

CANADA / JUDGMENT

Dr. Richard Benson Inc. v. Lauren Bramley MD Inc.

2021 BCSC 2352

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2352 Dr. Richard Benson Inc., v. Lauren Bramley MD Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dr. Richard Benson Inc., v. Lauren Bramley MD Inc.,

2021 BCSC 2352

Date: 20211201

Docket: S194610

Registry: Vancouver

Between:

Dr. Richard Benson Inc.

Plaintiff

And

Lauren Bramley MD Inc.,

Dr. Lauren Bramley & Partners and Lauren Bramley

Defendants

Before: The Honourable Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:

J. Hernaez

The Defendant, Appearing in Person:

L. Bramley

Place and Date of Trial:

Vancouver, B.C.

October 18-21, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2021

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OVERVIEW

- [1] This case concerns a dispute between two physicians about the terms under which one worked at the other's medical clinic. It illustrates the risks of not having a written work agreement.
- [2] The plaintiff, Dr. Richard Benson Inc. ("Dr. Benson") is an incorporated family physician. The defendants are Dr. Lauren Bramley, also a family physician, who is the sole director and officer of the defendant, Lauren Bramley MD Inc. ("LBMD") and Dr. Lauren Bramley & Partners ("LBP"), a sole proprietorship of LBMD. I will refer to the defendants as Dr. Bramley, unless it is necessary to specify the particular legal entity.

- [3] In 2015 or 2016, Dr. Bramley, who owned and operated a large private medical clinic in Hong Kong specializing in anti-aging and functional medicine, decided to open a clinic in Whistler, BC ("Clinic"). Her aim was to provide similar services, most of which are not covered by MSP, to paying clients. Dr. Bramley spoke with Dr. Benson, who received his medical degree in 2011 and completed his family medicine residency in 2013, about working at the Clinic and they discussed a number of arrangements. The parties never entered into a written contract.
- [4] The Clinic opened in May 2017. Dr. Benson performed some work for the Clinic and received some compensation. The relationship between Dr. Benson and Dr. Bramley deteriorated. Dr. Benson unilaterally stopped providing his services to the Clinic in August 2018. The Clinic did not do well financially, and it eventually closed. The parties disagree about when Dr. Benson started working for the Clinic, what his duties were and what compensation he was to receive.
- [5] Dr. Benson now sues Dr. Bramley to recover what he says he should have been paid for his work. Dr. Bramley, who is self-represented, says she paid Dr. Benson for his work and does not owe him anything more.
- [6] As Dr. Benson and Dr. Bramley were the only two witnesses, and there is very little in the way of documentary evidence, my assessment of the credibility of the parties and the reliability of their evidence is key to the resolution of their dispute. I will first set out the facts and contested evidence. I will consider credibility and reliability before applying the law to the facts.

FACTS AND CONTESTED EVIDENCE

- [7] In 2016, Dr. Benson was working at Northlands Medical Clinic in Whistler and Dr. Bramley was overseeing the construction and set up of the Clinic while directing and providing health services at her clinic in Hong Kong. The parties met in person in Whistler in February 2016. At the time, Dr. Bramley was looking for health practitioners to work at the Clinic and Dr. Benson was interested in leaving Northlands.
- [8] In June 2016, Dr. Bramley arranged for Dr. Benson to travel to Hong Kong to see how her clinic worked and to meet one of her Hong Kong business partners, Abhinav Gorawara. She introduced them to each other in a June 3, 2016 email, writing that Dr. Benson would be in Hong Kong on June 14-18, 2016, "to see the clinic in action". She added, "I briefly outlined to [Dr. Benson] equity opportunities and explained you would be able to outline further for him."
- [9] When Dr. Benson and Mr. Gorawara met in Hong Kong, Mr. Gorawara outlined the corporate business structure of which the Hong Kong clinic formed part, diagramming it on a napkin. Briefly, the Hong Kong clinic was mostly owned by a holding company, Spartan Ventures. Dr. Bramley was the majority owner of Spartan Ventures. There were other investors in Spartan Ventures as well as in the Hong Kong clinic. It is not clear in what

company Mr. Gorawara was an investor. According to Dr. Bramley, the diagram is inaccurate in several respects, but this is not material to the issues before me.

- [10] Mr. Gorawara proposed that Dr. Benson could acquire a 1% interest in Spartan Ventures, which Mr. Gorawara estimated to be worth about USD\$110,000.
- [11] According to Dr. Benson, this was a formal offer of employment. He says that the offer was for him to acquire a 1% interest in Spartan Ventures in return for his "sweat equity", which he describes as:

involvement in and provision of services to the Clinic, including meeting with and treating patients, undertaking administrative tasks, implementing new policies and procedures and other work in the Clinic

