund the things that needed to be done (such as preparation of up-to-date financial statements), and to enable the Applicant to continue with the litigation.

[90] The Applicant's other asset, beside its interest in the subject matter of this litigation, lies in cause of action Hfx No. 429358. This it has chosen not to pursue,

despite the fact that, in Mr. Fullerton's testimony, the case has generated at least one offer to settle in the past.

[91] Mr. Fullerton has set his affairs up such that his other numbered company, 305, owns the real property in which he resides. It also owns a vendor takeback mortgage (approximate balance of $10,000.00) on another piece of real property which was sold to a third party as described earlier. It receives regular payments with respect to this receivable, as well as with respect to the rental payments made by Mr. Fullerton relating to his residence. 305 is wholly owned and controlled by Mr. Fullerton, who has caused it to forward funds to the Applicant from time to time, as well.

[92] Very little information has been provided with respect to the residence in which Mr. Fullerton resides. The amount of rent paid on a monthly basis to 305, whether the residence is mortgaged, if so the amount of the monthly mortgage payments, and the amount of equity, if any, retained by 305 in the residence are sketchy at best.

[93] As well, I consider that 306 NSL is an assignee of the rights of The Jeanery in the subject litigation. It purchased that assignment from The Jeanery's Trustee. Neither the consideration paid or how the Applicant raised the funds for the purchase has yet been disclosed.

[94] The Applicant argues both with respect to the consideration paid to the Trustee, and its earlier noted (apparent) ability to repay significant indebtedness to Mr. Fullerton (in the amount of $117,050.00) over the course of 2018 and 2019, that this only means that it had resources at one time. It no longer does. It submits that it has rebutted the presumption created by *Civil Procedure Rule* 45.02(3) accordingly.

[95] With respect, the history of this matter provides a different conclusion. I have alluded to it earlier. It is this: whenever the Applicant has required access to funds, whether to acquire from the Trustee the right to the fruits of this litigation (if there are any), or to take a step in furtherance of it, or to repay indebtedness to Mr. Fullerton, or the Accountant, it has been able to raise them. Whether these funds were provided by conventional lenders, or by private individuals (such as Mr. Fullerton, his ex-wife, or 305 NSL) is not relevant to this portion of the analysis.

[96] I have not been satisfied of the Applicant's inability to raise security for a potential costs award, if one (in an amount considered to be reasonable in the circumstances) were to be imposed.

[97] I know nothing of Mrs. Fullerton's financial situation. I know little of that of Mr. Fullerton (personally) beyond the fact that he made approximately $83,000.00 from employment in 2019. I know somewhat more, but not much, of 305 NSL's affairs. It appears that one or more of Mr. Fullerton, Mrs. Fullerton and 305 NSL has provided funds in the past to the Applicant to enable it to retire indebtedness or this litigation to proceed. I have not been satisfied of either their unwillingness, or inability to do so again if an Order for Security for Costs is granted. Therefore, the Applicant has not rebutted the presumption created by *Civil Procedure Rule* 45.02(3).

iv) In all of the circumstances, is it unfair for the claim to continue without an order for security for costs?

[98] Reference has earlier been made to the tension between the two primary principles that are engaged in these types of motions. This tension was expressed in *Ocean* thus:

> 40. ... When considering all of the circumstances, I must recognize that in order for security for costs requires a Plaintiff to post security for a debt that has not yet been determined to exist. In this regard, it is a form of execution before judgement... On the other hand, if the risk of a costs award is going to serve its purpose of encouraging reasonable behaviour in litigation, there should generally be some protection of those risks are real to both the Plaintiff and the Defendant.

[99] So, too, in *Ellph.com*, at the Appellate level, we find reference to:

> 95. .. the well-known objective surrounding the grant, or refusal of costs which includes recognition that the risk of being exposed to a costs award is meant to encourage reasonable behaviour in litigation.

[100] Whether or not it was his primary objective to do so, Mr. Fullerton has set up his affairs so that the corporate Applicant, as the Assignee of the cause of action in this matter, is poised to retain the proceeds of this litigation (if any) without any corresponding risk of suffering financial detriment if it is unsuccessful and costs should be awarded against it. It essentially has no stake in the process, and as a consequence is faced with no incentive to conduct itself reasonably either with respect to an assessment of the merits of its case, or the manner in which it goes about prosecuting it.

