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Hulme v. Cadillac Fairview Corp.

WILLIAM D. HULME v. THE CADILLAC FAIRVIEW CORPORATION LIMITED

Ontario Court of Justice (General Division)

Montgomery J.

Heard: October 18-22 and 25-26, 1993
Judgment: December 2, 1993
Docket: Doc. 994/81

Counsel: *David Hager* and *Sylvia Tint*, for plaintiff.

C.L. Campbell, Q.C., *William Scott* and *Sacha Fraser*, for defendant.

Subject: Labour and Employment; Public

Employment Law --- Termination and dismissal — Termination of employment by employer — Constructive dismissal

Termination and dismissal — Termination of employment by employer — Constructive dismissal — Real estate development officer being taken off particular project and told that he would be kept on salary until another suitable project was found for him — Development officer not being constructively dismissed.

Termination and dismissal — Termination of employment by employer — Dismissal for cause — Legal action against employer — Employee bringing action against employer for damages for constructive dismissal while still employed by employer — Lawsuit by employee for wrongful dismissal being inconsistent with employment relationship — Employer being entitled to terminate relationship.

The plaintiff was employed by the defendant as a senior vice-president and development officer. He was sent to Texas to put together a joint venture agreement with a Texas company. The Texas company was not satisfied with the plaintiff's assessment of the project. Consequently, the plaintiff was removed from the project in October 1980. He

was told that he would be kept on salary until another suitable project was found for him. Attempts were made to find the plaintiff another position, but they did not come to fruition prior to January 1981, when the plaintiff commenced a lawsuit against the defendant for damages for breach of contract. The defendant terminated the plaintiff as of the date of the initiation of the lawsuit.

Held:

The action was dismissed.

It was not unreasonable, given the nature of the development business, to require the plaintiff to wait until the defendant could find him a suitable project which was acceptable to him. The major role of a development officer is to work from project to project. It was unreasonable for the plaintiff to expect that a suitable project would be available immediately. The plaintiff acted precipitously in suing the defendant. He was not constructively dismissed.

It is inconsistent with an employment relationship for an employee to be suing an employer for wrongful dismissal. The defendant was entitled to terminate the relationship as it did.

Cases considered:

Aleniuk v. Westown Food Sales Ltd. (1981), 28 A.R. 473 (Q.B.) — *referred to*

Cox v. Royal Trust Corp. of Canada (1989), 26 C.C.E.L. 203, 33 O.A.C. 95 (C.A.) [additional reasons at (November 19, 1990), Doc. CA 105/87 (Ont. C.A.), leave to appeal to S.C.C. refused (1989), 33 C.C.E.L. 224 (note), 105 N.R. 75 (note), 37 O.A.C. 395 (note)] — *referred to*

Irvington Holdings Ltd. v. Black (1987), 14 C.P.C. (2d) 229, 58 O.R. (2d) 449, 35 D.L.R. (4th) 641 at 676, 20 O.A.C. 390 (C.A.) — *referred to*

Jobber v. Addressograph Multigraph of Canada Ltd. (1980), 10 B.L.R. 278 (Ont. H.C.) — *referred to*

Mifsud v. MacMillan Bathurst Inc. (1989), 28 C.C.E.L. 228, 70 O.R. (2d) 701, 63 D.L.R. (4th) 714, 35 O.A.C. 356 (C.A.) [leave to appeal to S.C.C. refused (1990), 73 O.R. (2d) x (note), 68 D.L.R. (4th) vii (note), 39 O.A.C. 153 (note), 113 N.R. 400 (note)] — *considered*

Prozak v. Bell Telephone Co. of Canada (1984), 4 C.C.E.L. 202, 46 O.R. (2d) 385, 4 O.A.C. 12, 10 D.L.R. (4th) 382 (C.A.) — *considered*

Rubel Bronze & Metal Co. v. Vos (1917), [1918] 1 K.B. 315 — *referred to*

Turner v. Canadian Admiral Corp. (1983), 1 C.C.E.L. 130 (Ont. H.C.) — *considered*

Statutes considered:

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Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 130

Judicature Act, R.S.O. 1980, c. 223 [rep. Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 187] —

s. 36(6)

Action for damages for constructive dismissal.

***Montgomery J.*:**

1 This action is for damages for:

(1) dismissal and constructive dismissal;

(2) loss of employment benefits; and

(3) loss of value of shares sold in the company when taking a company assignment in the United States.

The Facts

2 The plaintiff, William Hulme ("Hulme"), is an architect and business executive who began his employment with the defendant, The Cadillac Fairview Corporation Limited ("Cadillac"), in January of 1971. His academic background included a medal in architecture, a scholarship in engineering and post-graduate work in Urban Economics at the University of California from which he intended to become involved in the development business.

3 From the commencement of his employment with Cadillac in January of 1971 until 1974, Hulme was a Special Projects Officer. In 1974 when Cadillac and Fairview merged, he became a Vice-President of Urban Development. Between 1974 and 1978 he was a Development Officer involved in a series of projects. The most significant one of these projects was Place du Centre, a large federal government office complex and convention centre in Hull, Quebec.

