

CANADA / JUDGMENT

Fleckenstein v. Deutsche Bank Securities Limited

2000 BCSC 1282

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 1282

Citation: **Fleckenstein v. Deutsche Bank Securities Limited** Date:
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2000 BCSC 1282 Docket:
C990964

Registry: **Vancouver**

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEVEN FLECKENSTEIN
PLAINTIFF

AND:

DEUTSCHE BANK SECURITIES LIMITED/
DEUTSCHE BANK VALEURS MOBILIERES LIMITEE
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE NEILSON

Counsel for the Plaintiff Murray Tevlin

& Katherine Arnold

Counsel for the Defendant Randal Kaardal

& Blair Curtis

Date and Place of Hearing/Trial: May 9, 10, 11 & 12, 2000

Vancouver, BC

INTRODUCTION

- [1] Steven Fleckenstein was employed by Deutsche Bank Securities Limited ("DBSL") as Branch Manager, Vice-President and Director, Fixed Income and Equity Department in Vancouver from September 23, 1996 until February 23, 1998, when he was dismissed due to DBSL's decision to close its Vancouver office. The central issue in this case is the interpretation of the severance package which Mr. Fleckenstein received from DBSL, in particular, whether a payment of \$400,000, which is described as a "discretionary special payment" in the package, was intended to be a bonus which Mr. Fleckenstein had already earned in 1997, or part of his severance pay in addition to that bonus.

THE FACTS

- [2] In 1996, Steven Fleckenstein was enjoying a successful career in the field of fixed income trading and sales. He obtained his M.B.A. in 1985 and worked for Wood Gundy until 1993, when he was recruited by Richardson Greenshields. There he worked as a Vice-President and Director of fixed income sales in Vancouver until August 1996, when Richardson Greenshields announced it was being purchased by Royal Bank of Canada, Dominion Securities ("RBCDS"). At that time, Mr. Fleckenstein was earning a base salary of \$75,000, plus a bonus of \$80,000 to \$100,000 each quarter.
- [3] A number of Richardson Greenshields employees were dismissed due to the take-over, but RBCDS offered Mr. Fleckenstein ongoing employment with a similar position and compensation to that which he had at Richardson Greenshields. Mr. Fleckenstein testified he expected to accept this position. RBCDS had a good reputation, it was profitable and stable, and he had no concerns about the take-over. However, coincident with the offer from RBCDS, Mr. Fleckenstein received a telephone call from Mr. Cass, a Vice-President and Managing Director in charged of fixed income trading for Canada for DBSL, who sought to recruit him to open a Vancouver office for DBSL.
- [4] Mr. Fleckenstein and Mr. Cass had several telephone discussions in late August. Mr. Fleckenstein testified that he knew little about DBSL, and he asked Mr. Cass for details of its operations. He said the first question he raised was whether this would be long-term employment, as this is a concern for any senior investment manager in considering employment with a foreign bank. There is a question about the commitment of such institutions to the Canadian market, and DBSL had only been in Canada for two years. Mr. Fleckenstein testified that Mr. Cass told him DBSL had made a major commitment in New York and was doing large renovations to its Toronto office. It planned to be a major player in the North American market, and was particularly interested in establishing a Vancouver office to enable it to deal with investments related to the provincial government in B.C. Mr. Cass told him he would be hired as a Vice-President and Director of DBSL as well as its Vancouver branch manager. They discussed what was needed in Vancouver, and Mr. Fleckenstein helped Mr. Cass develop a proposed business plan for the office.

