
CANADA / JUDGMENT

Birch v. GWR Resources Inc.

2016 BCSC 117

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Supreme Court of British Columbia

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2016 BCSC 117 Birch v. GWR Resources Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Birch v. GWR Resources Inc.,

2016 BCSC 117

Date: 20160127

Docket: S141708

Registry: New Westminster

Between:

Ronnie Floyd Birch

Plaintiff

And

GWR Resources Inc.

Defendant

Before: The Honourable Mr. Justice Schultes

Corrected Judgment: the text of this judgment was corrected

on page 1 on February 24, 2016

Reasons for Judgment

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Written Submissions of the Plaintiff:

June 8, 2015

Written Submissions of the Defendant:

June 19, 2015

Reply Submissions of the Plaintiff:

June 23, 2015

Place and Date of Hearing:

New Westminster, B.C.

May 27, 2015

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2016

I. Introduction

- [1] This summary trial application deals with the allegation of the plaintiff, Ronnie Floyd Birch, that he was promised a finder's fee by a representative of the defendant, GWR Resources Inc. ("GWR"), for successfully introducing an investor to the company. He seeks compensation either on the basis of an agreement with GWR to pay the finder's fee or, if I find that no contract was created, on the basis of quantum meruit for the benefit that he provided.
- [2] The parties have attempted to ensure that this case is suitable for summary determination by coming to an agreed statement of facts. It has been supplemented by the discovery evidence of Mr. Birch and a representative of GWR[1]. In addition, Mr. Birch has provided an expert opinion on the appropriate amount of the finder's fee.
- [3] At the conclusion of the hearing I asked counsel for some additional evidence and submissions on the issue of Mr. Birch's subsequent employment with GWR in "investor relations", and its effect on his eligibility for a finder's fee, which they have provided.

II. Admitted Facts and Additional Evidence

A. Essential Points from the Agreed Statement of Facts

- [4] Mr. Birch has an extensive background in the investment industry. GWR is a resource exploration company.
- [5] Mr. Birch had previously been an investor in GWR. Sometime before 2006, he had introduced other investors to it. When they made an investment in the company, he was compensated for his introduction by being issued shares in it.
- [6] "In or about 2009 or 2010", Irvin Eisler, the president and a director of GWR, told Mr. Birch that the company was looking for investors to do a "private placement" of capital (money provided to the company by a specific investor, in contrast to the general offering of shares for purchase by the public) for the exploration and development of the company's mining property in Lac La Hache. In relation to this project Mr. Eisler said words to the effect of "find us some money and we'll look after you."
- [7] Mr. Birch understood this statement to mean that he would receive a finder's fee if he introduced investors who made substantial investments in the company. There was no written agreement to this effect.
- [8] He then "reached out" to his contacts in the investment and resource industries "over the next several years", in an attempt to secure investors for GWR. One of these contacts was Michael Gray, who was then with a company called Genuity Capital Markets. He tried to arrange a meeting between Mr. Gray and officials of GWR for a briefing on the Lac La Hache project.
- [9] In August of 2010, GWR hired Mr. Birch as an investment relations consultant on what a press release by the company described as "a month-to-month salaried position as a part time employee." GWR also indicated in the release that it "plan[ned] to award a number of stock options to Mr. Birch at some point in the future, but the terms of his employment do not require any particular award."
- [10] After being hired in this position, Mr. Birch continued to seek investors for the Lac La Hache project. In November of 2010, he again contacted Mr. Gray, who was now with MacQuarie Capital Markets.
- [11] In late 2010 or early 2011 Mr. Birch arranged at least two meetings between Mr. Gray and Robert Shives, vice president of exploration and a director of GWR, for Mr. Shives to brief Mr. Gray on the Lac La Hache project.
- [12] In March of 2011, Mr. Birch, Mr. Gray, Mr. Shives and another analyst from MacQuarie met to discuss the Lac La Hache project. According to Mr. Shives neither he nor any other executive of GWR had attempted to arrange a meeting with Mr. Gray before then.
- [13] In June 2011, MacQuarie invested \$1.8 million in the project. It is in relation to this investment that Mr. Birch claims he has earned a finder's fee.
- [14] Mr. Eisler resigned as a director of GWR on June 2, 2011.