4 By 1978, Cadillac had entered the American market. In the fall of 1978 the decision was made to transfer Hulme to Texas and with some reluctance, he made the move in March of 1979.

5 Cadillac had decided that to compete in the United States market, they could keep senior executives only by offering equity participation in projects as their U.S. competitors did. Accordingly, eight Cadillac executives had been given equity participation in the White Plains Project, a regional shopping centre in White Plains, New York. The partnership agreement for this project was signed December 15, 1977. This predated the decision to send Hulme to

Texas, however, Hulme was given a copy of the White Plains agreement prior to his move to Texas and he was made aware that, although White Plains was closed to further participation, a similar project would come up in which he could share in the equity.

6 Kenneth Bream ("Bream"), an Executive Vice-President of the Urban Development Group, asked Hulme to go to Houston. Hulme went to Texas to put together a joint venture agreement with Texas Eastern Transmission who would manage the Project (the "Houston Project"). Texas Eastern Transmission, over a ten year period, had assembled about 33 blocks for redevelopment and had built some first-class buildings. The Houston Project was intended to include two large office towers and a Four Seasons hotel which came later.

7 Michael Prentiss ("Prentiss"), an Executive Vice-President of Cadillac stationed in Dallas, Texas, wrote to Hulme by letter dated December 20, 1979 to confirm the equity participation that Hulme was being offered by Cadillac. The letter provided:

> Following our meeting Sunday, I have had an opportunity to look into some of your personal situations and I have determined the following:
>
> > 1. You will be given an opportunity to invest in the planned Rocky Mount Regional Mall to the extent of a 6% ownership position which will yield a pro forma cash flow of $60,000 per year. There is a possibility the size of the mall may be reduced, in which case you will be offered an opportunity to increase the size of your investment. Should the commencement of Rocky Mount be delayed beyond May 1, 1980, it is anticipated other similar investment opportunities will arise in which you will have an opportunity to invest.
> >
> > 2. I am looking into the life insurance situation, but in the meantime, I can confirm that Cadillac Fairview will provide you with the same life insurance benefits you had while in Canada.
> >
> > 3. We will work out an arrangement with your car so that it does not create adverse tax consequences for you. This will be taken care of shortly.
> >
> > 4. With respect to your sale of Cadillac Fairview stock, I will try to mitigate the loss you suffered in the sale. Could you please provide me with a copy of the sale transaction so that I can pursue this issue?
>
> I sincerely hope that upon reflection you will decide to work with me in the Southern Region. I am convinced we can work well as a team and that you will find your job both challenging and rewarding. In the meantime, I would appreciate your sending me an organizational chart of your staff and the whole Houston Centre operation as soon as possible.
>
> Finally, as we discussed, I would like to get your thoughts on an appropriate organization and plan for the Houston Area.
>
> Please call me if you have any questions. Over the holidays, I can be reached in Atlanta at 404-422-3335.

8 Hulme was loaned money by Cadillac to buy shares in the company. Through Cadillac lawyers in Toronto, Hulme was given tax advice that resulted in him selling his shares before moving to the United States and making a $115,000 profit.

9 Prentiss was a graduate of Harvard. He was hired by Cadillac as a Vice-President in 1978 and promoted to Senior Vice-President in the fall of 1979 and transferred from Toronto to Texas in 1980, in charge of Cadillac southwestern region. Hulme had been reporting to Bream, but when Prentiss moved to Texas in charge of the Southern Region, Hulme reported to Prentiss in Dallas. This represented a significant organizational change.

10 Texas Eastern was not satisfied with Hulme's and Prentiss' assessment of the Houston Project. As a result of complaints from Texas Eastern, Prentiss spoke to Hulme and tried to mould Hulme to meet expectations, however, he was met by denial and Hulme refused to alter his approach to the Project.

11 Consequently, on the 30th of October, 1980, Prentiss met with Hulme and told him that he was removing Hulme from the Houston Project. There is more to be said later about the conflicting versions of this and other meetings with Hulme.

12 Many attempts were made to find Hulme another executive position but these did not come to fruition prior to January 27, 1981 when Hulme commenced a lawsuit against Cadillac for damages for breach of contract.

13 On February 25, 1981, Cadillac wrote to Hulme severing the employment relationship effective January 27, 1981.

14 The facts are further fleshed out as they relate to the triable issues.

The Issues

15

1. Was Hulme dismissed or constructively dismissed?

16 (a) If he was constructively dismissed, what was the effective date?

17 (b) If he was not constructively dismissed on October 30, 1980, was Cadillac justified in dismissing him on January 27, 1981, after he had commenced an action against Cadillac?

18 (c) If there was a constructive dismissal, what is the appropriate notice period and what was the annual employment benefit package to be applied?

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2. The Equity Issue

19 (a) If Hulme had remained an employee of Cadillac, would he have received an interest in Fort Worth equal to 90% of the interest of Prentiss as alleged in para. 13a. of the amended statement of claim?

20 (b) On January 27, 1981, was Hulme entitled to an equity interest in a hypothetical shopping centre?