- [5] Mr. Cass testified for Mr. Fleckenstein. He said they had worked together at Wood Gundy. In 1996, DBSL was in the process of recruiting high-profile established investment personnel to assist it in establishing a significant international investment presence in North America. When he heard about the RBCDS take-over of Richardson Greenshields, he approached Mr. Fleckenstein to see if he was interested in working for the new regional sales office which DBSL planned to establish in Vancouver.
- [6] Mr. Cass could not recall their discussions in detail. However, he agreed that international dealers such as DBSL often find it hard to recruit highly qualified individuals because of the perceived instability of their commitment to the Canadian market. As a result, a standard part of his recruiting pitch to Mr. Fleckenstein would have been to assure him that DBSL intended a long-term commitment. He knew Mr. Fleckenstein had an offer from RBCDS and, in order to encourage him to come to DBSL, he told him the latter saw itself as the up and coming dealer in North America, that it planned to have a large presence in the Canadian markets, that Mr. Fleckenstein would have a large impact on this, and that he would be well remunerated for his efforts.
- [7] Mr. Cass sent the proposed business plan to DBSL's New York office on September 3, 1996. The plan included projected revenues and expenses based on hiring Mr. Fleckenstein and two other employees with whom he had worked at Richardson Greenshields. It described Mr. Fleckenstein as "one of the most competitive, aggressive and successful salespersons in Canada," and said that he wanted a commitment of \$400,000 per year to the end of 1998. Mr. Cass noted that although a two-year commitment was beyond the standard offers of DBSL, he believed it was justified in this case because of the "profile of the group and the economics of the operation."
- [8] Mr. Fleckenstein was under severe time constraints as RBCDS wanted him to start immediately, and his decision also had a potential bearing on his right to a Richardson Greenshields share offering for departing employees. DBSL flew him to New York in early September to discuss its proposal and to try to convince him to accept it. He met there with Mr. Cass, and other senior representatives of DBSL including Paul Jacobson, the head of North American Government Trading and co-head of Global Markets.
- [9] Mr. Fleckenstein testified that the essential aspect of these discussions for him was to obtain a guarantee of three years of employment with DBSL. He felt this would demonstrate their commitment to the Vancouver office. He raised this with Mr. Jacobson, who explained DBSL could not make such an offer without the approval of its Board. The Board would not be meeting for six weeks to two months, so such a commitment was not possible in view of Mr. Fleckenstein's time constraints. However, Mr. Jacobson told Mr. Fleckenstein that he had his word that it would be a "term commitment" and that Mr. Jacobson would take care of him. Mr. Jacobson told him that DBSL wanted to have a strong presence in Vancouver as part of its plan to become a pre-eminent foreign dealer in North America. He said Mr. Fleckenstein could commit to as long a lease as possible with respect to office space and equipment. He also reassured him by telling him that DBSL had hired other senior employees away from

other major investment firms, including himself and Mr. Cass, and he personally was very comfortable about DBSL's future plans.

- [10] Mr. Fleckenstein testified that he clearly understood the decision he faced. He could either insist on the three year guarantee, or trust Mr. Jacobson. He chose the latter as he knew Mr. Jacobson had considerable stature with DBSL, and he felt to do otherwise would suggest he did not trust him. Mr. Fleckenstein said he felt they gave him every indication that DBSL was a going concern with a major long-term commitment to the North American market.
- [11] Mr. Cass confirmed that Mr. Fleckenstein asked DBSL for a three year compensation guarantee, that he was told that DBSL could not provide it without Board approval, and that the Board was not meeting for six weeks. Instead, Mr. Cass said he and Mr. Jacobson tried to make Mr. Fleckenstein comfortable by discussing the longevity of DBSL and assuring him it was in North America for the long term. As well, they increased his proposed compensation package to "sweeten the pot" because they could not give him a three year guarantee. They offered him a base annual salary of \$150,000 with a minimum bonus of \$100,000 for the remainder of 1996, and a minimum bonus of \$400,000 for 1997.
- [12] Mr. Fleckenstein ultimately accepted DBSL's offer to commence work with it on September 23, 1996 as Branch Manager, Vice-President and Director, Fixed Income and Equity Department in Vancouver. His two employees at Richardson Greenshields joined DBSL as well. DBSL sent Mr. Fleckenstein a written offer of employment on September 6, 1996, which he accepted and signed. The relevant terms of that agreement are:

1. Salary and Bonus

You will be paid a starting base salary of \$150,000 per annum payable on a monthly basis in accordance with DMG payroll policy. As well, you will be paid a minimum bonus of \$100,000 payable at normal bonus time with respect to the fiscal year 1996 and a minimum bonus of \$400,000 payable at normal bonus time with respect to the fiscal year 1997. This bonus will not be payable if you give notice of resignation in accordance with paragraph 5 of this letter, or your employment is terminated for cause prior to the bonus payout date. In subsequent years, you will be eligible to receive a discretionary bonus, based on your performance and the profitability of your department and Deutsche Morgan Grenfell.