- [15] On June 27, 2011 there was a conference call involving Mr. Birch, Mr. Shives and other directors of GWR about whether Mr. Birch would receive a finder's fee for introducing the MacQuarie investment. No conclusion was reached during the call.
- [16] In July 2011, John Van Driesum was appointed as a director of GWR. On September 13 he advised Mr. Birch that he would not be receiving a finder's fee, "subject to the possibility that further information received from MacQuarie might alter the decision." Mr. Birch's services as an investment consultant were terminated at the same time.

B. Expert Opinion on Finder's Fees

- [17] Jonathan George has 30 years of experience with publicly traded mineral resources and exploration companies, including as a senior officer and director of "numerous" companies. His expertise to give opinions in relation to the use of finder's fees by resource companies on behalf of Mr. Birch was not contested.
- [18] The important points established by Mr. George were:
- Typically resource companies secure funding through private placements (both brokered and non-brokered) 80% of the time.
 - "A finder's fee is payable to an individual or organization that locates an asset for an issuer, either monetary or tangible. In the mining sector this usually means sourcing funds through private placements, or mineral properties or assets."
 - The policy of the TSX Venture Exchange ("Exchange") (on which, I infer, GWR is listed) provides that "[a]n issuer which receives a measurable benefit through the efforts of a person who is neither an employee [or] an Insider of the issuer, can be rewarded for their efforts [sic] by paying a finder's fee or commission in the form of cash, shares warrants or an interest in the asset." The policy also provides guidance on the amount of the fee, which varies according to the nature and amount of the benefit that was conferred by the finder.
 - Agreements for finder's fees are reduced to writing "in almost every instance".

C. Additional Affidavit Evidence

- [19] In his subsequent affidavit, Mr. Birch provided more evidence with respect to the request from Mr. Eisler. He said that it was made during a conversation at a breakfast meeting. Andre Voskuil and Keith Watts, who also have some connection with investing, although their role is not made clear in the material, were also present at this meeting, and Mr. Eisler's statement about finding money for GWR was also directed to them.
- [20] Mr. Birch described other efforts that he made to interest potential investors in the project:
- In February of 2010 in Calgary, he arranged meetings with his contacts from five institutional investors. Mr. Eisler and Mr. Shives attended these meetings on behalf of GWR, as did Mr. Voskuil and Mr. Watts, the two others to whom he had also made the request to find money for GWR.

- In March of 2010 in Toronto, he arranged meetings between Mr. Shives and his contacts from eight institutional investors. Mr. Eisler and Mr. Voskuil were present for some of these meetings. One of the companies later made an offer to invest in GWR, but because of its terms the offer was rejected by Mr. Eisler.
 - In April and November of 2010, and January and March 2011 in Vancouver, he arranged meetings between Mr. Shives and his contacts from seven institutional investors. One of the meetings in March was the one with Mr. Gray and another analyst from MacQuarie that I referred to previously from the agreed statement of facts.
- [21] Mr. Birch also emphasized in his affidavit the distinction between the investor relations role for which he was later hired by GWR and his efforts to attract investment pursuant to the request from Mr. Eisler.
- [22] He explained that the investor relations position arose after a conversation with Mr. Eisler in which he stressed the importance of the company maintaining contact with existing shareholders to "keep them apprised of developments" and "keep them invested for the long haul." He believes that is why Mr. Eisler asked him to take on the position.
- [23] Once he was in it, his "typical functions" included communicating directly with existing shareholders. He also communicated with "licensed and registered representatives" (that is, who are authorized to sell securities) whom he knew, to introduce them to GWR in the hopes that they would recommend purchasing its shares to their clients.
- [24] In contrast to "finding money", that is, new investment, by reaching out to contacts in the financial services industry, investor relations was about communicating with existing shareholders, to keep them "happy and more importantly well informed about developments involving [GWR] with a view to keeping them from selling their shares and keeping them invested with [GWR] for the long term ."
- [25] Most importantly, Mr. Birch contends that after he was in the investor relations role he continued to pursue meetings between institutional investors and GWR to arrange private placements.
- [26] In reply, David Brett, GWR's current president, has provided an affidavit that addresses the nature of Mr. Birch's role as an investor relations consultant for the company and what he says is the prohibition imposed by the Exchange against such consultants receiving finder's fees.
- [27] Mr. Brett deposes that GWR engaged Mr. Birch only for the investor relations function, which he described as including "disseminating information about GWR to current and potential investors."
- [28] GWR's financial records for its 2010 fiscal year (which ended September 30 of that year) show a \$9,000 payment to Mr. Birch in November of 2009, which was recorded as a "retainer" for "investor relations services". Mr. Birch used it to buy shares in the company. (According to