3. The Share Issue

21 Was Hulme entitled to be compensated for the increase in value of the Cadillac shares he sold?

Issue 1. Was Hulme dismissed or constructively dismissed?

22 Hulme testified that in a meeting of October 30, 1980 he met with Prentiss who told him he was fired. He stated that "He wanted me to leave the Houston office." Prentiss' version is that he relieved Hulme of his position in Houston and told him that Cadillac would seek another position for him in the company. Prentiss is no longer with the company and therefore he is to some extent an independent witness. Prentiss told Hulme that he would be continued on the payroll and that it would take some time to find another project for him to run.

23 Prentiss said he talked to Jack Daniels ("Daniels"), Chairman and C.E.O. of Cadillac, and Marty Seaton ("Seaton"), a Cadillac executive, and they were prepared to meet with Hulme to explore other positions that might be available in the company.

24 Prentiss said he told Hulme that he had talked to Daniels and Gerry Shear, a Cadillac executive, and they were agreeable to looking for positions that would be appropriate to Hulme's skill and experience levels.

25 Hulme then went to see Daniels and Ephraim Diamond, Chairman of the Executive Committee and former CEO of Cadillac, about another project. This is more consistent with Hulme being taken off the project than being fired.

26 I prefer the evidence of Prentiss where it conflicts with Hulme. I believe Hulme is mistaken when he says he was fired. I find that he was not fired.

27 I now move to the question of constructive dismissal. It is important to note that Cadillac has not taken the position that it had the right to dismiss Hulme on October 30, 1980 because of his performance. Indeed, Prentiss said Cadillac must share part of the blame because it put Hulme in charge of the Houston Project where it should not have done so.

28 Cadillac says it had the right as employer, given the nature of the development business, to take Hulme off the Houston Project and put him somewhere else within the Cadillac organization.

29 A letter was sent by Cadillac to persons they were dealing with in the Houston Project advising that Hulme was no longer the project manager. The nature and tone of the letter was informational and in no way disparaging of Hulme.

30 It was argued by Hulme's counsel that the removal of Hulme from management of the Houston Project and the failure to promote him to an alternative position amounts to constructive dismissal.

31 Hulme's theory is that Cadillac's unilateral removal of him from an executive position in return for an undefined position constituted a fundamental change to his employment. Even if Cadillac acted bona fide and with genuine concern both for itself and for Hulme, this does not mean that Cadillac cannot be liable for constructive dismissal. The fact that Cadillac was properly motivated does not override the fundamental changes to Hulme's position.

32 In support reliance is placed upon:

Rubel Bronze & Metal Co. v. Vos (1917), [1918] 1 K.B. 315 at p. 323

Cox v. Royal Trust Corp. of Canada (1989), 26 C.C.E.L. 204 (Ont. C.A.) at p. 207

Aleniuk v. Westown Ford Sales Ltd. (1981), 28 A.R. 473 (Q.B.)

Jobber v. Addressograph Multigraph of Canada Ltd. (1980), 10 B.L.R. 278 (Ont. H.C.)

(Although this case involved a restructuring and the subsequent elimination of the plaintiff's position and may be distinguished on that basis.)

33 The defence relies on Prentiss' attempt to salvage Hulme within the Project, while dealing with an unhappy partner, Texas Eastern Transmission. A number of meetings and exchanges occurred within the company upon Hulme's removal from the Houston Project which evidence Cadillac's concern for Hulme and its effort to accommodate Hulme within Cadillac by finding him a suitable project.

34 Seaton learned that Hulme was taken off the Houston Project on October 31, 1980. Seaton subsequently phoned Hulme and suggested that Hulme speak to Diamond. Hulme flew to Toronto on November 2, 1980 at Cadillac's expense and met with Diamond. Hulme says that Diamond told him to speak to Daniels. On November 3, 1980, Hulme met with Daniels in Toronto for between thirty minutes and one hour. It should be noted that Daniels was Hulme's friend and still is. Daniels said he would try to find him another project and also suggested he take a holiday and go skiing. He suggested Hulme check out a project of Cadillac's in California. Hulme went to California, again at company expense, from November 11 to November 16, 1980, and met with Seaton to discuss the Yerba Buena Project. On returning to Toronto, Hulme met again with Daniels for one to two hours on November 17, 1980. He advised Daniels he was not interested in California because he did not want to have to report to Stan Nichols, a Vice-President of a Cadillac subsidiary, as he considered that to be a demotion. I find that Daniels in essence accepted that refusal. However, there is no evidence before me to indicate that Hulme would have to report to Stan Nichols. Daniels kept

trying to find a project for Hulme.

35 It was argued by the defence that by mid December, Hulme had reached the conclusion that Cadillac would not be able to find him an acceptable project. Around November 27, 1980, Hulme met with Mr. Smyth, another Cadillac employee, who was thinking of leaving Cadillac. They met with a Mr. Goodman around November 25, 1980 to see if they could get consulting work. Between November 27 and December 10, 1980, Hulme travelled to Vancouver to meet Mr. Poole of Daon to see if there was any employment in Vancouver.