5. Termination

Your acceptance of this offer of employment shall also signify your agreement that your employment may be terminated as follows:

- b) at any time by DMG providing you with the amount of severance pay, if any, and written notice of termination or payment in lieu of such notice required by the Employment Standards Act. In addition, we will provide you with a payment of base salary of two weeks' pay for each completed year of service.

- [13] Mr. Fleckenstein testified that he had had no discussions with DBSL's representatives about the provisions governing termination of his employment. He did not call anyone at DBSL to ask about paragraph 5 (b) before signing the contract.
- [14] The "normal bonus time" referred to in paragraph 1 was officially within 90 days of the end of the calendar year, but in practice DBSL paid the bonuses around the end of February. Mr. Fleckenstein received his \$100,000 bonus for 1996 in February 1997.
- [15] Mr. Fleckenstein worked for DBSL until February 23, 1998, when DBSL announced it was closing a number of its regional offices, including Vancouver. Mr. Fleckenstein was one of approximately 100 employees dismissed as a result of this decision. Joan Brunelle, Vice-President and Director of Human Resources for DBSL in Toronto, testified that she began to prepare for this restructuring in December 1997. The preparations included development of a severance package for each affected employee. Ms. Brunelle testified that in devising the severance packages, DBSL used the term "discretionary special payments" to categorize payments which were outside the salary and benefits presently owed under the employment contract. They wanted a generic term, given the number of employees' circumstances and payments with which they were dealing. The term was meant to cover a variety of items, including payments in lieu of bonuses, as well as such matters as employee share options.
- [16] Ms. Brunelle said that Mr. Fleckenstein and the other two Vancouver employees were advised of their dismissal by a conference call with her and Mr. Cass on February 23, 1998. There was a dispute as to whether they were bluntly advised that they were "fired" or whether it was put in more sensitive terms. I find I need not determine this point for the purpose of the issues before me. It is common ground that the announcement came as a surprise to Mr. Fleckenstein and the other two employees, and they were told that severance packages would arrive shortly. They were also advised that if they had any questions they could speak with Mr. Cass, Ms. Brunelle, or anyone in DBSL's human resources office. After the call, Mr. Fleckenstein testified that he called Mr. Cass to discuss the situation and Mr. Cass told him he should get a lawyer.
- [17] Mr. Fleckenstein's severance proposal came in the form of a letter dated February 23, 1998, and arrived on February 24, 1998. The relevant parts read:

This letter confirms that due to a restructuring of the business globally, and more specifically in Canada, your current position is terminated effective March 13, 1998 (the "Effective Date").

This letter will serve as written notice confirming the arrangements with respect to the termination of your employment. The foregoing offer is made to you without Deutsche Bank Canada and/or Deutsche Morgan Grenfell (Canada) Ltd. ("the Company") in any way waiving its rights to rely on the specific terms of your employment contract pertaining to termination.

You will receive a discretionary special payment of \$400,000.

The Company has asked that you continue to carry out your duties for the period between the date of this letter and the Effective Date which reflects the need for your services in the transition. If you agree to work for the entirety of this period, an additional payment of \$15,000 will be made to you on the monthly pay date immediately following March 13, 1998. Should you choose to leave in advance of the Effective Date, you will forfeit this additional payment.

In an effort to assist you in your transition to other employment, we are prepared to make the following separation package available to you.

- 1) We will provide you with salary continuation at your current monthly rate of \$12,500.00, commencing April 1, 1998 on the monthly pay dates up to and including May 1, 1998.
- 2) In addition, the Company is prepared to provide you with a discretionary special payment of \$33,526.00, payable on the monthly pay date immediately following May 1, 1998.