- [12] Dr. Benson said that he accepted this offer, understanding that he would become the manager or director of the Clinic. However, Dr. Benson could not recall details about when and to whom he communicated his acceptance. Dr. Bramley testified that Mr. Gorawara did not have the authority to offer Dr. Benson a position at the Clinic, as he was not a doctor and had no direct relationship with the Clinic.
- [13] Dr. Benson's subsequent email exchange with Mr. Gorawara suggests that discussions were ongoing and not concluded. On June 28, 2016, Dr. Benson wrote that he was "excited about the business proposition", and asked a number of questions, including about his remuneration, the structure of the Clinic, and whether the business could become a franchise. Mr. Gorawara replied on July 9. He did not answer Dr. Benson's questions, but said that he was communicating with Dr. Bramley about "how to structure a proposal for you."
- [14] Dr. Bramley admits that, at some point after this, she proposed to Dr. Benson that he acquire a 1% interest in Spartan Ventures and that, in August 2016, she told Dr. Benson he could not acquire a share in Spartan Ventures because of legal restrictions. She agrees that she told him that an alternative equity offer would be forthcoming.
- [15] Dr. Benson advised Northlands that he would be leaving his position there in early November 2016.
- [16] Anticipating that the Clinic would open in December 2016, Dr. Benson took courses in functional medicine, and planned to obtain his first certification in metabolic and nutritional medicine in December. It is not clear who paid for these courses.
- [17] He communicated his plans to Dr. Bramley in an email. Dr. Bramley responded with a lengthy email dated October 20, 2016. She supported his education plan. She suggested that he take training at the Clinic in various laser and similar procedures on specified dates in November, and she advised him that the planned opening date for the Clinic was January 28, 2017. She asked Dr. Benson if he was intending to keep his MSP practice "for now" and said that, if he was, it would be important to keep the billing systems entirely separate. She wrote "Also you and I need to do your contract" and continued as follows:

My thoughts shaping up for you

70% of all consults

60% of profits from procedures (i.e. botox, fillers, laser, IVs, PRP, minor ops etc)

30% profit on lab tests

30% profit on all products

I thought about many different options to involve you on an equity/profit share basis

How would you feel if I give you 10% sweat equity in Lauren Bramley MD Inc. by Dec 31st, with a shareholders agreement in place by then.

That way you are officially a partner

I have been using a firm in Vancouver and I could ask them to draft the agreement

with that arrangement - the clinic covers your insurance, your anti-aging courses and two anti-aging conferences a year.

At this point you and I are the only shareholders, with the understanding that only BC licenced MDs can be shareholders.

Are you Incorporated?

Regarding shareholding and terms - As it is all a bit of an unknown, we can then review annually at the end of December

[18] Dr. Benson testified that he considered this to be a formal offer of employment, which he verbally accepted in early November 2016. Dr. Bramley denies that this constituted an offer and also denies that Dr. Benson verbally accepted it. Both agree that they never entered into a written contract on these terms.

[19] Due to delays with building permits and licences, the Clinic did not open until May 2017.

[20] Dr. Benson testified that this left him in limbo. He submits that he provided services to the Clinic from at least December 2016 on, but gave no details about what he actually did during this period. Dr. Bramley denies that Dr. Benson worked at the Clinic before it opened.

[21] Dr. Benson also enrolled in a three-month intensive government-sponsored course in emergency medicine in Nanaimo, which ran from May to July 2017. He testified he was paid \$50,000 for this but did not say by whom. He testified that he thought this training would be beneficial to the Clinic, that he told Dr. Bramley about it and she was supportive. In cross-examination, Dr. Bramley said that Dr. Benson was certainly entitled to pursue emergency medicine, but to her it signified that he was not really interested in an equity stake in the Clinic. She said that she assumed he wanted to work there on the same basis as the other doctors and health practitioners who were paid a percentage of their billings. There is no written evidence of how others were paid.

- [22] From May to July 2017, Dr. Benson said he commuted between the course in Nanaimo and the Clinic, spending 2 ½ days a week in each. After the course ended, Dr. Benson testified that he worked at the Clinic full-time.
- [23] Around the time the Clinic opened, Dr. Bramley hired Paula Latorre as chief operating officer. She was a key employee at the Clinic with whom both parties communicated. Dr. Benson listed her as a witness in his trial brief and subpoenaed her to appear as a witness. When Ms. Latorre advised through her counsel that she was unwilling to do so, Dr. Benson asked me to issue a bench warrant, which I did. However, prior to its execution, Mr. Benson decided not to call Ms. Latorre after all. I cancelled the warrant. The parties rely on written and oral communications each had with Ms. Latorre. However, without her evidence, much of this is inadmissible hearsay. Absent supporting documentary evidence, I do not rely on the parties' evidence about their interactions with Ms. Latorre.
- [24] The parties disagree about how much work Dr. Benson actually performed for the Clinic from its opening in May 2017 to August 2018, when Dr. Benson stopped providing services.
- [25] Dr. Benson testified that he treated MSP patients and also treated private patients, providing them with functional medicine services. He estimated that he spent about 15% of his time providing services to patients and 85% of his time doing other work that he considered necessary for the Clinic. He did not testify that he sought Dr. Bramley's approval before doing any of this other work or that he informed her before undertaking it.
- [26] Dr. Benson described this work as writing a Clinic Operations Manual (he circulated a first draft in January 2018), introducing a project management software platform to coordinate the activities of Clinic staff, and acquiring electronic medical billing ("EMR") software.
- [27] In an email dated February 23, 2018, Dr. Benson gave examples of the variety of tasks he had performed to date:
- calling patients on Lauren's behalf
 - working on a detox protocol
 - organizing Room 4, including purchasing items for it and installing equipment
 - Work on EMR scheduler
 - work on optimization of EMR
 - many calls to MedAccess
 - Computer upgrade to Safari - Room 4 and Pharmacy
 - Drywall patch Room 1
 - create pap tray
 - Work on Marni's Multi-View Scheduler with Calendar views