36 Hulme met again with Daniels on December 17, 1980.

37 In my view, it was not unreasonable, given the nature of the development business, to require Hulme to wait until Cadillac could find him a suitable project which was acceptable to him. Even though Hulme was a Senior Vice-President, he was a development officer, as were many other senior executives. Bream testified that development officers' major role is to work from project to project. This was part of Hulme's job responsibility. I am satisfied on the evidence that it was unreasonable for Hulme to expect that a suitable project would be available immediately. The evidence indicated that for Hulme to not have a specific project to do for six to twelve months is not unusual. Bream said that in the 1980/81 time period, it could take from six to twelve months to find a project for a development officer.

38 Prentiss told Hulme that his salary would continue. The fact that the company continued to pay Hulme while he travelled at company expense is a clear indication of the company to continue the employment relationship. The fact that Hulme was not given an office as a development officer is not determinative of anything.

39 After 48 days, Hulme decided that the employment relationship with Cadillac was over, notwithstanding Daniels' stated intention to find him another project. I have considerable difficulty in accepting Hulme's evidence that he did not know from day to day whether he would be paid, and I reject this contention. Daniels was his friend and had told him that he would be paid. Hulme continues to have a high regard for Daniels. I consider that either side could have called Daniels. I draw no adverse inference from the failure of either side to call this former employee.

40 In my view, Hulme was wrong in expecting a new position from Cadillac in 48 days. I conclude that he acted precipitously in suing the company and that he was not constructively dismissed.

41 There was no constructive dismissal on October 30, 1980. It is inconsistent with an employment relationship for an employee to be suing a company for wrongful dismissal. Cadillac was, in my opinion, entitled to terminate the relationship, as it did in Mr. McMenemy's letter of February 25, 1981.

42 Cadillac relies upon the decision of the Ontario Court of Appeal in *Mifsud v. MacMillan Bathurst Inc.*, 70 O.R. (2d) 701, released November 21, 1989. In that case, an 18-year employee had been promoted to foreman and later to supervisor. After some dissatisfaction the employer reassigned him to the position of foreman with no reduction in salary but reduced chances of promotion, reduced responsibility and shift work.

43 At p. 706, McKinlay J.A. said:

> In this case, Mr. Mifsud was required to work at a different location; he was required to work three shifts rather than two; his designation was that of "foreman" rather than that of "superintendent" — clearly a position of less prestige within the company; he had responsibility for fewer plant functions than previously; and he had substantially fewer employees under his supervision. I am satisfied that those changes constituted a demotion. However, that does not of itself determine the constructive dismissal issue.

And at p. 707:

> I think it is fair to say that at the time of any promotion within an organization, if no specific agreement is reached to the contrary, the parties will have impliedly agreed that if the employee does not function adequately in the new position the employer will be able, without committing a fundamental breach to the employment contract, to return the employee within a reasonable period of time to a position similar to the one vacated. In other words, a reasonable period of probation would normally be considered a term to which the parties would have agreed had they turned their minds to the question.

And at pp. 709-710:

> Is the situation substantially different when an employer does not wish to dismiss an employee but, being unsatisfied with his performance, or for some other valid reason, wishes to place him in a different position at the same salary? Why should it not be considered reasonable for the employee to mitigate his damages by working at the other position for the period of reasonable notice, or at least until he has found alternative employment which he accepts in mitigation?
>
> The fact that the transfer to a new position may constitute in law a constructive dismissal does not eliminate the obligation of the employee to look at the new position offered and evaluate it as a means of mitigating damages. In all cases, comparison should be made to the contractual entitlement of the employer to give reasonable notice and leave the employee in his current position while a search is made for alternative employment. Where the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious (as in this case) it is reasonable to expect the employee to accept the position offered in mitigation of damages during a reasonable notice period, or until he finds acceptable employment elsewhere.

44 In any event, if I am wrong in concluding that there was no constructive dismissal, on the facts before me, the claim must fail for Hulme's failure to mitigate. I find that it was an implied condition of the development work that if Hulme did not work out on the Houston Project he would have to accept another project.

In any event, what is the appropriate notice period and what was the annual employment package?

45 Hulme was 35 years of age. He had been 10 years with the company. I consider 12 months to be the appropriate notice period. Hulme's salary was $105,000 U.S. per year. The car allowance was agreed at $4,800 U.S. per year.

46 It was usual for senior executives to receive a bonus of approximately $20,000 U.S. Cadillac's year end of January 31, 1981 fell within the notice period. I believe Hulme is entitled in the calculation to receive a bonus of $20,000 U.S. for the year ending January 31, 1981.

47 In the prior year, Hulme had a salary increase of approximately 10%. If an increase is to be considered, I believe it should be $10,500 U.S.

