IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *TCF Ventures Corp. v. The Cambie Malone's Corporation,* 2016 BCSC 1521

Date: 20160818
Docket: S128964
Registry: Vancouver

Between:

TCF Ventures Corp.

Plaintiff

And

The Cambie Malone's Corporation

Defendant

And

Tim Fernback

Defendant by Counterclaim

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Plaintiff and Defendant by Counterclaim:	R. Mahil P. Kressock
Counsel for the Defendant:	T.D. Goepel
Place and Date of Trial:	Vancouver, B.C. October 19-23, 2015 December 15, 2015
Place and Date of Judgment:	Vancouver, B.C. August 18, 2016

[1] TCF Ventures Corp. ("TVC") brings this action seeking to recover damages from The Cambie Malone's Corporation ("CMC") on the basis of an alleged wrongful dismissal.

Background and Positions of the Parties

[2] TVC is the incorporated entity of Tim Fernback. Through that corporation, Mr. Fernback provides a range of financial and commercial services. He has an extensive background in the financial industry and holds an MBA in finance. At the relevant time, he held no formal accounting designation but had significant practical accounting experience. In these reasons, I may from time to time refer to Mr. Fernback and to the plaintiff interchangeably.

[3] CMC is a private corporation based in Vancouver. Its sole shareholder at all material times was Mr. Sam Yehia. He was the president of the company. CMC is principally engaged in the hospitality industry and operates a number of businesses.

[4] In 2009, Mr. Fernback was working as the chief financial officer (CFO) of Upstream Biosciences Inc. That company was experiencing financial difficulties, and Mr. Fernback was looking for other employment. Specifically, he says he was looking for a full-time executive position in his field.

[5] In February 2009, Mr. Fernback learned of a job posting on Craigslist. The advertisement was entitled, "Chief Financial Officer Required for Hospitality/Development Company (Downtown Vancouver)." The advertisement had been placed by the defendant. Mr. Fernback responded by email, expressing interest in the position and providing his resume.

[6] In due course, contact was made. Mr. Fernback was interviewed by Mr. Yehia and Mr. Smith, a lawyer who provided in-house legal services to CMC.

[7] Following discussions, Mr. Fernback was offered employment as CFO. The offer was contained in a letter, dated March 31, 2009, on CMC letterhead, and signed by Mr. Smith. In that letter, Mr. Smith set out certain expectations, namely that, as the incumbent, Mr. Fernback would be dedicated to ensuring the company

achieves its desired goals. The letter then set out both generally and specifically what those goals were and articulated a number of projects. Mr. Smith also made reference to attainment of goals by quarter.

[8] It is apparent that the parties both understood and expected that Mr. Fernback would not necessarily spend five days per week at the CMC job—more likely in the order of three days per week. I would note as well that there was agreement between the parties that it would be acceptable for Mr. Fernback to have other clients, even though he had taken this position at CMC. There really is no dispute in that regard.

[9] On April 1, 2009, Mr. Fernback began work in the position.

[10] The relationship continued, albeit with changes from time to time, until early November 2012. At that time, Mr. Fernback was, in addition to performing the CFO function, engaged in a project to raise capital to develop properties as part of the CMC group's activities.

[11] In this action, Mr. Fernback contends that his relationship with CMC was that of an employee or, alternatively, that the nature of the relationship was such as to entitle him to reasonable notice upon termination. He says that he was terminated without the notice or cause, and that he was entitled to notice. He asks this Court to determine both the appropriate notice and the rate of compensation that should apply to calculate the quantum of damages to compensate him.

[12] Mr. Fernback takes the position that an appropriate notice at common law is in the order of 12 to 18 months. He seeks damages for the notice period based upon his annual salary and also to take into account the commission income he was entitled to earn for his role in raising capital for the defendant company.

[13] The defendant says that the relationship was essentially an agreement between two corporations and that the plaintiff's actual status is that of an independent contractor. Accordingly, it is the position of the defendant that the plaintiff does not have a right at common law to notice.