- Organize Jacket closet/sort gowns/towels into Rooms 1&2
- Create list of suture kit items of Operations Manual and inventory purposes
- Create list of special encounters & equipment/ preparation required
- Create suture cart
- Setting up remote access to view xrays at the clinic

[28] Dr. Bramley does not deny that Dr. Benson did these things. She says they were not within the scope of his employment and that she did not direct him to perform them. She testified that it was unnecessary for Dr. Benson to create an operations manual because Ms. Latorre had already created one based on the manual used at the Hong Kong clinic. She said that the expensive EMR software Dr. Benson purchased was only used by him to bill MSP, as everyone else billed clients privately, adding that both the EMR and the project management software were unnecessary. She testified that she staffed the Clinic with nurses and non-medical personnel, and engaged necessary contract services (IT, janitorial, repair, and so on). Dr. Benson did not contest this. Dr. Bramley said she never contemplated paying a doctor to perform the functions Dr. Benson described.

[29] Dr. Bramley acknowledged that, on her instruction, Ms. Latorre emailed Dr. Benson on September 28, 2017 to ask if he was available to meet to review and finalize his "consultant contract". No such contract was produced in evidence. According to Dr. Benson, he met with Ms. Latorre one or more times to express his concerns about his role at the Clinic and his compensation package. He testified that he also discussed this directly with Dr. Bramley at a dinner on October 3, 2017. He says that she offered him a 10% equity interest in a pharmacy she planned to operate out of the Clinic, which he accepted.

[30] Dr. Bramley denies that this dinner occurred. She testified that her husband died at around that time and that she took some time off, returning to work at a much-reduced patient load. She testified that she would never have offered Dr. Benson an equity share in a pharmacy because, although the Clinic was constructed in anticipation of an on-site pharmacy, this did not materialize. She acknowledged that Dr. Benson raised his dissatisfaction with his compensation more than once, but she considered that this was his problem because, under a fee for service arrangement, if he wanted to earn more money, he had to see more patients. Dr. Bramley did not testify that she communicated this to Dr. Benson.

[31] It appears that in December 2017, the parties agreed to have two days per week reserved for him to see private patients at the Clinic. Dr. Bramley testified that she wanted Dr. Benson to take over seeing her patients to allow her to work at a reduced load and as a way to build his private practice. A contemporaneous email from a Clinic receptionist documents the need to move patients who were booked with Dr. Bramley to see Dr. Benson instead.

[32] On December 8, 2017, Dr. Benson wrote to Dr. Bramley as follows:

Hi Lauren

I was hoping that we could arrange a business meeting early next week to clarify my role within the clinic. I have a number of concerns, the chief of them being that I feel unsupported, and consequently, my professionalism and passion for medicine has been compromised in the process. I really do believe in the culture you have created, the clinic, and the fantastic team, and I know that establishing a clearer direction will make me a more valuable and effective team member.

[33] Dr. Bramley responded promptly, saying that it was very important that doctors have support and that they should meet. That did not occur. On December 18, 2017, Dr. Benson emailed Dr. Bramley again. He reiterated the sentiments in his previous email, referring to his "efforts to build a franchisable operation, and to create a practice for other family physicians" so that he could focus on functional medicine. He said his efforts were not being appreciated, adding:

I hope before the year is through that we can agree on what my role is to be, design a financial arrangement, sign a contract, and to clarify the goals of the clinic.

[34] Dr. Bramley proposed a couple of meeting times. According to Dr. Benson, she did not show up for either. Dr. Bramley could not recall whether they met.

[35] Dr. Benson also worked outside the Clinic during this period. Records show that between August and the end of December 2017, he worked two weekend "on call" shifts of 63 hours in Pemberton and seven additional 10-14 hour shifts in Pemberton, Squamish and Whistler.

[36] The parties agree that they communicated by text in early January 2018. Dr. Benson again expressed dissatisfaction with his compensation and proposed that he be paid a salary. Dr. Bramley wrote, "that's a good thought" and agreed to discuss it.

[37] Dr. Benson set out his proposed terms for a contract in an email dated January 17, 2018:

Hi Lauren,

Here is a list of terms as requested. If you would like a better idea of how I came up with my offer, or what makes me uniquely qualified, I am happy to provide them to you.