[101] In particular, the manner in which all tangible assets have been retained by either 305 or Mr. Fullerton personally, the precipitous manner in which the

Applicant, over a period of two years, was tapped to repay to Mr. Fullerton what appears to be some type of shareholders loan (it was never really satisfactorily explained) of over $117,000.00, the selective and piecemeal manner in which funds are provided to the Applicant by Mr. Fullerton and 305, just enough to enable it to fulfil the expenses of carrying on this litigation, are telling. The hiatus of over five years during which essentially nothing was done to move this case forward (until the Prothonotary made a motion to have it dismissed) is troubling.

[102] The lack of production of much of the documentation in relation to the Applicants acquisition of the Assignment of this cause of action is also noteworthy. This includes information explaining how much was paid for the assignment, and whether any party other than Mr. Fullerton or his company was provided with the opportunity to bid on or purchase the claim.

[103] The company appears to be nothing more than a "straw man" interposed between Mr. Fullerton and 305, which two latter entities own all of the tangible assets and income streams available to the three.

[104] Moreover, this cause of action evolved under circumstances quite different to those referenced in many of the authorities. There is no evidence that The Jeanery was a fledgling, unsophisticated operation facing a commercial or logistical disadvantage when the terms of the lease were negotiated and/or when the alleged misrepresentations were made. While it may be the case that Dartmouth Crossing wielded marginally more bargaining power at the time that the lease was consummated, there is no basis for the suggestion that this was disproportionate or determinative.

[105] I am unable to lay any of the excessive delay in moving this matter forward at the doorstep of Dartmouth Crossing. No Affidavits of Documents have yet been provided, no discoveries or experts reports have been provided, and there is evidence of repeated requests for updated financial information to be provided by the Applicant over the five-year hiatus between the commencement of the Application, and the next meaningful steps which were undertaken.

[106] Among other things, it would not have been responsible for the Respondent to have brought this Application until at least most of the important financial information relevant to 306 NSL, 305 NSL and Mr. Fullerton was provided. It is to be noted that some of this relevant information was not received until the Applicant's responding documentation in relation to these motions was received.

[107] Moreover, as pointed out earlier, s. 152 of the *Companies Act* provides an alternative basis for an Application such as this given the Applicant's corporate status. I agree with Justice Moir's observation in *Ellph.com* (in the trial decision):

> 22. The *Companies Act* contains its own provision about security for costs: s. 152. I do not think that the discretion under that section is governed by considerations different than those under *Rule* 45 -- Security for Costs.

[108] It has earlier been pointed out that, historically, either Mr. Fullerton 305 NSL, or (possibly) Mrs. Fullerton has financed all of the necessary steps in this litigation so as to enable the Applicant to pursue it. It appears unlikely, therefore, that a reasonable security for costs award, *per se*, would stifle the matter, or inhibit its progress.

[109] Under all the circumstances, I conclude that it would be unfair for the claim to continue without an award for security for costs. That said, the award will be balanced between the competing objectives outlined above, and in particular, will not be so onerous, in my view, as to effectively deprive the Applicant of its day in Court without a hearing on the merits.

v) How much?

[110] *Civil Procedure Rule* 45.03(1) provides as follows:

> An order for security for costs must require the party making the claim to give security of a kind described in the order, in an amount equal to or lower than that estimated for the potential award of costs, by a date stated in the order.

[111] Many of the decided authorities have drawn attention to the use of the word "estimated" in the above. It is obvious that precise mathematical calculations are neither prescribed or (in many cases) even possible.

[112] As (then) ACJ Smith observed in *Ocean*:

> 53. Estimating a potential award for costs prior to trial can be difficult. As a preliminary matter, costs are in the discretion of the trial judge who, pursuant to *Civil Procedure Rule* 77.02(1), may make any order about costs that will "do justice" between the parties. It is almost impossible to know prior to the trial what costs order will accomplish that.
>
> 54. Further, when considering costs the trial judge can take various factors into account such as a written offer of settlement, the conduct of a party, et cetera. It is

> not possible to know prior to a trial how these factors are going to play out when costs are determined.

[113] The only constraint upon my discretion is that I may not make an award higher than that which is estimated for the potential award of costs after trial. The first portion of the exercise, then, requires that I determine the "amount involved" in the applicant's claim in order that Tariff "A" may be consulted.