[14] Moreover, the defendant says that the plaintiff was provided with three months' notice in March 2012 when its job responsibilities were changed from full time (at a rate of $100,000 per annum) to part time (at a rate of $75,000 per annum), albeit with an additional function to perform. The defendant says as well that the plaintiff was provided with two months' notice of the termination of the agreement in September 2012 and that it was offered a further two months' notice.

[15] Finally, the defendant says that the plaintiff fully mitigated its loss by taking on another contract on September 1, 2012.

Discussion

[16] I propose to set out, in a reasonably summary way, the history of events between April 1, 2009, and the end of 2012. I will then provide my analysis and conclusions.

Preliminary observations

[17] At the outset, it will be useful to make two observations with respect to the evidence in the case.

[18] The first is that considerable evidence was adduced concerning the matter of the plaintiff acquiring or earning some type of equity in the defendant company. It is clear to me that never progressed beyond the discussion stage. I suspect both Mr. Fernback and Mr. Yehia had their expectations of what that might involve; however, it is apparent that there never was a meeting of the minds. The matter does not, in my respectful view, have any meaningful role in the issues at bar.

[19] The second observation that is important to make is that the issue of termination for cause is not applicable in this case. In the course of the evidence, reference was made to an incident that involved a human rights complaint brought by a former employee. There was some suggestion that Mr. Fernback's conduct in that matter may have been a factor contributing to the end of the relationship between the plaintiff and the defendant. There was also evidence tendered to the

effect that Mr. Fernback's performance of his duties was not of an acceptable standard.

[20] Ultimately, I do not understand the defendant to contend that this is a situation where the plaintiff is disentitled to damages in lieu of notice because the termination was for cause. In other words, if this Court concludes that the relationship was of a character that entitled the plaintiff to notice, and that there was no notice or insufficient notice given, there is no allegation that such remedy should be barred because the termination was for cause.

[21] With those observations made, I propose to provide an outline of the circumstances as I find them to emerge from the evidence.

The history of events

[22] As part of the discussions following his initial interview, Mr. Fernback sent an email to Mr. Yehia and Mr. Smith, dated March 11, 2009, proposing that he would be the defendant's CFO. In the email, he set out a number of functions that he proposed to perform. The matter of goals was to be a subject of further discussion.

[23] In his email, Mr. Fernback also proposed that he would provide his services by way of his personal corporation:

> In order to make this beneficial to all parties, I will contract my services out via my personal services firm, TCF Ventures Corp. (I am 100% owner).
>
> By doing so, there will be no need to incur additional source deductions costs for the company which will save the company money. In turn, I will need to charge GST (currently 5%), but this amount, as you are aware, is fully recoverable by the company. I will make this contract very flexible and will include a 30 day termination clause if in the event things do not work out. The contract will be a simple format that I have used in the past.
>
> As for compensation, I will work with your budget of $75,000 annually (plus GST). I would expect that part of my contract will include the repayment of any expenses that I incur on the company's behalf (ie. travel etc.), would include suitable parking downtown and also for access to a company benefit's [sic] plan (if available) on the same terms as other senior management. I would be open to a further discussion of a performance related or annual bonus for achieving tasks ahead of time or under budget.
>
> My initial thoughts are that I will most likely need to spend quite a bit of time in this office up front as I become more familiar with your team and operations. I imagine that there may be a need for some local travel

> immediately to see the company's Vancouver Island based operations as well. Ultimately, I would like to operate three days a week out of the downtown office, and two days a week out of my home office.
>
> As mentioned before, and in the interest of being totally up front with you on some of my current obligations, I have some board of directors and officer commitments that require that I travel to New York and Kelowna from time to time. This will not impact my ability to work on Cambie Malone's Corp. work, and may actually be a nice benefit given that I may be able to leverage some of the New York related travel to benefit Cambie Malone's Corp's proposed expansion plans in the area.
>
> [Emphasis in original.]