Salary: \$300,000 for 12 months, starting Jan 1, 2018. This may be paid monthly at \$25k/month.

Based on a 5 day work week at 8 hours/day, the equivalent of 40 hours/week. It is hoped that the equivalent of 3 weeks/year could be allotted for work-related educational opportunities and holidays. If extra time beyond the 1960 hours/year (40 hours x 49 weeks) is required, consideration could be made to pro-rate it.

Roles: Family physician, Nutritional Medicine, clinic Medical Director - (creation of protocols, working to put together comprehensive Operations Manual), optimization of MedAccess EMR features and educating staff on best use, odd jobs around clinic - eg. small renovations/repairs.

All regular duties required of a physician (seeing patients, taking notes, establishing treatment plans etc.) would be my responsibility.

Billing to MSP would be my responsibility, with the hopes that front staff could help me out with any bills that have been refused initially, requiring corrections. 100% of MSP billing from Jan 1st onwards would go to the clinic.

It is understood that this agreement is based on future contributions. Verbal agreement of 10% ownership of the pharmacy would be in recognition of work done in the past year.

Further discussion at the end of the year could be made in order to renew the contract or devise a new one.

Hope that helps! Please email/call if you require any clarification.

Rich

[38] On January 23, 2018, Dr. Benson forwarded this email to Ms. Latorre without any explanation. The next day, Ms. Latorre sent an urgent email to Dr. Bramley asking if the terms were approved and advising that Dr. Benson was not willing to work until Dr. Bramley agreed to these terms.

[39] Dr. Benson testified that he explained to Ms. Latorre in person at the Clinic that he was not willing to schedule patients for February and March until a written contract was in place. He said that she left the room and returned shortly after to tell him that Dr. Bramley had proposed "six months and \$200,000". Dr. Benson says that he understood this to mean she was proposing to pay him \$200,000 for a six-month contract (the equivalent of \$400,000 per year). He testified that he told Ms. Latorre that he accepted the offer.

[40] When Dr. Benson's account was put to Dr. Bramley in cross-examination, she explained that these events occurred when she was facing a crisis with the investors in her other companies. They were demanding repayment of a loan she had taken to finance construction of the Clinic, which neither she nor the Clinic were able to repay. She was willing to consider some sort of salary arrangement for Dr. Benson because she needed someone to be available for her patients. However, at most, he would be paid for two days a week.

[41] Dr. Bramley recalled Ms. Latorre speaking to her about Dr. Benson's compensation. She testified that she would never have authorized Ms. Latorre to negotiate contractual terms with a physician. She said that in response to Ms. Latorre's enquiry about Dr. Benson's proposed contractual terms, she told Ms. Latorre that she would handle it herself. She says she did discuss salary arrangements with Dr. Benson, and offered him \$100,000 total for six months in return for full-time work (40 hours per week) at the Clinic. There is no written evidence to support this and Dr. Bramley gave inconsistent evidence about whether this occurred in January or March.

- [42] From February 10, 2018 to August 6, 2018, Dr. Benson regularly worked one to two 10-hour overnight shifts per week as an emergency medicine doctor at the Whistler health clinic. Dr. Benson testified that these shifts did not interfere with his 40-hour work week at the Clinic because he scheduled them for nights when he did not have patients to see the next morning. He also testified that he worked from home about six hours per week. He could not recall details of what work he performed from home.
- [43] Dr. Benson issued two invoices to LBP in February 2018, each for \$16,666.67. He explained that he did this based on his understanding that they had agreed he would be paid \$200,000 for six months, starting February 1, 2018.
- [44] Ms. Latorre emailed Dr. Benson on February 23, 2018, questioning the amount of his invoice. She wrote that the amount was double what they had agreed and that, as he had not actually worked 40 hours per week at the Clinic in February, some further reduction was needed.
- [45] Dr. Benson responded immediately, stating, "we agreed that my salary for 6 months at 40 hours a week, would be \$200k. This amounts to \$33,333/month or \$16,667 every 2 weeks." He also wrote that he had been working over 40 hours per week, only part of which was seeing patients.
- [46] Dr. Benson also drafted an employment contract for himself, which he testified that he reviewed with Ms. Latorre. The terms of this draft contract differ somewhat from those in his email.
- [47] A week later, on March 2, 2018, Dr. Benson emailed Dr. Bramley in Hong Kong complaining that he had just heard from Ms. Latorre that his salary was half of the agreed amount, and mentioning that he had delivered a signed contract to her. He advised Dr. Bramley that he had cancelled patient appointments for the rest of the week.
- [48] Dr. Bramley replied, stating:

This is the first I have heard of this issue? Let's speak on the phone asap. I am heading into the clinic but will call you as soon as I can in between patients. This highlights a number of issues which we have to rectify

- [49] Neither party gave evidence about what, if anything, occurred in the interim, but on March 5, 2018, Dr. Bramley wrote to following email to Dr. Benson:

Hi Rich

Sorry about the massive misunderstanding. My commitment on salary was for 200K/annum with a 6 month trial period. How this was misconstrued I am unsure.