[114] Dartmouth Crossing argues:

> 151. At para. 117 of the Fullerton Affidavit, he states that by July 2014, The Jeanery's accumulated losses at the Dartmouth Crossing location were $489,253 and overall losses of the company (which Fullerton appears to attribute to the alleged issues with the Dartmouth Crossing location) were $1,058,601. Presumably, The Jeanery will also claim for alleged future losses, but Dartmouth Crossing cannot estimate the amount of those alleged losses at this juncture given the lack of disclosure from the Applicant.
>
> 152. While it is difficult to estimate the length of the trial at this juncture, Dartmouth Crossing submits that it would take at least seven days: two days for Fullerton's evidence (given the length of the Fullerton Affidavit, which does not even include a quantification of damages), two days for the evidence of Dartmouth Crossing's lay witnesses, one day for expert evidence, and one day for submissions.
>
> 153. Using the $1,058,601 as a conservative estimate of the damages claimed by the Applicant, and applying Scale 2 (Basic) of Tariff A to the 'amount involved' of $1,058,601, Dartmouth Crossing would be entitled to $68,809 plus $14,000 for seven day trial ($2,000/day) should it be successful in this matter. This results in costs of $82,809, plus disbursements.

[115] I agree that the Respondents' estimate of the "amount involved" will likely prove to be somewhat conservative when all of the trial evidence is known. However, at this stage of the proceeding, it is probably the best alternative to pure guesswork that is available.

[116] The information provided with respect to the financial circumstances of Mr. Fullerton and 305, although incomplete, suggests that the Applicant's ability to raise an amount ordered for security of costs financed by either of them is not unlimited. I would have some concern with respect to an amount of the magnitude suggested by the Respondents, even though (as I have said) I agree that the "amount involved" upon which it is based is likely a conservative one. There is a distinct possibility that it would stifle the litigation were I to award it, in these circumstances.

vi) Conclusion – security for costs

[117] Balancing of all of the currently known factors in this case and the competing objectives of an Order for Security for Costs (as outlined in *Ocean*, *Ellph.com* and other decided authorities) as best I can, I direct that the Applicant shall post security for costs with this Honourable Court on or before January 31, 2021, in the amount of $40,000.00. The order to be prepared in accordance with this ruling shall conform in all respects with the requirements of *Civil Procedure Rule* 45.

C. Severance

i) The applicable principles

[118] This is the third motion contested between the parties. This time the Applicant is the moving party, and it seeks relief under *Civil Procedure Rule* 37. The relevant provisions of this *Rule* follow:

> 37.01. A Judge may consolidate proceedings, trials, or hearings or may separate or sever parts of the proceeding, in accordance with this *Rule*.
>
> 37.05. A Judge may separate parts of the proceeding for any of the following reasons:
>
> > (a) a party joined a party or claim inappropriately;
> >
> > (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
> >
> > (c) the benefits of separating the party or claim from another party or claim outweighs the advantage of leaving them joined.

[119] The Applicant appropriately refers, at the outset, to the appellate decision in *Rajkhowa v. Watson*, 2000 NSCA 50, to the following effect:

> 42. The test was expressed by Lord Denning in *Coenen v. Payne* [1974] 2 All E.R. 1109, at p. 1112:
>
> > In future, the court should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together, but the court should be ready to order separate trials whenever it is just and convenient to do so.
>
> 43. We would adopt the comments of Tidman, J. in *McManus v. Nova Scotia (Attorney General) et al*. (1993), 119 N.S.R. (2d) 137, at 140, that in order to determine what is just and convenient on the severance issue, the court must:
>
> > consider the effect of such a decision on all of the parties as well as its effect on the court system, ...

[120] All parties have referenced *Ocean*, and the concise summary of the principles involved noted therein:

> 21. It is a basic right of a litigant to have all issues in dispute resolved in one trial unless it is just and convenient considering the interests of all parties and the proper administration of justice do otherwise.

[121] The normal practice is that liability and damages are tried together. That said, it is clear that the Court should be prepared to order separate trials whenever it is just and convenient to do so.

[122] In order to determine what is just and convenient, the Court must consider the effect of such a decision on all of the parties, as well as its effect upon the Court system.

[123] As per usual, one cannot lay down a definitive list of circumstances in which, when present, it will be appropriate for the Court to grant such a motion. The characteristics peculiar to each of the decided authorities simply provide some guidance with respect to when the Court has been disposed to exercise that discretion. They are simply guidelines.