[24] I am satisfied that agreement was reached for Mr. Fernback to become CMC's CFO, in general accordance with the discussion reflected in this email and in the letter from Mr. Smith on March 31, 2009, noted earlier in these reasons. In fact, no formal contract of employment was ever executed, although I do not consider that to be a serious problem with respect to the issues at bar. On the basis of the extensive evidence led at trial, I am able to draw the necessary conclusions as to the relationship.

[25] As noted, Mr. Fernback began to work at CMC in April 2009. The arrangement was that he would work approximately three days per week and would look after the financial side of the business. The rate of remuneration was $75,000 per year.

[26] In his role, Mr. Fernback had a number of significant functions. He was the direct supervisor of a number of employees and was granted a substantial amount of autonomy in his role. He worked fairly closely with Mr. Yehia. In fact, it would seem that meeting the job demands probably exceeded the three days per week. Mr. Fernback was, from the outset, provided with an office at the CMC premises. He had a phone local, email accounts, and business cards. He had a parking space assigned and had his computer and telephone supplied by CMC. He also had a company expense account. I note that he was on the extended health plan of CMC.

[27] In November 2009, there was a change in his role. He took on the position of both CFO and Chief Operating Officer (COO). That entailed more responsibility. He was to work five days per week and his remuneration was increased to $100,000 per

year. The change in job duties in November 2009 required taking on more operational duties.

[28] Mr. Fernback stayed in that position until March 2012. At trial, there was a difference of opinion between Mr. Yehia and Mr. Fernback as to how effectively Mr. Fernback performed in that role. Mr. Yehia purported not to be impressed or satisfied, and in fact he said it was for this reason that arrangements were then changed again in March 2012. Mr. Fernback insisted quite stoutly that he had performed the tasks well.

[29] The fact is, there is no need for this Court to decide that issue.

[30] Whatever the cause, in March 2012, there was a change in Mr. Fernback's role. The COO duties and title were dropped; he continued in the CFO role, again with the expectation of working three days per week at that job, and at the previous rate of remuneration, $75,000 per year. In addition, Mr. Fernback was to take on a new role—namely, raising capital for expansion ventures upon which CMC hoped to embark. The arrangement was that Mr. Fernback would be paid a commission of 4% on all capital that he raised.

[31] The parties reduced their understanding to a written contract with respect to the fundraising duties (the "Finder's Fee Contract"). The Finder's Fee Contract is dated June 1, 2012, and is filed as Exhibit 15.

[32] The fundraising project was unable to get underway until October because certain necessary paperwork had not been filed with the appropriate regulatory authorities. In the result, Mr. Fernback continued to perform his CFO role, although the evidence indicates that the responsibilities were less because the defendant had hired a competent person with accounting skills to take over some of the tasks. In that regard, the defendant says that Mr. Fernback's role by that time was more in the nature of a comptroller and entailed less responsibility than the CFO position had required.

[33] On September 1, 2012, Mr. Fernback (through TVC) took on a consulting contract with a third-party client based in Smithers, B.C., UTM Exploration Services Ltd. ("UTM"); that continued until April 8, 2013. TVC was paid a fee of $7,000 per month for that service. Mr. Fernback testified that he took the UTM assignment because he needed the income, given that the opportunity to earn commission income for raising capital was not available at the time because of the filing problem.

[34] The actual raising of capital for CMC began in October 2012. Mr. Fernback had a number of leads, which I understand were provided by Mr. Yehia. Through his efforts with those prospective investors, Mr. Fernback was able to raise the sum of $1.2 million. In doing so, he earned commissions of approximately $50,000; that commission was the subject of an invoice rendered by TVC to CMC.

[35] There was some controversy at trial with respect to the payment of that invoice. Evidently there was legal action taken by TFC to enforce payment. I have elected not to deal with that, as I do not consider that to fall within the scope of the issues with which this trial is concerned. Nevertheless, I will make further reference to the matter later, as it is relevant to an argument raised by the defendant.