There was also to be a 5 x 8 hour working shifts a week

I had also assumed you would be exclusive to the practice or restrict work elsewhere to outside of your clinic working hours.

Only if the working hours were [committed] to and the private side and aesthetic practice are grown is the salary sustainable but I am willing to back you for that with the 6 month trial period

Also the salary takes the place of any shareholding but we would review that at the 6 months

Also I wanted a on-call arrangement set up between us to enter into the contract

I am very sorry if there was a misunderstanding in the above or if Paula conveyed a different message?

I would like to solve this with you one on one and will ask Paula not to be involved with it.

Thanks

Lauren

[50] Dr. Bramley initially denied that this was the first time she informed Dr. Benson that he was required to work exclusively at the Clinic, claiming that they had discussed this from the outset. However, she later conceded that she assumed that he understood that an equity stake was contingent on exclusivity, because 'everyone understands that is the way a private clinic functions: you can either be a contract physician and receive a percentage of your billings, or you can be a partner and receive an equity interest in return for committing to work exclusively at a clinic'.

[51] When confronted with her evidence on examination for discovery, in which she admitted that she did not inform Dr. Benson that an equity interest in the Clinic was conditional upon exclusivity, Dr. Bramley resiled from her discovery evidence.

[52] The parties agree that they met in person on March 15, 2018. According to Dr. Benson, they agreed that he would retain 100% of his MSP billings, he would be provided with a personal assistant and he would be paid \$1,000 per day for two days a week during which he would work as the Clinic's director. Dr. Benson says they agreed he would be paid \$33,333 for the month of February 2018.

[53] According to Dr. Bramley, they agreed that Dr. Benson would be paid 100% of his MSP billings, but that he would pay rent for "MSP days" calculated based on the number of patients he saw each day. Dr. Benson would receive \$1,000 per day for two days a week to see Dr. Bramley's private patients, and to receive this he would have to give up working at the Whistler health clinic. Dr. Bramley denied that she agreed to provide Dr. Benson with a personal assistant and maintained that she, not he, was always the Clinic's director. She says she did not agree to pay Dr. Benson \$33,333 for the month of February 2018.

- [54] Dr. Benson testified that he received 100% of his MSP billings, but was never paid the \$1,000 per day for two days per week or the \$33,333. He admitted he never remitted any rent to the Clinic. Dr. Benson said he tried to meet Dr. Bramley to discuss his concerns and that they might have had some more discussions. He could not provide further detail.
- [55] Dr. Bramley testified that she did not pay Dr. Benson the \$1,000 per day because he continued to work at the Whistler health clinic. She said that by this point the relationship had deteriorated badly and she did not want to engage with him. In her view, he was a contract physician entitled to 100% of his MSP billings, from March 1, 2018 on, nothing more.
- [56] At some point between March and August 2018, Dr. Bramley terminated Ms. Latorre's employment. Neither party could recall when this occurred.
- [57] On August 20, 2018, Dr. Benson emailed Karen Fryer, the Clinic's bookkeeper, asking for her advice on how to get the remuneration he felt he was owed. He testified that he stopped performing any work at the Clinic on August 22. On August 30, he emailed Dr. Bramley to inform her that he had stopped working and would not resume until he had been paid for what he described as "20 months" of "extensive services". Dr. Benson did not ask Clinic staff to notify his patients that he was no longer at the Clinic until sometime in October 2018. He commenced this action in April 2019.

CREDIBILITY AND RELIABILITY OF WITNESSES

- [58] In light of the many conflicts in their testimony, assessment of the relative credibility of Dr. Benson and Dr. Bramley and of the reliability of their evidence is critical to my determination of the nature of the arrangement between them and what, if any, remedy is owed to Dr. Benson.
- [59] Credibility and reliability are related, but not synonymous. Recently, in *Johnson v. Wentworth*, 2021 BCSC 50, at paras. 98-105, Justice Crabtree reviewed the relationship between these concepts. Both require assessment of what a witness said in order to give it appropriate weight. The court must consider what the witness said in the context of the evidence as a whole:
- [105] This involves a consideration whether evidence is at odds with other evidence in the case; and whether the evidence is implausible or improbable, having regard to the surrounding circumstances. The real test of the truth of a witness's testimony must be its harmony with the preponderance of the probabilities, which a practical and informed person would readily recognise as reasonable in that place and in those conditions. Finally, it should be borne in mind that an apparently honest, confident, or convincing witness may not necessarily be an accurate witness.