[124] Some of these factors previously have included:

- Whether the case is extraordinary and exceptional;
- Whether the issue to be tried separately is simple;
- Whether the issue to be tried separately is not interwoven with other issues in the action;
- Whether severance would introduce too much danger of substantial delay before the matter is concluded in all its aspects;
- Whether the proceedings will be lengthier by reason of severance and whether two sets of pretrial proceedings would be required;
- Whether one portion of this proceeding would proceed more expeditiously on its own than if it were tied to a more complex portion of the proceeding;
- Whether substantial cost had already been incurred on both issues of liability and damages;

- Whether several of the witnesses will give evidence on both issues of liability and damages;
- The reasonable likelihood that an appeal against the determination of liability may follow;
- Whether the Plaintiff's credibility is a significant issue to be resolved in both issues of liability and damages;
- Whether there is a reasonable basis on which to conclude the determination of liability will add or reduce to the cost and delay of the final determination of the proceeding.

(See for example, *Fraser v. Westminer Canada Ltd.* (1998), 168 NSR (2d) 84; *Piercy v. Board of Education of Lunenburg County District et al; Jeffery v. Naugler*, 2010 NSSC 385)

[125] As Duncan J. (now ACJ) pointed out in *Jeffery*:

> 38. In my view, the underlying basis of the court's determination has not been changed by the new *Rule*. As the Court of Appeal stated in *Kirby, supra*, at para. 19:
>
> > The judicial exercise of that discretion comes down to this: applying proper legal principles the judge must weigh all of the circumstances involved and determine a course of action that will best attain the object of the *Rules* which is to secure the just, speedy and inexpensive determination of every proceeding.

ii) Analysis

[126] The Applicant concedes that it bears the burden of satisfying the Court that severance should be granted. It has not discharged that onus.

[127] Recall that according to the Applicant, the statements made about its competitor's sales figures induced it to enter into the Lease. These misrepresentations are alleged to have been made to Mr. Fullerton by the Respondents' Agent. None of the impugned statements appear in that Lease Agreement. The Agreement itself contains a merger clause.

[128] After 15 months at the location in Dartmouth Crossing, with less than anticipated revenues, the Applicant initiated an Application in Chambers, claiming that this has resulted in the failure of that location, and also of the six other separately leased locations in the Province. The Applicant says that it would have known that

the location was not viable had it been given accurate information at the outset by the agent of the Respondent.

[129] To establish negligent misrepresentation, it must be shown that there was a "special relationship" between the parties, one which gives rise to a duty of care. A representation must have been made that was untrue or misleading, and it would have to be shown that the Respondent acted negligently or recklessly in making the statement(s).

[130] If it can establish the foregoing, then the Applicant must also show that The Jeanery relied (reasonably) on the representation, and show that the damages which it claims have resulted are linked to that reliance. (See for example, *Queen v. Cognos*, [1993] 1SCR 87).

[131] The damages which must be established, in other words, must be shown to have flowed from the misrepresentations themselves. They must be causally connected.

[132] Obviously, not every case in which causation must be established is unfit for bifurcation. This is one, however, where the breadth of the consequences emanating from the representations in question (the failure of all seven of the Applicant's locations) is significant enough that the Court can conclude that the issue of causation cannot be neatly or easily severed from the damages assessment.

[133] The significance of this is obvious. Causation links liability and damages. It is linkage which all of the asserted damages must possess in order to ground an award. Not only is quantum implicated in this, but also the very nature or types of the damages which are alleged to have been sustained by the Applicant as well.

[134] There are other factors present which militate against severance. For example, the Respondent points out that virtually all of the elements which will have to be established by the Applicant will be strongly contested. As a result, they argue that much duplication of evidence will be involved if these issues are heard separately.

[135] This would include evidence from employees or agents of Dartmouth Crossing as to how the Applicant operated and/or conducted its business at the Dartmouth Crossing location and other locations. The Respondents also anticipate calling evidence from former employees and individuals with whom the Applicant consulted (for example) as to the latter's business model and financial performance, what led up to the execution of the Lease Agreement, and those factors which

contributed to its failure. Expert evidence regarding the Applicant's business model as well as the kind and quantity of the damages alleged to be sustained, is anticipated.

[136] In a nutshell, it is apparent that a not insignificant portion of the same evidence (both lay and expert) will underpin the issues of liability, damages and whether a causative link can be established.