[36] By the end of October, relations between Mr. Fernback and Mr. Yehia had deteriorated quite significantly. Essentially, Mr. Yehia took the position that he had terminated Mr. Fernback from the CFO position. In an email advising Mr. Fernback of that development, Mr. Yehia stated that he left open the possibility of negotiating a new arrangement.

[37] In his testimony, Mr. Yehia testified that there had been discussion with Mr. Fernback that as of November 1, 2012, Mr. Fernback would no longer be on the payroll of CMC. Going forward, he would be working solely in the fundraising enterprise, raising capital for a subsidiary of CMC.

[38] In regard to these changing roles, Mr. Yehia says that, with respect to the change of status in March 2012—that is, when Mr. Fernback was relieved of the COO responsibilities and his salary reduced to $75,000 per annum— that the defendant continued to pay Mr. Fernback at a rate of $100,000 per annum for a

further three months. He takes the position that this was notice as Mr. Fernback had requested. In the discussions between Mr. Yehia and Mr. Fernback at the end of October, Mr. Yehia claims that he offered Mr. Fernback two further months of pay for the CFO duties, even though Mr. Fernback would not have to perform those functions.

Analysis

[39] At the outset, I wish to make comment with regard to the issue of credibility.

[40] Both plaintiff and defendant, in their submissions, refer to the credibility of the principals, that is Mr. Fernback and Mr. Yehia. Each says that the other's evidence is suspect.

[41] Speaking generally, each of those individuals, in their testimony, tended to describe events and give their evidence in ways that probably comport with their recollections and views of events. That is commonplace in disputes such as this.

[42] Nevertheless, I must observe that I was struck by Mr. Fernback's time in the witness stand. In my view, some of the testimony he provided, particularly with respect to his earnings from sources other than the defendant, contracts and contacts he has had with organizations and entities other than the defendant, and the income he has earned was, frankly, less than perfectly forthcoming and was somewhat opaque.

[43] With respect to Mr. Yehia, I have no specific observation to make that would suggest he was not a trustworthy witness, although he clearly testified in a way that is consistent with having seen events from his own perspective. I am not certain that his description of events was always entirely objectively correct.

[44] In a related vein, I note that among the cases provided to the Court by plaintiff's counsel was a decision of Madam Justice Dickson in previous litigation involving Mr. Yehia. I looked carefully at the case and am unable to see that it has actual relevance to the issues at bar in this matter. I also note that the Court there made observations of Mr. Yehia that were less than positive. I do not consider that

any impression another judge of this Court may have had in different litigation should in any way inform my view of the matters in this trial.

Nature of the relationship

[45] It is necessary to determine the essential character of the relationship between the plaintiff and the defendant.

[46] Mr. Fernback provided his services to the defendant by way of his personal corporation; that was an arrangement that was acceptable to both parties. It was done at the behest of Mr. Fernback. It is clear that he had his reasons for doing so—principally, it seems to me, to enable him to achieve significant tax savings. A related factor is Mr. Fernback's practice to be almost constantly looking for other job opportunities and situations. The evidence disclosed a nearly incessant sending of resumes and expressions of interest for a wide range of positions. While that might have been, for some employers, a matter of concern or dissatisfaction, it was not an issue for Mr. Yehia (although I do not believe he was fully aware of the extent of Mr. Fernback's endeavours on that front). He knew from the outset that Mr. Fernback wished to have the latitude of pursuing additional or supplementary business as circumstances allowed, and he did not object, presumably so long as those activities did not interfere with Mr. Fernback's ability to fulfil his obligation to CMC. Indeed, the initial agreement contemplated that Mr. Fernback would work only on a part-time basis for CMC.