We would ask you to advise us immediately should you commence alternative employment prior to May 1, 1998. In such an event, all of the payments set out in paragraphs 1) and 2) will cease and you will receive a lump sum payment equal to 50% of the balance owing of the said payments.

- 3) Furthermore, we will continue your present benefit coverage up to and including May 1, 1998 or the date on which you commence alternative employment, save for long term disability coverage, which will cease immediately in accordance with the insurer's policy.
- 4) As well, we are making arrangements to pay to you any outstanding vacation pay owing to you. No vacation time will accrue after the statutory notice period.
- 5) All of the preceding payments are subject to statutory withholdings and deductions.
- 6) We will reimburse you for all incurred expenses in accordance with the Company's expenses policy.
- 7) We will continue to deduct your RRSP contributions as previously indicated by you, and make the corporate contributions in accordance with our benefit policy for the duration of your severance package. We will make the necessary provisions to enable you to transfer your Group RRSP funds to your personal RRSP account at the appropriate time.
- 8) We will also make available to you professional outplacement counseling services. You may contact Human Resources at (416) 682-8262, for more information.

...

The above offer is open for acceptance until March 5, 1998. To accept the offer, please return the attached release and this letter, both signed by you, to the Human Resources Department, 222 Bay Street, Suite 1100, P.O. Box 196, Toronto, Ontario, M5K 1H6. Your acceptance must be indicated by dating, signing and having a person witness your signature and also sign the Release. If you do not respond by the above date, the offer may be withdrawn without further notice to you in which case, the Company will pay you the minimum statutory entitlement, or your contractual entitlement, whichever is greater. Payments pursuant to this offer will require

the Release to be signed.

We regret the circumstances that have required us to make this decision but we wish to thank you for your past efforts and contribution and wish you every success in your future endeavours.

Sincerely,

DEUTSCHE BANK CANADA/DEUTSCHE MORGAN GRENFELL CANADA LTD.

Douglas S. Byers Joan C. Brunelle

President & CEO Vice President & Director

I hereby accept this _ day of _____, 1998

Steven Fleckenstein

[18] The release referred to in the severance package read in part as follows:

RELEASE AND INDEMNITY

IN CONSIDERATION of the separation package and other good and valuable consideration set out in the letter dated February 23, 1998, attached hereto, the receipt and sufficiency of which is hereby acknowledged, I, for myself and for my heirs, successors, executors, administrators and assigns, Steven Fleckenstein hereby release and forever discharge Deutsche Bank Canada, or Deutsche Morgan Grenfell Canada Ltd. and their predecessors, any affiliated or related companies, or their successors, officers, directors, employees, agents and servants (hereinafter collectively referred to as the "Releasee") of and from any and all actions, causes of action, claims and demands for damages, that I have, have had or may have in the future relating to my employment with the Releasee, or the cessation of that employment with the Releasee.

AND FOR THE SAID CONSIDERATION I further agree not to make any claim, or to commence or maintain any action or proceeding against the Releasee for or arising out of my employment with the Releasee or the termination of my employment including any action, claim or grievance under the Employment Standards Act of Ontario, An Act respecting labour standards in Quebec, the Employment Standards Code of Alberta, the Employment Standards Act of British Columbia, Canada Labour Code or Canadian Human Rights Act, or any other similar legislation.

...

I HEREBY DECLARE that I have been given sufficient time to obtain legal advice prior to executing this Release and that I fully read the within Release and understood that it contains a full and final Release of all claims that I have or may have against the Releasee and that in the event that I should make any claim or demand or commence or threaten to commence any action, claim or proceeding against the Releasee for or by reason of any cause, matter or thing, the within Release can and will be raised as a complete bar and estoppel to any further action. I hereby voluntarily accept the offer contained in the letter dated February 23, 1998 for the purpose

of making full and final settlement and in satisfaction of all of the statutory and contractual obligations of the Releasee to me in respect of my employment and the termination of my employment, including any obligations for termination pay or severance pay.

IN WITNESS WHEREOF the undersigned has hereunder set his/her hand at ____, this __ day of ____, 1998.