questions asked of Mr. Birch on discovery, this payment may relate to a situation in which he "took down a private placement", a term that was not defined. In any event, it has not been argued that his position as an employee of GWR began at that time, as opposed to when he was formally hired.)

- [29] All other payments to him for that fiscal year were subject to employee source deductions. Those payments appear from the records to be \$2,000 per month, beginning at the end of May 2010. This is three months earlier than the start date in the agreed statement of facts. The company also lists him as an employee in its resolution authorizing the granting of options to employees pursuant to its stock option plan. Mr. Birch would have had to confirm that employee relationship in an agreement in order to be eligible for the options, according to Mr. Brett.
- [30] The significance of all of this is that Mr. Brett also asserts that while investor relations employees are permitted to receive salary stock incentives, they are prohibited from receiving any "success-contingent" compensation, such as commissions or finder's fees. That prohibition is consistent with the policy referred to by Mr. George in his opinion. It was one of the reasons that GWR's August 2010 press release about Mr. Birch's role also provided disclosure about the nature of his compensation.

D. Relevant Portions of the Examinations for Discovery

- [31] Mr. Birch confirmed that his role in MacQuarie's private placement was to introduce Michael Gray to GWR, and that any technical presentations that convinced MacQuarie to invest in the project were done by others. There were two or three meetings with Mr. Gray and then one that also involved MacQuarie's institutional broker.
- [32] In general, Mr. Shives was a critical component of Mr. Birch's approaches to institutional investors because of his technical knowledge. When he travelled with Mr. Shives in relation to these meetings, his expenses were paid by GWR.
- [33] Mr. Birch never got anything in writing from Mr. Eisler concerning the finder's fee, even after MacQuarie began showing interest, because he believes strongly in the concept of "a gentleman's agreement." When he spoke again to Mr. Eisler, sometime after the GWR board had refused to pay him a finder's fee, Mr. Eisler responded, "I'm no longer with GWR" and did not confirm that there had been any agreement in place.
- [34] Mr. Birch was asked about the basis of his role as an investor relations consultant with GWR:

Q And why were you being paid?

A Because I have a network of individuals who listen to what I say and, if they like the story, will buy shares of the company. So this was to talk to individual investors about buying shares in the market.

Q Individual investors apart from institutional investors?

A Correct.

Q Okay. And did you talk to some individual investors?

A I did.

Q And you did talk to institutional investors, correct?

A I did.

[Q. 58-61]

[35] He expressed the view that he was not an employee of GWR during the time that it was paying him in this investor relations capacity.

[36] GWR's counsel also pursued the significance of this distinction between individual and institutional investors in relation to the statement by Mr. Eisler that is alleged to promise a finder's fee:

Q The express agreement was "Find us some money and we will look after you." Was that from individual investors and institutional investors?

A It would have been from individual investors if they were participating in a private placement.

[Q. 69]

[37] On behalf of GWR, Mr. Shives gave the following description of Mr. Birch's role:

Q How would you describe what he did for GWR?

A I think he was -- he had a fairly robust contact list of possible brokerages of interest. [Mr. Birch] would pre-screen, if you wish, to make sure these fellows were available for the two of us to go to their corporate offices, whether it was Vancouver or Toronto.

I would make a technical presentation and neither one of us would actually "make the deal", as far as I know, in that Irvin Eisler, at that time Irvin Eisler was the one who would approve or disapprove and we certainly did see that. Irvin would make a decision about whether or not the potential offer or interest from the brokerage firm was of interest to GWR.

[Q. 47]

[38] Mr. Shives believed that prior to the introduction to Michael Gray, Mr. Birch had been receiving a monthly "stipend" from GWR, to do investor relations and public relations work. As to any statements by Mr. Birch in reference to an anticipated finder's fee, Mr. Shives testified:

A I recall vividly Ron on more than one occasion saying that he hopes Irvin is able to look after him in that sense, yes.