48 Robins J. (as he then was) considered both bonus and salary increase and concluded the employee was to be entitled to both in *Turner v. Canadian Admiral Corp.* (1983), 1 C.C.E.L. 130 (Ont. H.C.). He said at p. 133:

> In my view, the plaintiff is entitled to both. If the bonus or salary increase were purely ex gratia payments, I would agree with the defendant's contention. But those payments were not made by the company on that basis. On the uncontradicted evidence ... persons at the plaintiff's level received an annual increase and bonus as a matter of course. Historically, increases and bonuses were forthcoming every year. The immediate past president of the company testified that these sums were regarded as part of the total compensation package of senior management. As I view the pattern, they formed an integral part of the applicable salary structure, and as far as the plaintiff and others in comparable positions were concerned, they were "money in the bank", so to speak. The defendant is not entitled to deny the plaintiff the salary increase and bonus that would have accrued to him during the notice period. While technically there may be a discretion, as the defendant argues, as to whether these payments should be made to a particular employee, that discretion has never been exercised against an employee and it would be unfair here, in my opinion, to deprive the plaintiff of these salary payments.

49 I would allow the salary increase and bonus for the reasons given by Mr. Justice Robins.

50 The annual employment package was, therefore, $140,300 U.S.

51 Hulme was paid by Cadillac for three months of the notice period which is one-quarter of $140,300. From that resultant $105,225 American dollars, I must transpose to Canadian dollars, which equals $140,759.48. Counsel have agreed that the mitigational factor for the remaining nine months of the notice period was $4,752 Canadian. This results in a loss of $136,007.48 Canadian during the notice period.

Issue 2. The Equity Issue

52 (a) If Hulme had remained an employee of Cadillac, would he have received an interest in Fort Worth equal to 90% of what Prentiss got from Forth Worth as alleged in para. 13a. of the statement of claim?

53 Prentiss had switched his entitlement in equity participation from the Rocky Mount regional shopping centre complex in North Carolina (the "Rocky Mount Project"), to a commercial real estate project consisting of an office tower complex, not a regional shopping centre, in Fort Worth, Texas ("the Fort Worth Project"). Hulme admitted in cross-examination that all he could do was request a replacement from Cadillac but it was up to Cadillac to decide

whether he would have received an interest in the Fort Worth Project or not. Hulme was reporting to Prentiss. It was Prentiss' decision whether or not to recommend that Hulme receive an equity position in the Fort Worth Project. Prentiss switched himself to the Fort Worth Project in early October, before he had decided to remove Hulme from the Houston Project. Prentiss testified that if Hulme was to be considered for the Fort Worth Project, he would have been brought into the Project at the same time as Prentiss for income tax considerations. Prentiss testified that Hulme's compensation deal with Cadillac was separate from any other executive. I accept Prentiss' evidence that he would not and did not recommend Hulme for participation in the Fort Worth Project. Hulme admitted that he was never told that he would get 90% of what Prentiss got, notwithstanding that at an earlier time their interests in the Rocky Mount Project were 10% to Prentiss and 9% to Hulme. I conclude that Hulme's equity participation did not include any participation in the Fort Worth Project. I further conclude that if he had remained as an employee he would not have received any interest in the Fort Worth Project.

54 (b) On January 27, 1981, was Hulme entitled to an equity interest in a hypothetical shopping centre?

55 At trial, it was conceded by the defence that the name of individual subsidiaries would not affect claims against Cadillac.

56 The evolution of the statement of claim demonstrates the plaintiff's difficulty in determining whether or not his claim is based on an employment benefit analysis or a collateral contract analysis.

57 Paragraph 10 of the statement of claim, delivered 27 January, 1981, provides:

> 10. In or about May of 1978, it was agreed between the Plaintiff and the Defendant that the Plaintiff would, within one year, become a partner with a U.S. subsidiary of the Defendant in a shopping centre partnership, which arrangement would yield to the Plaintiff an annual minimum net cash flow of $60,000.00 (U.S.), tax sheltered. It was further agreed that, should the Defendant wish to buy the Plaintiff out of his arrangement at any time, the buy-out figure would be a number equal to 11 times the said net cash flow figure of $60,000.00, or $660,000.00 (U.S.), tax sheltered. This arrangement was a term of the Plaintiff's continued employment with the Defendant, and in fact encouraged the Plaintiff to continue his employment with the Defendant during the years 1978, 1979 and 1980.

Paragraph 13 claims in the alternative to be entitled to damages for breach of contract.

58 The statement of claim was amended February 17, 1993, as follows:

> 13. With regard to the equity arrangement referred to in paragraph 10 above, the Plaintiff states that during the summer of 1979 and at the request of the defendant, he expressed his interest, in writing, in participating as an equity partner in the Rocky Mount regional shopping centre development in North Carolina ("Rocky Mount"). In December, 1979 the defendant advised the plaintiff in writing, that he would be given an opportunity to invest in Rocky Mount. In addition, the plaintiff was advised that if Rocky Mount was delayed beyond May, 1980 he would be provided with an opportunity to invest in a similar investment opportunity. The plaintiff states that in early 1980 he was provided with draft documentation with respect to Rocky Mount and advised that he and

Prentiss were to participate as equity partners with a subsidiary of the defendant and that his equity interest would equal 90 per cent of the equity interest provided to Prentiss. Rocky Mount did not proceed. However in April, 1981 Prentiss and a subsidiary of the defendant entered into a partnership agreement for the purpose of acquiring a joint venture interest in a commercial real estate project in Fort Worth Texas ("Fort Worth"). Prentiss acquired 19% of the partnership and through the partnership a 9 1/2% interest in Fort Worth.