- [60] Credibility is an assessment of whether the witness is telling the truth; reliability is an assessment of a witness's ability to observe, recall and recount the events in issue. That means that a credible witness is not necessarily a reliable witness. However, a witness who is not credible is not capable of providing reliable evidence.
- [61] I have reservations about the credibility of each of Dr. Benson and Dr. Bramley.
- [62] Turning first to Dr. Benson, assessed from the perspective of a reasonable and informed person, key aspects of his evidence are not believable. For example, Dr. Benson testified that, when they met in Hong Kong, Mr. Gorawara offered him a contract as the Clinic's director for, among other things, a 1% equity interest worth about USD\$110,000, which he accepted.
- [63] At that time, Dr. Benson was a junior family physician with no experience or certification in anti-aging or functional medicine, nor with the business of running a private medical clinic. Mr. Gorawara was a minority investor in Dr. Bramley's Hong Kong clinic. It is not believable that on first meeting Dr. Benson, Mr. Gorawara would make a binding offer to him of an equity share in Dr. Bramley's holding company. Dr. Benson did not provide any evidence to support his belief that Mr. Gorawara was Dr. Bramley's agent. Dr. Benson's own subsequent email asking about his remuneration conflicts with his testimony that the parties entered into a binding contract in Hong Kong.
- [64] I do not accept Dr. Benson's testimony that he understood Ms. Latorre, again on Dr. Bramley's behalf, to be offering to pay him \$200,000 for six months' work at the Clinic in response to his proposal that he be paid \$300,000 for 12 months' work. It is not reasonable to believe that someone would reject an offer yet counter with a higher offer than what was initially proposed. When it was put to him, Dr. Benson expressly denied that the counter offer was actually \$200,000 per year for a six-month period.
- [65] Dr. Benson testified repeatedly that he had not been paid for his work. However, he admitted that he was paid for all of the MSP and private patients he saw and for the procedures, lab tests and products he sold according to the percentages in Dr. Bramley's email of October 21, 2016. His exaggeration of the extent of his under-compensation is self-serving.
- [66] For these reasons, I do not believe Dr. Benson's testimony where it is unsupported by other evidence.
- [67] Dr. Bramley also was not a credible witness. She gave inconsistent evidence on the key issue of whether exclusivity was a term of the arrangement she proposed to Dr. Benson. She testified both that she had communicated this to Dr. Benson and that she simply assumed he understood this. None of her emails setting out proposed contractual terms prior to the March 5, 2018 email mentions exclusivity, although she was aware Dr. Benson was working shifts elsewhere. When Dr. Bramley's admission on discovery that she never told Dr. Benson about exclusivity was put to her in cross-examination, she said that her discovery evidence was untrue.

- [68] Dr. Bramley contradicted herself more than once. For example, she denied ever offering Dr. Benson a share in Spartan Ventures, but later agreed that she did. She stated that she offered to pay Dr. Benson \$100,000 for a six-month contract in January 2018, but then agreed she first made this offer in March.
- [69] Dr. Bramley's explanations for the fact that Dr. Benson was working at the Clinic at least from May 2017 to August 2018 without any written contract are not believable. With respect to her assertion that they were still negotiating terms, her email responses to his increasing complaints about lack of remuneration are at the very least, evasive. I do not accept her explanation that she never puts anything of significance in emails because it is inconsistent with her detailed email of October 21, 2016.
- [70] Dr. Bramley testified that, from the time the Clinic opened, Dr. Benson was working under a "standard" consultant or physician contract akin to those developed for her Hong Kong clinic. However, she did not give any evidence about when Dr. Benson agreed to those terms. Dr. Bramley did not explain why she did not provide even a draft of a standard contract any time after May 2017, when she said she assumed he wanted a fee for service arrangement. I reject Dr. Bramley's unsupported assertions that others working at the Clinic, including Ms. Latorre, had written contracts in light of her failure to produce them in evidence.
- [71] I reach the same conclusion about Dr. Bramley's credibility as I did for Dr. Benson. I do not believe her testimony where it is unsupported by other evidence.
- [72] In this situation, the observations of Southin J., as she then was, in *Le v. Milburn*, [1987] B.C.J. No. 2690 at para. 2 (S.C.), are apt:

When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

ISSUES

- [73] Dr. Benson pleads breach of contract and, in the alternative and further alternative, contractual quantum meruit and unjust enrichment.
- [74] In order to recover for breach of contract, a plaintiff must prove that the parties communicated to each other (1) that they each intended to be bound and (2) the reasonably certain mutually agreed terms: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 322. Contractual quantum meruit permits a plaintiff to recover if there is an enforceable contract that only lacks a binding term about price. If so, the court will determine a reasonable price for the services provided based on the cost to the plaintiff of providing the services: *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215. If there was no contract at all, the equitable principle of unjust enrichment (or restitutionary quantum meruit) permits the plaintiff to recover the value of the benefit the plaintiff

provided to the defendant: Gregory N. Harney Law Corporation v. Angleland Holdings Inc., 2016 BCCA 262.

[75] That means the following issues arise:

- a) Was there a binding contract between the parties and, if so, did the defendants breach it?
- b) If not, was there a binding contract except as to price and, if so, did the defendants breach it?
- c) If not, have the defendants been unjustly enriched?

[76] If there has been a breach or an unjust enrichment, a fourth issue arises, namely, what is the appropriate remedy?