[Q. 79]

- [39] The board meeting at which Mr. Birch made his case for a fee took place after Mr. Eisler was no longer with the company. Mr. Shives recalled that board members wanted proof that there had actually been an arrangement for a finder's fee with Mr. Eisler. In addition they did not see a need to pay one when Mr. Birch had been receiving "some sort of a monthly payment for these services." There was no suggestion from the board that he should not have been paid for providing the services and Mr. Shives said that "those [that is, the monthly payments to Mr. Birch] are quite reasonable funds for the services provided." The difference between the finder's fee and the monthly payments, according to Mr. Shives, was that the board knew about and had discussed the monthly arrangement.

III. Positions

- [40] Mr. Birch's initial position is that the statement by Mr. Eisler created an "implied agreement" that Mr. Birch would be paid an "industry standard" finder's fee. He refers to the well-known authorities that permit a court to imply terms of a contract in situations where the parties would have regarded those terms as obvious if they had been suggested to them by an outside observer. In light of Mr. Birch's long experience and Mr. Eisler's role, the intention to pay such a fee in return for introducing investors would have been obvious to both of them. If the Exchange's policy is to be applied, then Mr. Birch seeks a fee of \$122,500, representing the maximum that the manual permits for a placement in this amount, in recognition of his primary role in obtaining it.
- [41] If no agreement is found, then Mr. Birch submits that on the basis of quantum meruit he is entitled to compensation for the benefit that he conferred to GWR by introducing Mr. Gray. He points to authorities that have applied the quantum meruit analysis in the finder's fee context, in particular where the plaintiff and defendant were without an agreement governing such a payment. According to the authorities, the particular focus in assessing the amount of the resulting payment should be on the value of the service to GWR. Based on that analysis and comparison to a similar case, the minimum that he should receive is \$50,000.
- [42] Mr. Birch submits that his efforts to find investors for a private placement, pursuant to his conversation with Mr. Eisler, and his dealings with existing investors, pursuant to his formal role with the company, were separate and distinct roles, so that his entitlement to a finder's fee for a successful placement was not affected.
- [43] In his submission, strong evidence of that distinction is found in the different compensation schemes set out for finder's fees and investor relations services in the Exchange's policies. It is also very significant on this point, he says, that his efforts to attract investment from Mr. Gray began before the investor relations position was created, and continued simultaneously after he began working in the position.

- [44] Mr. Birch also argues that this separation in roles puts paid to any suggestion of illegality in his earning a finder's fee while he was employed by the company. In any event, the policy permits the prohibition on a non-arm's length party receiving a finder's fee to be waived if satisfactory reasons for it are given by the company.
- [45] GWR's position on the existence of an agreement is that the evidence does not demonstrate, on the objective assessment required by the authorities, any intention by the parties to create legal relations here. It submits that on these facts there was no more than an "agreement to agree", which is not enforceable.
- [46] In addition, the expressed terms were too vague, particularly on the critical issues of what exactly Mr. Birch needed to do to earn a fee and how the amount would be determined.
- [47] Regardless of the existence of any agreement, GWR submits that Mr. Birch's subsequent employment with the company precludes him from obtaining a finder's fee, since his compensation for those services would have been subsumed in his agreement to work for it in investor relations. The company rejects Mr. Birch's contention that he was fulfilling discrete functions and submits that both roles involved significant encouragement of new investment. It argues that the late point in this application that he produced evidence of the difference between the two roles should cause me to give less weight to it.
- [48] It also rejects the proposition that the different compensation schemes for finder's fees and investor relations somehow entitle Mr. Birch to a fee here. The relevance of that difference, the company argues, is simply that a person employed in investor relations cannot also receive a finder's fee. It is noteworthy in this regard that the "investor relations activities", as defined by the Securities Act, R.S.B.C. 1996, c. 418 are easily broad enough to also encompass Mr. Birch's efforts towards Mr. Gray and MacQuarie.
- [49] As to the influence of the Exchange's policies on the amount of any compensation under quantum meruit, GWR raises concerns about the illegality of such a payment in light of those policies, and in light of a related prohibition in the Securities Act against unlicensed trading in securities or acting as an investment adviser.
- [50] More fundamentally, GWR submits that the evidence falls short of demonstrating any deprivation of Mr. Birch resulting from his involvement here, to correspond with the enrichment of the company. Such deprivation is an essential element of a quantum meruit claim.