Witness (must be signed) Steven Fleckenstein

- [19] Ms. Brunelle testified that DBSL designed the letter to Mr. Fleckenstein to identify those items at the outset which were unrelated to the severance package being offered. He was one of a limited number of employees who were not terminated immediately, but were offered employment to March 13, 1998 during the transitional period. This meant Mr. Fleckenstein would still be working for DBSL when his 1997 bonus of \$400,000 was paid. Ms. Brunelle said the offer of transitional employment and the payment of his 1997 bonus were unrelated to his severance package, and were therefore dealt with in the first four paragraphs of the letter. The reference to the "discretionary special payment of \$400,000" was intended to be in lieu of the 1997 bonus.
- [20] Ms. Brunelle testified that the actual severance package began after this at the fifth paragraph, with the eight items enumerated thereafter. While she acknowledged that some of the eight items, such as vacation pay, related to pre-existing obligations, she said they were part of the severance package because entitlement to them was at an end. The "discretionary special payment of \$33,526" referred to in paragraph 2 of the severance package was intended to be in lieu of any bonus due to Mr. Fleckenstein for 1998, pro-rated to May 1, 1998.
- [21] Mr. Fleckenstein testified that he took the letter of February 23, 1998 at face value. He understood the discretionary special payment of \$400,000 to be an extraordinary payment for the next nine months of 1998 based on his 1997 income of \$550,000. He said he thought it complied with the wording of his employment contract regarding future discretionary payments, as well as the assurances he had received from Mr. Jacobson in 1996 in the context of his request for a three year guarantee of compensation. Mr. Fleckenstein said he thought the second discretionary special payment of \$33,526 represented a bonus for January and February 1998, although he agreed the figure was low compared to his previous bonus levels.
- [22] Mr. Fleckenstein testified that it did not occur to him that the discretionary special payment of \$400,000 mentioned in his severance package was related to his 1997 bonus. This was something he had already earned and was due regardless of his severance. DBSL had no discretion with respect to the 1997 bonus owed and so he did not equate this with the discretionary special payment of \$400,000.

[23] Mr. Fleckenstein accepted DBSL's offer to work during the transitional period until March 13, 1998. He testified that after he received his severance package, he called DBSL's New York office and was told the \$400,000 representing his 1997 bonus would be deposited to his account on March 2, 1998. He did not have to provide the release for his severance package until March 5, 1998. On March 2, 1998 he checked with his bank to ensure the \$400,000 had been deposited. He then sought legal advice, and signed and returned the release to DBSL later that day with a covering letter acknowledging his acceptance of the severance offer and stating:

I ask you to deposit the discretionary special payment of \$400,000.00, together with a salary continuation and other amounts pursuant to your offer of February 23, 1998, to my bank account as has been the usual practice.

I acknowledge with thanks the recent deposit to my bank account of the minimum bonus amount pursuant to my employment letter of September 6, 1996.

[24] Mr. Fleckenstein agreed he had not written DBSL in 1997 to thank them for his 1996 bonus. He said he specifically mentioned the payment of the discretionary special payment of \$400,000 in this letter because it was a significantly larger amount than the others due to him in the severance package.

[25] DBSL admits that it received this letter through its usual channels. However, no one at DBSL replied to it. Ms. Brunelle speculated that their main concern in receiving the releases from the dismissed employees was to check their signatures, and she could not say if anyone had read the letter when it was received. Both Ms. Brunelle and Mr. Jenko, the other DBSL representative who testified at trial, indicated they did not see the letter until this litigation commenced, when it was found in Mr. Fleckenstein's file. Ms. Brunelle agreed it would have been appropriate for someone at DBSL to contact Mr. Fleckenstein on receipt of the letter and advise him he was mistaken in anticipating a second payment of \$400,000.

[26] Mr. Fleckenstein testified that the week after he sent the release he had four telephone conversations with Mr. Jenko, who worked in DBSL's human resources office in Toronto. In the first, he asked Mr. Jenko where his money was, and Mr. Jenko advised he would not get it until DBSL had his documents. When Mr. Fleckenstein told him they had been sent the week before, Mr. Jenko said he would look for them.