[47] There were material differences between the format that these parties had and what one might characterize as a purely conventional, traditional arrangement whereby a worker is hired as an employee. In that type of structure, the individual is on the company payroll and generally receives paychecks each pay period where the statutory deductions are made by the employer and remitted to the relevant authority, in addition to a host of other earmarks of a typical salaried employee.

[48] The jurisprudence of employment law has, in relatively recent times, evolved to recognize the realities of the modern workplace and the fact that the relationship between workers and those to whom they provide their services are not simply

binary—either employee-employer or independent contractor. In a number of decisions, the courts have come to acknowledge that there are a variety of different arrangements that the parties may have. The approach to be taken is to examine the situation from a functional perspective.

[49] The result has been the recognition of relationships that fall within an area between the two traditional models. Dealing with a similar issue in *Kahn v. All-Can Express Ltd.*, 2014 BCSC 1429, I made the following comments, which I feel are pertinent to the matter at hand:

> [21] … Based upon a number of authorities to which I have been referred, I am satisfied that the common law with respect to this issue has evolved into a more nuanced state, one that reflects the reality of an economy where many workers perform services for others in arrangements that are specifically structured such that they are neither employer - employee relationships nor are they properly characterizable as independent contractor relationships.
>
> [22] In effect, the courts have recognized that these sorts of relationships, depending upon their particular features, can fall at different points along a continuum, ranging from pure employer-employee situations to classic independent contractor arrangements: *Hillis Oil and Sales Ltd. v. Wynn's Canada*, [1986] 1 S.C.R. 57; *Stewart v. Knoll North America Corp*., 2007 BCCA 11; and *Movassaghi v. Steels Industrial Products Ltd*., 2012 BCSC 1663.
>
> [23] In that analytic framework, there is a recognition of what is sometimes labelled a dependent contractor status. It is neither of the traditional positions, but rather has some features of each.
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> [24] … In *Mancino*, Mr. Justice Lederman stated the following at paras. 9-10:
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> > Although the plaintiff in fact ran his own business, an examination of the relationship between the parties shows that there was a dependency which was mutual and permanent in nature….
> >
> > There is no doubt that the plaintiff, to use the words in *the Labour Relations Act*, was in "a position of economic dependence" upon the defendant which "more closely [resembled] the relationship of an employee than that of an independent contractor". The fact of dependency continued even after the plaintiff's change of status from a "dependent contractor" to a broker. In either capacity the plaintiff's arrangement had all the hallmarks of an employment relationship with the defendant. This relationship was of a permanent and exclusive nature implicit in which was the understanding that it would be terminated only on the giving of reasonable notice. [Citation omitted.]

[50] In *Marbry Distributors Ltd. v. Avrecan Int. Inc.*, 1999 BCCA 172, at para. 38, Braidwood J.A. provided the following non-exhaustive list of factors for determining where on the continuum a relationship falls, noting that not one is by itself conclusive nor necessary to determine the type of relationship as one requiring notice:

> [38] … Those factors are:
>
> [1] Duration/Permanency of the Relationship. The longer the duration of the relationship or the more permanent it is militates in favour of a reasonable notice requirement. Amongst other evidence, the purchase and maintenance of inventory, which contains a permanency aspect, should be considered;
>
> [2] Degree of Reliance/Closeness of the Relationship. As these two interrelated sub-factors are increased the more likely it is that the relationship falls on the employer/employee side of the continuum. Included in this factor is whether the sale of the defendant's products amounted to a significant percentage of the plaintiff's revenues; and
>
> [3] Degree of Exclusivity. An exclusive relationship favours the master/servant classification.

[51] Notwithstanding the formal structure (that is, the provision of services through a corporation) and the lack of complete exclusivity, it is my conclusion based on all of the above that the arrangement the parties agreed upon in this case entailed a significant element of personal service. CMC set out to hire a CFO; it wanted a professional person to provide certain services to the corporation. That entailed having a specific, identified, and qualified person to perform those functions. The person CMC selected was Mr. Fernback. It was his package of attributes that CMC wanted to have working for it, and that is what occurred.