IV. Discussion

- [51] In general, I conclude that the evidence is sufficient to allow me to find the necessary facts. There is one issue for which that is not as clear, which I will come to.

- [52] On the question of whether there was an agreement between Mr. Birch and GWR to pay a finder's fee, the statement by Mr. Eisler is not in dispute -- the issue is whether it amounted to an enforceable legal promise.
- [53] If there was an agreement here, it would have been a type of unilateral contract. In such contracts, the offeree accepts the offer by performing the obligation that it contains, rather than acceptance being followed at some later point by performance. In theory, unless the offer is revoked, the opportunity for the offeree to accept and perform the obligation remains outstanding.
- [54] They are described as unilateral contracts because unless the offeree accepts the offer by performance, he or she is under no obligation to perform the obligation. The classic formulation of these contracts is in relation to offers made "to the entire world", like contests, or offers of a reward in return for information, but they can also arise between specific individuals: A. Swan and J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham: LexisNexis Canada Inc., 2012), § 2.174 - 2.178. Such contracts are conceptually different from "agreements to agree", which, as GWR has noted, the law will not enforce.
- [55] In this case, if it was sufficiently clear from Mr. Eisler's statement that he was making an offer on behalf of GWR to compensate Mr. Birch (or Mr. Voskuil or Mr. Watts, to whom the statement was also made) for securing an investment in the company, then Mr. Birch's successful performance of that task, regardless of when it eventually occurred, would trigger GWR's obligation, as long as it had not revoked the offer in the meantime.
- [56] The difficulty however, as GWR's counsel noted, is that it may not be possible to attach sufficiently certain meanings to the terms "find us some money" and "we'll look after you", when one is asking objectively what needed to be done and what would be given in return for it. The requirement of certainty of terms in an agreement was helpfully summarized in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303:
- [339] The Court cannot enforce an apparent bargain if its terms are unclear: *Anchorage Management*, supra. This is so because it cannot be said that the parties came to a meeting of the minds where the terms of the alleged agreement are vague, ambiguous or incomplete: *Klemke*, supra. As Viscount Maughm explained in *G. Scammell & Nephew Ltd. v. Ouston*, [1941] A.C. 251 (H.L.):

In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words, the consensus ad idem would be a matter of mere conjecture.

- [340] As noted, however, there are enforceable contracts in which some matters are left to be determined in the future. The contract will not fail for uncertainty so long as an effective mechanism for their determination is agreed. In *Hillas & Co., Ltd. v. Arcos, Ltd.*, [1932] All E.R. 494 the House of Lords stated:

Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects ... that ..., however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain.

- [57] While it is at least arguable that finding GWR "some money", could be understood objectively as taking its meaning from the general practice with respect to private placements in the resource industry, with some reasonable range of potential investments being understood as meeting the threshold, the compensation that was being offered to him for achieving that result is much less clear.
- [58] Mr. Birch argues that the nature of the compensation can be implied here as corresponding to that provided for in the Exchange's policies, but similar past assistance by him had apparently resulted in payments by shares, of a value and a relationship to the investment that is not disclosed in the evidence. In particular, there is no suggestion that the Exchange's policy had governed the compensation.
- [59] Thus I find it impossible to find with any degree of certainty that there was a meeting of minds on the level of compensation flowing to Mr. Birch at the point that he accepted and performed the "offer" by successfully helping to bring in MacQuarie's investment. Applying the amounts in the policy would in effect be making the contract for the parties on that point.
- [60] It is helpful to compare this alleged agreement with one that was found to be sufficiently certain, at least to survive a no evidence motion, in *Brule v. Rutledge*, 2015 BCCA 25. In that agreement the term "finder's fees" was explicitly used, and there was a mechanism provided for defining the fee in relation to the amounts of the transactions involved. And, those transactions were themselves defined.
- [61] As a result I am not able to find that an enforceable agreement was formed. This makes it unnecessary to explore the further question of whether Mr. Eisler had the authority to make an offer on behalf of the company, or whether it was a situation of ostensible authority on his part.