ANALYSIS

Was there a binding contract and, if so, did the defendants breach it?

[77] Dr. Benson argues that there were five binding contracts between the parties. He sets out the dates of these alleged agreements as June 13, 2016 (the date he met Mr. Gorawara), October 20, 2016 (the date of Dr. Bramley's email to Dr. Benson), October 3, 2017 (based on a dinner meeting with Dr. Bramley), January 18, 2018 (based on his discussions with Ms. Latorre), and March 15, 2018 (the date of a meeting with Dr. Bramley).

[78] In order for a binding contract to arise, the parties must agree on all essential terms. In the employment context, common essential terms are: position or title, duties, compensation, and termination. The burden of proof is on the party relying on the contract.

[79] Leaving aside other essential terms, Dr. Benson has not led evidence establishing that the parties ever agreed on his compensation.

[80] I have already rejected as not credible Dr. Benson's evidence that Mr. Gorawara made a binding offer on June 13, 2016. Dr. Benson's testimony that Dr. Bramley's October 20, 2016 email was an offer that he orally accepted was contradicted by Dr. Bramley in her testimony. The only documentary evidence is the email itself. Even if it could be construed as an offer, there is no credible evidence that Dr. Benson accepted it. Similarly, Dr. Benson's testimony about the October 3, 2017 dinner is contradicted by Dr. Bramley, who said it did not occur.

[81] There is no admissible evidence that an offer capable of acceptance was made on January 18, 2018: Dr. Benson did not specify this date and he testified that the offer was made by Ms. Latorre, not Dr. Bramley. As Dr. Benson decided not to call Ms. Latorre as a witness, his evidence about what she said is hearsay and I infer that the evidence she would have given would be unfavourable to Dr. Benson.

[82] The parties agree that they met on March 15, 2018 and reached an agreement. However, they provided conflicting accounts of what the agreement was, including whether Dr. Bramley would provide Dr. Benson with a personal assistant, whether Dr. Benson would be the

Clinic's director, whether he would work exclusively at the Clinic, and whether he would be paid \$33,333 for the month of February 2018. Absent objective evidence, I cannot prefer the evidence of one over the other. I find that Dr. Benson has failed to establish that the parties entered into a binding contract on March 15, 2018.

[83] As Dr. Benson has failed to prove that a contract was formed, his claim for breach of contract must fail.

Was there a binding contract except as to price and, if so, did the defendants breach it?

[84] Dr. Benson's written submissions fail to address what essential terms, other than compensation, the alleged contract contained. The parties' evidence conflicts about whether Dr. Benson was the Clinic's director and whether his duties were confined to the provision of patient-related services.

[85] As he testified, Dr. Benson considered that he was the Clinic's director and, at least until early 2018, spent the vast majority of his time engaged in work that did not produce any direct revenue. As she testified, Dr. Bramley considered that Dr. Benson's primary responsibility was to build a clientele of revenue-generating private patients, and she was adamant that she, not he, was the Clinic's director.

[86] I conclude from this that Dr. Benson has not established a basis for his claim in contractual quantum meruit.

Have the defendants been unjustly enriched?

[87] Unjust enrichment is made out where a plaintiff proves that a defendant has been enriched, the plaintiff has suffered a corresponding deprivation, and there is no juristic reason for the enrichment. *Pink v. 0957765 B.C. Ltd.*, 2019 BCSC 1684 contains a helpful discussion of these elements.

[88] The enrichment in issue is confined to Dr. Benson's non-patient-related work at the Clinic as Dr. Benson agrees that he was paid for his patient services. I have set out Dr. Benson's description of his non-patient-related work at paras. 26-28 above. I have also considered Dr. Benson's description of his non-patient services work in a document that he says he gave to Dr. Bramley on October 3, 2017, which she denies receiving. In addition to the tasks already described, it includes "setting up clinic to allow for GPs to be added to the team in the future", "approaches for efficient patient workflow", "creating business relationships", "contributing to design of services offered by Clinic", and "headhunting - eg nurses, billing agents". I will refer to all of this as the "Work".

- [89] Determination of whether there has been an enrichment is a straightforward economic analysis: did the defendant receive a benefit or realize a saving?: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para. 15. The gist of Dr. Bramley's evidence on this issue was that she did not ask or expect Dr. Benson to perform the Work and his performance of it meant that he did not perform what she considered the economically essential work of attracting paying patients to the Clinic.
- [90] Dr. Bramley did not deny that Dr. Benson performed the Work. I understand her position to be that it was of little economic benefit to the defendants, not that it had no economic value at all. On its face, at least some of the Work would have provided a benefit to the Clinic.
- [91] As a result, this element is satisfied. Dr. Bramley did not make submissions on the other two elements of the test and they are clearly made out. Dr. Benson would not have volunteered to do the Work and the time he spent doing it meant that he was not performing remunerative work elsewhere. No one has suggested any juristic reason for the enrichment.
- [92] I conclude that Dr. Benson has proved unjust enrichment.

What is the appropriate remedy?