[52] By way of analogy, this was not a situation where CMC entered into a contract with a third-party corporate entity—say, for example, one of the major accounting firms—to have that firm assign a properly qualified worker to provide the services required. CMC bargained to have Mr. Fernback join its workforce, and that is what happened. There was a permanency to that relationship that persisted for a significant time—some three and a half years.

[53] Accordingly, I am satisfied that the essential nature of the relationship was akin to an employer-employee situation, as opposed to a pure independent contractor.

[54] My view is that Mr. Fernback was "employed" by CMC between April 1, 2009, and November, 2012. Over that span of time, his responsibilities and rate of remuneration changed from time to time. Initially, he was the CFO at $75,000 per year; he subsequently took on the dual COO/CFO role at a rate of $100,000 per year. Finally, in March 2012, he reverted to the CFO job description at a rate of $75,000 per year. That was augmented by the fundraising assignment that he took on.

[55] The actual end of the relationship between the plaintiff and the defendant is somewhat shrouded in confusion. Some insight into that is to be found in an email exchange between Mr. Fernback and Mr. Yehia at the end of October.

[56] My conclusion is that Mr. Fernback was effectively terminated on November 15, 2012. That date is somewhat arbitrary, as Mr. Yehia and Mr. Fernback carried on their discussion regarding the matter over a period of time. However, it seems to me that, by then, the parties knew that the relationship that had subsisted to then, albeit in somewhat shifting forms, was over. Notwithstanding that, Mr. Fernback appears to have continued to pursue his activities to raise capital for the defendant for a period of time. In fact, the plaintiff subsequently rendered an invoice to the defendant with respect to the commissions related to those funds. I made mention of that invoice earlier.

[57] In the result, I find that the relationship between the plaintiff and the defendant was such as to entitle the plaintiff to notice at common law. The termination was without cause. It is my view that, at the point of termination, that is, on November 15, 2012, the rate of remuneration upon which any damages in lieu of notice would be based would be comprised of two components: (a) an annual salary of $75,000 per year; and (b) the commission earned at a rate of 4% with respect to funds generated for the business enterprises of CMC under the Finder's Fee Contract.

Reasonable notice

[58] The purpose of reasonable notice is to ensure an employee has an opportunity to obtain similar or comparable employment elsewhere: *Ostrow v. Abacus Management Corporation Mergers & Acquisitions*, 2014 BCSC 938, at para. 35.

[59] Recently, in *Cheong v. Grand Pacific Travel & Trade (Canada) Corp*., 2016 BCSC 1321, Warren J. discussed the law on reasonable notice, noting that the factors to apply are those set out in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.). She then stated, at para. 75:

> [75] The leading decision on reasonable notice in British Columbia, which refers to the *Bardal* factors, is *Ansari v. B.C. Hydro & Power Authority* (1984), 2 B.C.L.R. (2d) 33 (S.C.), aff'd (1986), 55 B.C.L.R. (2d) xxxiii (C.A.). McEachern C.J.S.C., as he then was, held as follows regarding the factors to consider when assessing notice:
>
> > At the end of the day the question really comes down to what is objectively reasonable in the variable circumstances of each case, but I repeat that the most important factors are the responsibility of the employment function, age, length of service and the availability of equivalent alternative employment...
> >
> > In restating this general rule, I am not overlooking the importance of the experience, training and qualifications of the employee but I think these qualities are significant mainly in considering the importance of the employment function and in the context of alternative employment.
> >
> > What all this means, in my view, is that the general statement of factors quoted above from *Bardal* are the governing factors, and it would be better if other individual or subjective factors had not crept into the determination of reasonable notice. In my view such other matters are of little importance in most cases (at 133).
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> [Emphasis added.]