- [62] A much more viable route to recovery for Mr. Birch here is quantum meruit, to remedy what would otherwise be an unjust enrichment of GWR from the services that he provided.
- [63] As he has argued, courts have acknowledged the applicability of this remedy to finder's fee situations in which the parties do not have an agreement governing it: *Malik (Estate of) v. State Petroleum Corporation*, 2009 BCCA 505 at para. 34. Malik also makes clear that the time and effort expended in bringing the parties together, or at least the loss of opportunity to devote those resources elsewhere, are a sufficient deprivation of the finder to fall within an unjust enrichment analysis: see para. 40.
- [64] The evidence supports a finding that Mr. Birch's efforts were one of the reasons for the investment by MacQuarie (along with Mr. Shives's technical presentations) and that Mr. Birch devoted time and effort to the process of introducing this investor that he could have spent for his own benefit elsewhere. There was no real dispute about those efforts or their effects.
- [65] The impediments raised by GWR to an award based on quantum meruit instead relate to Mr. Birch's subsequent employment with the company, to deal with investor relations.
- [66] I do not think his assertion in his discovery testimony that he was something other than an employee is tenable in light of all of the other evidence and indeed in his submissions he does not seem to take issue with having been in that role.
- [67] The first issue is whether the terms of Mr. Birch's employment incorporated the work of attracting private placements to the company that he had been doing previously on a less formal basis. If they did, then there would be a "juristic reason" for the enrichment, namely his employment contract, that precludes recovery on the basis of unjust enrichment: see *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 44.
- [68] As I have said, Mr. Birch's evidence is that investor relations and seeking private placements are fundamentally different roles. He has related the investor relations position to a specific conversation with Mr. Eisler and has described its duties in a way that is capable of distinguishing it from attempts to seek investment for private placements. GWR says that these assertions are contradicted by his answer on discovery that he was being paid, in effect, to persuade individuals to buy the company's shares in the market.
- [69] GWR is correct to point out that s. 3.4 of the Exchange's policy describes the investor relations position as including:
- (a) communicating with investment dealers, advisers and Shareholders - both current and prospective - to increase awareness of and interest in the Issuer [Emphasis added.]
- [70] It is also correct that the definition of "investor relations activities" in s. 1 of the Securities Act:

any activities or oral or written communications, by or on behalf of an issuer or security holder of the issuer, that promote or reasonably could be expected to promote the purchase or sale of securities of the issuer

is broad enough to encompass efforts to obtain private placements.

- [71] Mr. Brett and Mr. Shives are not able to address this question directly. Mr. Shives refers only to the fact that the directors felt that Mr. Birch had already been paid for the services.
- [72] Neither side has provided evidence from Mr. Eisler. I expect that he could have shed some light on the nature of this investor relations position and its differences, if any, from the role of attracting private placement investors. Because there is no basis to determine which version of events he would necessarily have supported, no adverse inference against either party is appropriate.
- [73] Ultimately I do not think this is a credibility issue that requires a full trial to resolve. Mr. Birch's evidence, which is the only direct evidence on this point, supports a distinction between attracting investors for private placements on one hand, and encouraging the purchase and retention of shares in the market (that is, offered for sale to the public through the Exchange) on the other. I am satisfied on his evidence that his efforts after speaking to Mr. Eisler were directed to the former purpose and his employment with the company to the latter. I am aware that the Securities Act makes no such distinction, but the important finding here is with respect to the intended scope of an employment contract, and there is no evidence that the definition in the Act informed the agreement of the parties with respect to that scope.
- [74] Thus I conclude that recovery on the basis of quantum meruit is not precluded on the basis of any contract governing the benefit that was provided by Mr. Birch.
- [75] The second issue is whether there was an element of illegality, which courts have found is also applicable in a quantum meruit situation, in Mr. Birch earning a finder's fee as an employee, contrary to the Exchange's policies and, potentially, to the Securities Act.
- [76] There does not seem to be any doubt that from May 2010 to September 2011, Mr. Birch was an employee of GWR. (I accept that earlier start date, in preference to the one in the agreed statement of facts, because it is supported by GWR's financial records, which have been provided.) In that capacity, he was explicitly forbidden from receiving finder's fees, subject to a justification for the exception being offered by the company. Although the Exchange generates its own policies, it is permitted to operate under them by the securities commissions in the provinces in which it carries on business. Conduct that is contrary to its policies can be characterized as being, at least on its face, "illegal" for the purposes of this analysis.
- [77] While the fact that an agreement that turns out to be unenforceable is also illegal is a consideration when deciding whether relief on the basis of quantum meruit should be granted, it is not an absolute bar to that relief. The court must engage in a balancing process