[27] Mr. Fleckenstein said he called Mr. Jenko a second time later that day. Mr. Jenko told him he had found the severance package, and said, "\$400,000 - I can see why you would be wanting that." He said he would look into it.

[28] Mr. Fleckenstein said he called Mr. Jenko a third time the following morning and asked where his cheque was. Mr. Jenko told him he would get it that day and send it by overnight mail.

- [29] Mr. Fleckenstein testified that the following morning Mr. Jenko called him and told him he would not be sending the \$400,000 because payroll said he had already received it. He disagreed with Mr. Jenko but did not argue with him. He hung up and sought legal advice. Mr. Fleckenstein said he was in shock, scared, and panicked as he had no job. He said that he was scared that he had not made it clear that the money was his.
- [30] Mr. Jenko testified that he recalled two conversations with Mr. Fleckenstein after March 2, 1998. In the first, Mr. Fleckenstein called and asked about his severance payment of \$400,000, and Mr. Jenko told him he would look into it. Mr. Jenko said he then checked with payroll, who told him Mr. Fleckenstein had received the \$400,000 on March 2, 1998 by direct deposit.
- [31] Mr. Jenko testified there was then a second call in which he told Mr. Fleckenstein he had received his \$400,000 and it should be in his account. Mr. Fleckenstein told him he was looking for his second discretionary special payment of \$400,000, and Mr. Jenko explained that there would be no second payment; the minimum guarantee bonus for 1997 and the discretionary special payment were one and the same. Mr. Jenko testified that Mr. Fleckenstein then laughed and said, "I had to try". They exchanged pleasantries, and Mr. Fleckenstein hung up. Mr. Jenko felt Mr. Fleckenstein understood the explanation and had accepted it.
- [32] Mr. Fleckenstein denied that he had laughed and said, "I had to try."
- [33] Mr. Jenko was familiar with Mr. Fleckenstein's severance package, and testified that he understood the items enumerated as 1 through 8 were a separate matter which Mr. Fleckenstein would receive on signing the release. The \$400,000 payment was not dependent on providing the release. He could not recall telling Mr. Fleckenstein that he would send a cheque for \$400,000 when the release was signed, but indicated that this would have applied to the entire package of items 1 through 8, which was a distinct issue to the \$400,000 payment. He assumed he meant that in order for an employee to receive everything described in the letter, he would have to sign the release. Mr. Jenko also testified that he understood that DBSL was paying the dismissed employees an amount in lieu of the bonus for 1997 that they would have received if they were still employed. To distinguish that from money due to them under their employment contracts, this was called a "special discretionary payment," as were other similar payments unrelated to the employment contracts.
- [34] Mr. Jenko said that he discussed his conversation with Mr. Fleckenstein with Ms. Brunelle. Neither of them discussed it again with Mr. Fleckenstein. Ms. Brunelle testified that she understood from their conversation that Mr. Jenko had addressed the situation satisfactorily, and Mr. Fleckenstein knew there would be just one payment and was not upset. She said she would have raised it again with him if there had been any remaining concern. As well, she spoke to Mr. Fleckenstein by telephone several times between February 23 and March 13, 1998, and he did not raise any questions about the interpretation

of his severance package or Mr. Jenko's explanation of it.