[60] Both the plaintiff and the defendant have provided me with numerous cases where courts have determined the appropriate notice periods based on the position and the years of service. The significant range in the months' pay awarded in lieu of notice in these authorities highlights what the Supreme Court of Canada noted in *Honda Canada Inc. v. Keays*, 2008 SCC 39, at paras. 25–32: the Court must determine the appropriate notice period on a case-by-case basis, applying the *Bardal* factors and taking into consideration all of the circumstances of the parties.

[61] It is my conclusion that, given the duration of the employment relationship between the plaintiff and the defendant, taking into account the particulars of the relationship, including that TFC retained its right to work at other contracts (and in fact did so), and considering Mr. Fernback's age and qualifications, an appropriate term of notice would be nine months. Based upon an annual salary of $75,000 per year, that equates to damages in the amount of $56,250.

[62] In its submissions, the defendant makes reference to earlier amendments or changes that were made in the relationship between the plaintiff and the defendant, particularly the job description, duties, and rates of compensation. For example, earlier in 2012, Mr. Fernback's responsibilities were changed from being both COO and CFO to CFO only. That was at the same time the agreement with respect to the raising of capital was being made.

[63] The defendant would suggest, as I understand the submission, that the rate of compensation at the time of the change continued at the higher level for a further three months after the adjustment of responsibilities, thus constituting something of additional pay in recognition of an obligation to provide notice.

[64] To the extent the defendant suggests that was a factor in determining obligations at the conclusion of the relationship, I decline to accept that proposition. For my analysis, I have considered that the plaintiff and Mr. Fernback were in an employment-like relationship with the defendant from April 1, 2009, through to November 15, 2012. While there were modifications made to the responsibilities and the compensation over the life of the relationship, it is, in my view, most sensibly and logically treated as one continuous piece.

[65] The defendant also makes reference to the fact that on two occasions, draft contracts were prepared wherein notice of termination was stipulated to be 90 days. The defendant says that the issue of appropriate notice ought to be informed by those provisions. The defendant also points to some evidence of the conversation between Mr. Fernback and Mr. Yehia wherein there was apparently reference to a shorter notice period in the event of termination of the contract.

[66] In my view, none of those represent an enforceable agreement between the parties. For his part, Mr. Fernback described the inclusion of the 90-day terms in the draft contacts as something that was part of what he characterized as a "boiler plate" contract he used to make a rough draft, for discussion purposes, and not his actual position.

[67] The fact is, there was no executed contract setting out the notice requirements. As I am unable to conclude that the 90 days represented Mr. Fernback's communicated expectation by which he must be bound, let alone a point upon which the parties were in agreement, I can do no more than to take into account this was a notice period that had been discussed and may have been within the contemplation of the parties. However, I am not satisfied that the circumstances are such that I should find that the parties are bound by it to the exclusion of the common law principles. My conclusion is that the shorter notice periods that were mentioned in the discussions are a factor to be considered and should inform my assessment in only a minor way.

Commissions

[68] I also consider that there should be damages awarded to the plaintiff with respect to the termination of the Finder's Fee Contract, whereby the plaintiff would raise funds and be entitled to commission payment. That was a part of the plaintiff's job duties that were brought to an end by the action of the defendant. The plaintiff should be compensated for the commissions that he would have been paid if the defendant had given reasonable notice: *Sciancamerli v. Comtech (Communication Technologies) Ltd.*, 2014 BCSC 2140, at para. 53.

[69] In *Stuart v. Navigata Communications Ltd.*, 2007 BCSC 463, at para. 30, the Court held:

> [30] If the mode of remuneration of an employee … includes commissions, the award of damages should include such commissions as the employee would likely have received during the notice period (the burden being on the plaintiff to show that there was some reasonable probability of receiving commissions during the notice period) [citations omitted].

[70] I have already determined that reasonable working notice in this case would have been a term of nine months. The Finder's Fee Contract, unlike the contract at issue in *Sciancamerli*, did not contain provisions pertaining to the payment of commissions on termination. I must, then, determine an appropriate amount of commissions to be paid over the nine-month notice period.