- [93] In *Nygard v. Continental Steel Ltd.*, 2018 BCSC 541, Justice Thompson reviewed the authorities on valuing services for the purposes of restitutionary quantum meruit: at paras. 82-97. He summarized the relevant factors as follows:
- a) the nature and extent of the services;
 - b) their reasonable market value;
 - c) the plaintiff's special expertise and personal connections;
 - d) the negotiations between the parties; and
 - e) any other facts bearing on the benefit of the services to the defendants.
- [94] Although in his written submission Dr. Benson cites a number of authorities setting out relevant factors for calculating a restitutionary quantum meruit claim, including *Nygard* and the cases it reviews, the only factor he addresses is the negotiations between the parties.
- [95] He says that he was told that a 1% share in Spartan Ventures was worth USD\$110,000, that he was offered a 10% shareholding in LBMD (no evidence of value), that Dr. Bramley admitted that she was willing to offer Dr. Benson a salary of \$100,000 for six months and that she would have paid Dr. Benson the same amount per day as he received per shift at the Whistler health clinic (\$1,000 per day for two days per week). Based on this, he asks the Court to craft an appropriate remedy.
- [96] Evidence about negotiations is helpful when terms concerning price assist in valuing the services to be provided. However, in this case, there is unresolvable conflicting evidence about the services to which these amounts relate. According to Dr. Benson, these amounts

were in return for the work of running the Clinic other than the patient service role. According to Dr. Bramley, these amounts were for performing patient-related services that would make the Clinic profitable. Having found Dr. Benson was paid for his patient-related services, these amounts do not assist me in valuing the Work.

- [97] Dr. Benson tendered virtually no objective evidence about the nature and extent of the Work. He did not produce any records of the time he spent at the Clinic or at home performing the Work. He tendered no objective evidence about the reasonable market value of the Work in order to establish the value of the benefit provided to the defendants. For example, he tendered no evidence about what medical clinic directors are paid, nor evidence about the market value of the services he performed based on type of work (medical administration, computer support, repairs, and so on). I infer that Dr. Benson chose not to adduce such evidence.
- [98] While it is generally true that, having found a defendant liable, a court will do its best to craft an appropriate remedy based on the available evidence, damages may be denied to a plaintiff who chose not to lead available evidence. In *Payne v. The Kimberley Academy Ltd.*, 2020 BCSC 506, the Court awarded nominal damages of \$1,000 to the plaintiff in a wrongful dismissal case:
- [50] This is not [to] say that difficulty in fixing the precise amount of damages is a bar to recovery. Just because the loss is difficult to quantify does not mean that damages will not be awarded. However, this principle applies to situations where there are difficulties in quantifying the loss, not in situations where the plaintiff has chosen not to lead specific evidence on the issue: *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 at para. 394.
- [51] Where a plaintiff has provided minimal proof of damage, the court can award nominal damages. In *Century 21 Canada Ltd.*, Justice Punnnett awarded \$1,000 to the plaintiff who had failed to adduce evidence of loss and expenses incurred in relation to the wrongful actions of the defendant. The same amount was awarded in *San-Co Holdings Ltd. v. Kerr*, 2009 BCSC 1747, where the plaintiff could not prove damages resulting from the defendant's misrepresentation.
- [99] In *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 at para. 396, the court quoted a passage from the Court of Appeal's decision in *Green et al. v. Stanton* (1969), 6 D.L.R. (3d) 680 at 691-692 (B.C.C.A.) that is apt here:

Notwithstanding the deficiencies in the evidence and the failure of the respondents to produce, or to even attempt to produce, evidence of how their income was affected, I am prepared to say that some loss must have been sustained. But whether it be trivial or substantial cannot be determined from the evidence. The onus was on the respondents to at least give some realistic base for pecuniary compensation, and it is not the obligation of the appellant to "account" for any profits he might have made

[100] As I have explained, the evidence led by Dr. Benson does not permit me to quantify the benefit of the Work to the defendants. He did not explain why he could not provide any objective evidence of value. I therefore conclude that a nominal award of damages of \$1,000 is appropriate.

CONCLUSION

[101] In conclusion, I award Dr. Benson \$1,000.

[102] Dr. Benson seeks costs. However, the amount I have awarded is within the Small Claims court jurisdiction of \$35,000. Rule 14-1(10) of the Supreme Court Civil Rules provides:

A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[103] A judge must apply this subrule unless the plaintiff had sufficient reason, at the time the action was commenced, to bring the action in Supreme Court: *Gehlen v. Rana*, 2011 BCCA 219 at para. 24.

[104] I am satisfied that, at the time he filed the Notice of Civil Claim, Dr. Benson had reason to believe that the action was properly commenced in this court. At that time, he would not have known the extent of the conflict between his and Dr. Bramley's evidence or the absence of documentary evidence.

[105] I award Dr. Benson his costs on Scale B. However, if there is an issue arising from Rule 9-1(4) and (6), the parties may apply to me in writing within 30 days of the date of this decision.

"Iyer J."

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