- [35] Mr. Fleckenstein agreed that following his last call with Mr. Jenko, he spoke with DBSL representatives periodically until March 13, 1998, but did not mention the \$400,000 payment again. He said he felt it was out of his control. He sought legal advice and concentrated on getting another job.
- [36] Mr. Fleckenstein testified that the Vancouver job market for people with his experience was poor in 1998. There were limited positions available, and they were filled with long-term incumbents. He ultimately negotiated an arrangement by which he purchased DBSL's equipment and leases in Vancouver, and set up a Vancouver office for Canada Trust. He started work with Canada Trust on March 23, 1998 at a base salary of \$150,000 with a minimum guaranteed bonus of \$150,000 during his first year. In following years the bonus was to be discretionary based on performance and profitability.
- [37] Mr. Fleckenstein received all of the payments due to him under items 1 - 8 of the severance package. However, some of these were adjusted to allow for the reduction of 50 per cent in accordance with item 2 since he commenced alternative employment before May 1, 1998.
- [38] Mr. Fleckenstein's position with Canada Trust required him to move to Toronto and establish an office there as well. He returned to Vancouver and in August 1999 Toronto Dominion Bank bought Canada Trust. Mr. Fleckenstein was dismissed in the course of that take-over. He received a severance package of \$330,000 in April 2000.
- [39] Mr. Fleckenstein commenced work with the National Bank in Vancouver on April 3, 2000 at a salary of \$120,000 plus participation in a quarterly bonus pool. He testified that the bank was presently not doing very well. As well, his moves to and from Toronto, as well as the circumstances of the Toronto Dominion/Canada Trust take over, had interfered with his account base and his sales have decreased. As a result, his income has decreased substantially from that which he received while working for DBSL.

ANALYSIS

- [40] The central issue is the interpretation of the severance agreement of February 23, 1998. Mr. Fleckenstein says the third paragraph of that document clearly offered him a discretionary special payment of \$400,000, distinct from and in addition to his 1997 bonus of \$400,000. DBSL says that on a proper construction of the agreement the \$400,000 payment was one and the same as Mr. Fleckenstein's 1997 bonus. Alternatively, DBSL argues that the agreement is ambiguous as to the nature of that payment, and extrinsic evidence should be considered to assist in interpreting the true intentions of the parties with respect to it.
- [41] The principles which govern interpretation of contracts have been usefully summarized by the B.C. Court of Appeal in *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) 102 at pp. 108-9:

The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words, viewed objectively, bear two or more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties: *Delisle v. Bulman Group Ltd.* (1991), 54 B.C.L.R. (2d) 343 (S.C.), approved by Chief Justice McEachern in *Bramalea Ltd. v. Vancouver School Board No. 39* (1992), 65 B.C.L.R. (2d) 334 (C.A.); *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Eli Lilly and Co. v. Novopharm Ltd.* (1998), 161 D.L.R. (4th) 1, (S.C.C.).

The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning: *MacMillan Bloedel Ltd. v. British Columbia Hydro & Power Authority* (1992), 72 B.C.L.R. (2d) 273 (C.A.); *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1997] 1 N.Z.L.R. 391 (P.C.).

- [42] Mr. Fleckenstein argues that the agreement is clear in its intention to provide him with an extraordinary payment of \$400,000, distinct from his 1997 bonus of the same amount. The words "discretionary" and "special" speak for themselves. It is a severance payment, paid at the discretion of DBSL because he has been wrongfully dismissed. If DBSL intended it to be his 1997 bonus, it would have described the payment as a bonus. The language of the contract does not allow it to be read as a payment in lieu of that bonus. Moreover, there was no discretionary element to his bonus. DBSL was obliged to pay him \$400,000 as a minimum bonus for 1997 under his employment contract. That obligation had nothing to do with his dismissal. DBSL would not offer him something he had already earned as part of a severance package.
- [43] Mr. Fleckenstein says his interpretation is supported by looking at the agreement as a whole, and the surrounding circumstances. DBSL paid him the \$400,000 representing his 1997 bonus before he was obliged to accept the severance offer and sign the release. However, in order to receive the discretionary special payment of \$400,000, the offer required him to sign a release. Mr. Fleckenstein says he did so, and DBSL is now obliged to pay him the discretionary special payment of \$400,000. Finally, Mr. Fleckenstein argues that \$400,000 would be appropriate severance pay for him, given his compensation level and the representations DBSL's representatives made to him with respect to job security in 1996 in order to induce him to work for DBSL.
- [44] DBSL argues that a proper construction of the severance agreement shows the parties intended the discretionary special payment of \$400,000 to refer to Mr. Fleckenstein's 1997 bonus. It argues that the agreement contained three distinct parts. The first is the statement that Mr. Fleckenstein will receive a discretionary special payment of \$400,000. The promise to pay this amount is made in clear unconditional language, indicating Mr. Fleckenstein will

receive this payment independent of the items dealt with in the balance of the letter. As well, the coincidence between the payment of \$400,000 and the amount of his 1997 bonus, as well as the fact that that bonus was to be paid shortly after receipt of the letter, made it clear that the payment and the bonus were one and the same. Finally, DBSL says it was not inconsistent to describe the bonus as a discretionary payment since the \$400,000 bonus set out in Mr. Fleckenstein's employment contract was a minimum amount, and DBSL had the discretion to pay him more.