13a. The plaintiff states that in August, 1986 the defendant purchased the interest of Prentiss in Fort Worth for $9,437,000 U.S. The plaintiff further states that if he had remained an employee of the defendant he would have received in April, 1981 an interest in Fort Worth equal to 90 per cent of the interest of Prentiss and that he would have received $8,493,300 U.S. from the defendant when the defendant, in 1986, began the purchase of the interests of equity partners in its partnerships relating to real estate.

13b. The plaintiff states that as a result of the wrongful termination of his employment by the defendant he has suffered damages as follows:

(a) loss of salary and car allowance during a reasonable period of notice of eighteen months in the sum of $142,281 U.S.;

(b) loss of the value of equity participation in real estate in the sum of $8,493,300 U.S.;

(c) loss of profit with respect to the shares of the defendant in the sum of $337,500; and

(d) moving expenses in relocating from Houston to Toronto in the sum of $5,777 U.S.

14. The Plaintiff therefore claims:

. . . . .

(b) damages in an amount in Canadian Currency sufficient to purchase $8,641,358 U.S. at a chartered bank in Ontario at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of U.S. Dollars before the date payment of the obligation is received by the plaintiff;

59 Nowhere in the amended claim does Hulme claim a contractual obligation to provide him with an equity interest as of January 17, 1981. Paragraph 13a. claims an employment benefit tied to the Fort Worth Project.

60 There is no alternative pleading.

61 In his reply, Hulme attempts to plead a new cause of action, namely, a collateral contract. If a contractual obligation crystallized on January 27, 1981, it would have been based on representations made prior to January 27, 1981. One would have to use traditional contract analysis of offer and acceptance with consideration and certainty. The representations which would form the contract would include the promotion meeting, the subsequent conversa-

tions with Diamond and Daniels where the Rocky Mount Project was identified, and the Prentiss letter of December 20, 1979.

62 Cadillac argued that the dealings between the parties evolved over time and the representations made during the promotion meeting were amended by Daniels when he told Hulme he would be getting the Rocky Mount Project, and then were further amended by Prentiss' letter of December 20, 1979.

63 Hulme did not demand his equity interest immediately but realized that he had to wait until a suitable regional shopping centre was identified by Cadillac and subsequently built and tenanted, at least with anchor tenants.

64 Hulme's evidence was that he was to receive an equity interest in a U.S. regional shopping centre, which would result in a net cash flow the first year of $60,000; he would get his deal within one year; the deal would be very similar to White Plains; it was up to Cadillac to choose the centre and it might not be the next regional centre. Diamond's evidence was essentially the same as Bream's — the $60,000 was based on a pro forma and pro formas are based on assumptions. He did not know in which project he would receive the opportunity to invest. Once the $60,000 was crystallized into a percent figure what he would get would be a percentage interest in a shopping centre, *not* $60,000 a year.

65 Bream testified that Cadillac wanted to give Hulme an investment opportunity similar to White Plains, although not White Plains, as it was unavailable. The nature of the investment was to work towards an equity interest that would generate income based on a pro forma that would ultimately give $60,000. There was certainly no guarantee. Pro formas were based upon the first year of substantial lease-up or completion which usually occurred after the third year after completion of the centre. Bream told Hulme that there was no definite project and there was uncertainty as to when a project would start.

66 Hulme therefore was to get an opportunity to invest in an interest in a shopping centre that would provide him with a return of $60,000 based on a pro forma. The representation was *not* that he would get $60,000 a year but that he would get an opportunity to invest and the anticipated interest would give him $60,000.

67 Hulme knew that a pro forma was only as good as the assumptions contained in it. The figure of $60,000 was based upon anticipated cash flow after the third year after completion. First Cadillac had to pick the suitable project, then the project had to continue in the normal course. No start up time was clear. The identity of the project was in the discretion of Cadillac.

68 Hulme knew that the documents were to be similar to the terms of the White Plains contract which he had seen.

69 Hulme was told by Diamond that the Rocky Mount Project had been picked by Cadillac as the regional centre.

70 I am satisfied that Hulme knew that the pro formas were not guarantees.

71 It is true that White Plains documentation provided for a buy-out of executives by Cadillac and the buy-out was

of all those investors. *Hulme would be the only executive in the Rocky Mount Project so he equated to all of the executives*. Hulme was concerned that where his buy-out was based on a multiple of net cash flow, he might not receive anything if Cadillac bought him out in the first few years and there was no cash flow. It was argued by Cadillac that Hulme must take the position that he would accept the terms of the White Plains multiple buy-out or else he has to take the position that the terms, in particular the buy-out formula, remained to be negotiated.

72 The buy-out terms are of crucial importance to the value of Hulme's interest. The defence says that if Hulme argues that it was open to negotiation as to the buy-out terms, then there was no agreement as to the essential terms of the contract.