[137] In *Walsh v. T.R.A. Co.*, 2018 NLSC 178, the Court observed:

> 18. Most cases addressing the issue of bifurcation speak generally of the division of a trial into two parts being liability on the one hand and damages on the other. However, it is important to stress that the third and equally important element of a tort claim is causation.
>
> 19. On the facts of the case before me, the Plaintiffs must establish that "but for" the tort committed, the Plaintiffs would not have suffered losses. In this respect, the onus is on the Plaintiffs is to establish that it is "more probable than not" that the Defendants' conduct caused the loss (Remedies: *The Law of Damages*, 3rd ed. Cassels and Adjin-Tettey, at page 363).
>
> 20. The extent or quantification of that loss is an additional element required to be established. (Cassels and Adjin-Tetty, at page 364).

[138] In *Walsh*, the Court also addressed the attendant delay which would accompany a bifurcation of the issues in that case:

> 39. The history of this 17-year old litigation suggests a strong likelihood of an appeal from any decision made in favour of the Plaintiffs on liability/causation on a bifurcated trial. Such an appeal would ultimately result in a delay of one to two years before resumption of the damage assessment. The Sixth Defendant has died since the action was started. It is a reality of life that memories are fading. Delay presents obvious problems.
>
> 40. If liability and quantum were heard together, the likelihood of appeal would still exist but any appeal would address all issues in dispute and there would not be a 1-2 year delay in getting back before the seized trial judge to commence phase 2.

[139] The Respondents argue that they would appeal any adverse finding of liability in the circumstances of this case. If so, this would result in the reality of the very concerns discussed above in *Walsh*. While it is (perhaps) unsurprising that a party opposing bifurcation would say such a thing at this juncture, the objective circumstances in this case lend support to such a contention. The litigation has been very protracted to date, and what I have seen and heard of the evidence, issues and

the arguments advanced during the course of these motions is also supportive of the probability of an appeal in the event of a liability ruling adverse to the Respondents.

[140] Similarly, I see nothing in the proceeding which would lead me to conclude, if the matter is bifurcated and liability is found, that this would assist the parties to settle some or all of the other outstanding issues. It would, in all likelihood, simply delay the conclusion of the hearing.

[141] In addition, I have observed earlier that the damages portion of the hearing will probably involve some repetition of the evidence heard related to liability. If this is correct, there is a danger that the total of the actual court time required would likely increase in direct proportion to the amount of this repetition, if severance was granted.

[142] I have already addressed the significance of the issue of credibility earlier within the context of the motion to convert this application in Court to an action. Without repeating everything that I said earlier, the significance of this issue would permeate both liability and damages assessments. This was one of the factors noted in *Jeffery* to be of some significance in a context such as this.

[143] Significant factual issues, such as whether the representations were actually even made at all, how reasonable it was to rely upon them if made, and the extent and nature of the harm flowing from that reliance, all lend themselves to a combined unitary assessment of credibility within the context of the evidence to be presented both with respect to liability and damages.

[144] This is not unlike the situation to which the court adverted in *Kirby v. Raman*, 2009 NLTD 22:

> 41. The problem with this case as to its exceptionality is that it does not appear that the issue of battery stands alone as the only issue upon which the Plaintiff is proceeding against the Defendant. There are also issues of negligence, misinformed consent or misrepresentation which will be part of the whole trial and will, by necessity, involve much, if not all, of the same evidence, especially the credibility of the Plaintiff and Defendant. This would place any court hearing this trial in a potentially impossible position, that is, having to make findings of credibility for the "stand alone" issue and then not have that interfere with subsequent evidentiary issues. On that issue alone, I am not satisfied that the Plaintiff has convinced this court on a preponderance of the evidence that this would not be the case. On the contrary, I am satisfied that once the trial judge determines the credibility of a witness on the separated or split issue, he or she can no longer enter the full trial forum and hear those same witnesses again. The danger is obvious and places the

> court in a potentially impossible position. The court's own credibility is then a real issue.

iii) Conclusion – Severance

[145] The Applicant's severance motion is accordingly dismissed.

Costs (overall)

[146] Three motions were heard. They took one complete day. Ultimately, the Respondents were successful in all three, albeit less so with respect to their motion for security for costs which, although granted, was awarded in an amount much less than was sought. I take these and all other factors into consideration.

[147] Dartmouth Crossing will receive one award of costs with respect to all three motions. The award will be in the total amount of $3,000.00, including disbursements. It is to be paid by the Applicant forthwith, and in any event of the cause.

Gabriel, J.