-- between the interests of public policy and the need to prevent an unjust enrichment. This balancing includes considering whether the plaintiff's "moral turpitude is of such a magnitude" that recovery would be contrary to the public interest: *Koliniotis v. Tri Level Claims Consultants Ltd.* (2005), 257 D.L.R. (4th) 297 (Ont. C.A.) at paras. 34-40.

- [78] As Mr. Brett explains, the potential abuse that the Exchange's prohibition on finder's fees for employees is intended to address is the high-pressure sales of securities to the public by company employees who have a financial incentive in making those sales -- the notorious "boiler rooms" that he mentions in his affidavit.
- [79] The breach in this case is earning a finder's fee by helping to attract a private placement while in the status of an employee. There is no evidence of any "success-contingent compensation", as Mr. Brett describes it, being potentially applied to any of Mr. Birch's activities for GWR except this successful private placement. The risk to the public from his efforts to attract a willing investor to the company was non-existent. It is also noteworthy that there can be an exemption from the prohibition by the Exchange if there is a sufficient explanation, so the conduct is not viewed as being illegal in every circumstance.
- [80] I conclude therefore that the potential moral turpitude of any of the parties and the public policy concerned with rewarding Mr. Birch's efforts are quite low. In contrast, if GWR is not required to recognize the part that Mr. Birch played in bringing about this \$1.8 million investment, expending a meaningful amount of his time and effort in the process, it will have obtained a substantial benefit for which it has paid nothing.
- [81] Balancing these various concerns I am satisfied that some form of compensation to Mr. Birch is required.
- [82] He submits a simple and practical formula for arriving at the amount -- in Malik similar services that brought about an \$18 million investment led to a finder's fee of \$500,000. Based on that result, he seeks a payment of at least \$50,000 to reflect his role in bringing about an investment of \$1.8 million in GWR.
- [83] I agree that Malik offers helpful guidance, although I do not feel comfortable trying to compare Mr. Birch's efforts as directly with that case as he urges, since Mr. Malik's efforts included international travel and arranging meetings with government officials (para. 66).
- [84] The concepts that I will apply from that case however, are (1) the value of Exchange guidelines in determining what is a fair amount (para. 62), and (2) the need to recognize that the finder may be one of several additional parties who contributed to the successful outcome (paras. 67,70). There is also this general statement:

- [71] It is important to recognize that what is paid to a finder is indeed a fee for services. It may be paid in the form of a percentage commission, but it is nothing like a sharing of profits derived from a large return on an advantageous business investment. The amount of such a fee must be consistent with its purpose - compensation for the service rendered. It is to be no more and no less than what the service is worth. [Emphasis added.]
- [85] Mr. Birch is correct that the maximum finder's fee available to him under the Exchange policy is \$122,500. Without his introduction to Mr. Gray the investment would not have been made, but it is difficult to see how Mr. Shives's technical presentations, describing the actual significance of the project as a mining endeavour, could have been less than equally responsible. That allocation of responsibility would yield a maximum fee to Mr. Birch of \$61,250.
- [86] From that figure should be subtracted at least a nominal amount to reflect the existence of some limited moral turpitude, albeit not an amount sufficient to preclude recovery. As a self-described experienced investment consultant, Mr. Birch had to know, when he continued to pursue the MacQuarie investment after accepting the investor relations position, that he was now wearing two hats and that his situation was not one that the regulators would endorse.
- [87] Therefore I will award Mr. Birch \$55,000 on a quantum meruit basis.
- [88] He will also be entitled to his costs at Scale B.

The Honourable Mr. Justice T.A. Schultes

- [1] The combined effect of Rules 9-7(5) and 12-5(46) is that this evidence is only admissible against the party who gave it.

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