73 At the risk of repetition, but in order to clearly focus on the equity argument, I repeat the Prentiss letter to Hulme of December 20, 1979:

> You will be given an opportunity to invest in the planned Rocky Mount Regional Mall to the extent of 6% ownership position which will yield a pro forma cashflow of $60,000.00 per year. There is a possibility that the size of the mall may be reduced, in which case you would be offered an opportunity to increase the size of your investment. Should the commencement of Rocky Mount be delayed beyond May 1, 1980, it is anticipated other similar investment opportunities will arise in which you will have an opportunity to invest.

74 The Rocky Mount Project was in fact delayed beyond May 1, 1980. That gave rise to Hulme's anticipation of a similar investment opportunity as provided in the last sentence of the letter.

75 There was no project identified. It was up to Cadillac to make the selection and it need not be the next one. While it is clear that Cadillac intended to give Hulme an equity interest, can it be said that there was sufficient certainty in the arrangement to constitute a binding contract?

76 Cadillac says that notwithstanding Hulme's expectations and Cadillac's intention, there are too many important terms missing to create a contract: no centre had been named; the timing of when Cadillac would give the equity interest was undetermined; and the buy-out terms were not defined with certainty. When one looks at the White Plains agreement, it is clear that there were numerous terms that had to be agreed upon.

77 While I have great sympathy for Hulme's position on the equity issue, I cannot conclude with assurance what investment vehicle Hulme would have received or its value, nor can the court determine when Cadillac would have been entitled to repurchase the interest. If there was a buy-out would it be on multiple times cash flow, as Cadillac contends, or a fair market value, as argued by Hulme? The court cannot formulate the contract. There is too much uncertainty.

78 I accept the evidence of Bream and Prentiss that an equity interest was not for past performance, but to keep the executive in the company fold in the future. As Prentiss put it, it was golden handcuffs.

79 On March 1, 1981 Cadillac implemented an employment benefit plan for all senior employees. This plan

would not start to vest until after the notice period. In any event, the five projects in Houston that were to give senior employees benefits were unsuccessful and of no value. This was the so-called phantom equity plan. In fairness, Hulme was in fact promised real equity before the phantom equity plan came into play.

80 If Hulme wants to claim the real equity interest that predated the phantom plan, then, in my view, the value must be based upon the multiple buy-out and not a fair value buy-out. According to the evidence of Mr. Bullock, a former Vice-President of Cadillac, now President and CEO of Laidlaw Inc., if a multiple buy-out in the White Plains formula was used for the Rocky Mount Project, Hulme would have received nothing regardless of the year that was picked. The other centre identified by Mr. Bullock, Esplanade/Kenner, a regional shopping centre near New Orleans, Louisiana, would similarly have yielded a zero value on the above formula.

81 What the court is being asked to do is create a hypothetical shopping centre because there is uncertainty as to what centre Hulme would have received. I am further asked to assume fair market value for the buy-out and assume that Hulme would have kept the asset until 1993. The court cannot engage in such conjecture.

82 The opinion of Hulme's expert valuator is flawed because he assumed the receipt of $60,000 in the first year of stabilized income. This is not what Hulme was promised. He was promised an opportunity to invest in a regional centre to be picked by Cadillac which it was anticipated would generate $60,000 in the first stabilized year of occupancy based on pro formas.

83 I cannot conclude that the alleged equity agreement was a form of bonus that would be payable during the notice period. On the evidence before me, there is nothing to suggest that within one year of October 30, 1980 a suitable project would have been selected and the appropriate documents drawn and executed. I find that what Hulme lost was an investment opportunity that had not yet crystallized and further would not have crystallized within the notice period.

84 In *Prozak v. Bell Telephone Co. of Canada* (1984), 4 C.C.E.L. 202, the Ontario Court of Appeal dealt with two long-term employees who were to develop a phone system involving long distance phone usage and persuade the Ontario and federal governments to purchase it. They were to be paid commissions on increased revenues. At p. 228, Mr. Justice Goodman, speaking for the court, said:

> In these circumstances, it cannot be said that the respondents have shown that on the balance of probabilities they would have made a sale to the federal government within the appropriate time period, nor can it be said that the respondents suffered damages by reason of their loss of opportunity. They would not have been entitled to any commission unless they had effected a sale within the time limited for proper termination of their contract. Accordingly, the respondents are not entitled to any award of damages with respect to the federal government contract.

85 I believe that the plaintiff's claim to an equity interest, whether by way of employment benefit or collateral contract, must fail for lack of certainty.

The experts

86 Cadillac does not take issue with the conclusion reached by Hulme's expert, Peter Korpacz, if the purpose of the exercise was simply to value a hypothetical shopping centre somewhere in the United States where the essential ingredient was a net cash flow of $60,000 per annum. I have already concluded that Cadillac was to choose the centre and, therefore, a hypothetical is inappropriate for valuation purposes.

87 The evidence of Cadillac's expert, Mr. Gelbtuch, was that the Rocky Mount Project did not meet the expectations based on the preliminary pro forma. Mr. Bullock, for the defence, said it was a difficult decision for Cadillac whether or not to proceed with the Rocky Mount Project; they decided to proceed because of the amount of money already spent on the Project. Mr. Gelbtuch's evidence was that the Rocky Mount Project was worth zero value before it was built. When Cadillac was putting executives into equity deals to keep them with the company, they would not have wanted to put Hulme into a zero return project. This reinforces the conclusion that the Rocky Mount Project was not "the" vehicle.