[71] The plaintiff says that the lost commission opportunity should be found to have a value between $10,000 to $20,000 per month based on the capital he raised for the company in his first six weeks in the role.

[72] I am unable to accept that submission. In my view, it must be considered that there are practical limitations to the task that the plaintiff had taken on. It cannot be said with certainty that Mr. Fernback would have raised a further $5 million or an overall total of $5 million. While his initial fundraising endeavors were apparently successful, the clear sense that I take from the evidence is that was in substantial part because he was provided with a list of contacts by Mr. Yehia, and that his initial work had been, to some extent at least, something of a matter of "picking the low-hanging fruit." As well, there is the practical reality that raising funds was not simply a matter of turning on a tap.

[73] The defendant says that the plaintiff has no right to any damages with respect to the arrangement between the parties for Mr. Fernback to solicit capital for the defendant. As I understand the defendant's submission, it says that the consent order which was agreed to by the parties and entered on May 13, 2014, is a complete bar to any recovery by the plaintiff of fees related to the raising of capital.

[74] With respect, I disagree. Evidently the plaintiff had raised funds for the defendant, something in the order of approximately $1.2 million. The plaintiff claimed a fee of approximately $50,000 and rendered an invoice. When that invoice was not paid, the plaintiff brought action against the defendant to have the account paid. That action was resolved by way of consent, and the consent order is the evidence of that resolution.

[75] I have examined the order carefully. As I see the matter, it deals only with the claim that had been made by way of the invoice for commission respecting funds that had been raised. I do not see how it can stand as a bar to any further claim by the plaintiff for raising other funds in accordance with the contract between the parties. I do not accept that it exhausts the plaintiff's right to recover in this regard.

[76] Having considered the circumstances, I conclude that an appropriate award of damages for the lost opportunity to earn commission is in the amount of $75,000. That represents a commission upon $1.875 million raised over the nine-month period. In my view, that is a reasonable projection, from the perspectives of both the plaintiff and the defendant.

[77] Accordingly, the total damages to which the plaintiff is entitled for the termination are $131,250.

[78] However, there is one further dimension to be considered. As noted, Mr. Fernback began to provide contract services to a third party, UTM. He earned those funds, at a rate of $7,000 per month, from September 1, 2012, through April 8, 2013. It is my conclusion that a portion of the funds earned from UTM during the notice period must be offset against the award of damages. I have concluded that 70% of the funds earned from the UTM contract during the period of November 16, 2012, through April 8, 2013 (when the contract ended), should be applied in mitigation of the damage award. Based on the plaintiff's invoices to UTM over that time period, and subtracting exactly half of the November invoice for the time the plaintiff remained employed with CMC, the amount the plaintiff earned from UTM in that period totals $33,366.67.

[79] That percentage attribution is admittedly somewhat arbitrary; it is based upon the recognition that Mr. Fernback had some opportunity to work at contracts outside of his obligations to the defendant. However, given the responsibilities that he had and the remuneration he contends would have been earned, and also taking into account other responsibilities that Mr. Fernback had, I am unable to conclude that he could have earned all of that income (from UTM) while still properly discharging his

obligations to the defendant. Accordingly, the award of damages is reduced by $23,356.67.

Conclusion

[80] The plaintiff is awarded damages in the amount of $107,893.33 as a result of the termination.

[81] Subject to any submissions by counsel, the plaintiff is awarded costs at Scale B. If they wish, counsel may make written submissions going to costs through the registry within 45 days of this judgment.

[82] By way of a final observation, it seems to me that this dispute and this lawsuit are a regrettable outcome of experienced and ostensibly competent businessmen entering into important arrangements without documenting the terms they expect to apply to that relationship. When differences arise, as not-infrequently occurs, litigation, with all the attendant uncertainties and risks, often results. Ultimately, that is to the benefit of no one.

"J. Williams, J."