88 Mr. Gelbtuch's evidence is flawed because he relies on future results and does not have his valuation on the date of October 30, 1980.

89 I therefore reject the numbers of both experts. If pressed to choose some number, reluctantly, I find the most appropriate is Mr. Gelbtuch's calculation of $60,000 per year commencing in 1984 utilizing a multiplier of eleven. This would result in a value of $440,000 U.S.

Issue 3. The Share Issue — Was Hulme entitled to be compensated for the increase in value of the Cadillac shares he sold?

90 This claim is for $337,500 Canadian. Based on tax advice received in Toronto, Hulme sold his Cadillac shares before going to Houston. The money for the purchase of the shares was supplied by his employer. On the sale he made a profit of approximately $115,000 Canadian.

91 Hulme did not repurchase Cadillac shares on going to the United States. He said he did not have the money to purchase the shares. He did not ask Cadillac for a loan for the purpose. It was Prentiss' evidence that he was confident that if Hulme had asked for a loan for that purpose, it would have been provided, as that was Cadillac's practice.

92 Cadillac provided Hulme with mortgage money for the entire purchase price of a home in Houston with financing of $325,000. Of this sum, $100,000 was a first mortgage of $100,000 at 10% while the balance of $225,000 was a twenty year interest-free loan. In the fall of 1981 Hulme sold this home for a net profit of $230,000 U.S.

93 The transfer to Houston, therefore, resulted in two large profits for Hulme. Not satisfied, Hulme claimed what he felt he had lost in the sale of his shares.

94 There can be no claim against the employer for the adverse effect of a transfer unless there is a specific agreement with the employer to cover such adverse effect. Here there was no such agreement. Notwithstanding,

Hulme complained and in an effort to keep their employee happy, Prentiss proffered a settlement of $50,000 American ($10,000 withheld for tax). Hulme negotiated the cheque.

95 I conclude that Hulme had no cause of action against Cadillac under this head of his claim. Even if he did, there was a settlement evidenced by the cashing of the cheque. This claim must also fail.

Prejudgment interest

96 I am obliged to address prejudgment interest should it become relevant in another court.

97 I am sick and tired of seeing the court blamed for delay. It took 12-1/2 years to get this case to trial — January 27, 1981 to October 18, 1993.

98 The delay is not the fault of the judiciary. The delay is not the fault of the justice system.

99 The fault lies purely and simply on the doorstep of the lawyers. Alternative dispute resolution is no panacea if it too is controlled by lawyers. I have analyzed these proceedings from start to finish. I hasten to say that counsel for the plaintiff at trial cannot be faulted at all for the delay. Mr. Hager had the trial completed within one year of becoming solicitor of record. The delay before he became involved is scandalous and inexcusable.

100 Gaping blocks of time exist between steps in the action which cry out for judicial prodding of counsel. Alas, that period predated the advent of case management. If there was ever any doubt about the need for case management, this example should put all doubt to rest. I hasten to add that the task cannot be accomplished by the court on the present basis, absent the necessary resources for adequate staffing and computerization.

101 As stated by the Ontario Court of Appeal in *Irvington Holdings Ltd. v. Black* (1987), 58 O.R. (2d) 449, s. 36(6) of the *Judicature Act*, R.S.O. 1980, c. 223 gives a successful plaintiff a prima facie right to prejudgment interest and the onus is on the defendant to persuade the trial judge to exercise his discretion to the contrary.

102 Finlayson J.A. said at p. 487:

> Interest should not be used as either a reward or a penalty, but should reflect the value of money wrongfully withheld from the appellant from the date of its demand for payment for its injury to the date when the compensation due it was determined at trial. ... Interest is the cost of money to the borrower just as it is the return to the lender or investor.

103 Counsel have agreed that the average rate of interest of 12% is appropriate.

104 The question of interest is not, however, to be decided under the *Judicature Act*, but under s. 130 of the *Courts of Justices Act*, R.S.O. 1990, c. C.43, which gives a much broader discretion than that under the *Judicature Act*.

105 Section 130 provides:

> *130.* — (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
>
> (*a*) disallow interest under either section;
>
> (*b*) allow interest at a rate higher or lower than that provided in either section;
>
> (*c*) allow interest for a period other than that provided in either section.
>
> (2) For the purpose of subsection (1), the court shall taken into account,
>
> (*a*) changes in market interest rates;
>
> (*b*) the circumstances of the case;
>
> (*c*) the fact that an advance payment was made;
>
> (*d*) the circumstances of medical disclosure by the plaintiff;
>
> (*e*) the amount claimed and the amount recovered in the proceeding;
>
> (*f*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
>
> (*g*) any other relevant consideration.

106 Because of the inordinate delay in this action, in the exercise of my discretion, I shorten the interest period from 12-1/2 years to 4 years pursuant to the above-noted section and in particular s. 130(*f*).

107 For these reasons, the action is dismissed with costs to the defendant.

Action dismissed.

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