- [45] DBSL argues that the second distinct part of the agreement is the offer to Mr. Fleckenstein to work through the transitional period to March 13, 1998, instead of being dismissed immediately. DBSL points out that this clearly required Mr. Fleckenstein to make an election to work during the transitional period before March 5, 1998 when the release was due. This aspect of the agreement is therefore independent of the severance package and release as well.
- [46] DBSL says the third distinct part of the agreement, which follows matters unrelated to the offer of severance pay, then sets out the actual severance package which is comprised of eight points offered in conditional terms. This part states DBSL is "prepared to make the following separation package available," indicating that acceptance is conditional, and payment will only be made on receipt of the signed release. It is left to the employee to decide whether to accept the package on those terms. The offer includes payment of salary until May 1, 1998, and a further discretionary special payment of \$33,526. DBSL argues that if the discretionary special payment of \$400,000 represented severance pay, these other payments are unnecessary and their purpose is unclear. Further, both of these additional payments were subject to a "claw back" provision if the employee mitigated by obtaining new employment before May 1, 1998. The discretionary special payment of \$400,000 is not subject to a similar provision, indicating that it is distinct from the severance package, and is not severance pay. DBSL says that severance pay is dealt with only in this third part of the letter agreement. It acknowledges that some of the eight listed items cover earned entitlements such as vacation pay which, like the 1997 bonus, were already owed to the employee. However, it says these matters are included as part of the severance package because their calculation and payment were triggered by the severance, unlike the 1997 bonus.
- [47] DBSL says this segmental interpretation of the agreement supports the conclusion that the discretionary special payment of \$400,000 was one and the same as Mr. Fleckenstein's 1997 bonus. Alternatively, it argues that the two conflicting interpretations put forward by the parties create an ambiguity and it is necessary to examine the extrinsic evidence available to determine the true intent of the parties.
- [48] I have concluded that the agreement is ambiguous with respect to the nature of the payment of \$400,000. I find the fact that the term "discretionary special payment" is used twice in the agreement with respect to different and apparently unrelated payments creates an ambiguity. While it seems reasonable to assume that these payments are linked in some

way, the agreement provides no definition of that term to assist in deciphering the nature of each payment. As well, I agree with DBSL that if the \$400,000 represented a severance payment, the role of the payments set out later in the letter becomes unclear. I also agree that having a "claw back" provision tied to those, but not to the \$400,000, makes it unclear whether the \$400,000 payment is severance pay. Finally, the coincidence in the amount and timing of the \$400,000 discretionary special payment and Mr. Fleckenstein's 1997 bonus leads to doubt as to whether that payment was independent of or the same as the 1997 bonus.

- [49] I therefore find that the severance agreement is capable of two interpretations insofar as the \$400,000 payment is concerned, and I turn to consider what extrinsic evidence is available to assist in determining its true nature. This will include evidence of the facts leading up to the making of the agreement, evidence of the circumstances which existed at the time it was made, and evidence of subsequent conduct of the parties to the agreement. With respect to subsequent conduct, the most useful evidence will be that of intentional acts of individuals which are related only to the agreement, and are consistent with only one of the alternative interpretations: *Canadian National Railways v. Canadian Pacific Limited* [1979] 1 W.W.R. 358 (BCCA) at pp. 372-373; *aff'd* [1979] 2 S.C.R. 668.
- [50] I will begin with the subsequent conduct of Mr. Fleckenstein, in particular, his final telephone conversation with Mr. Jenko. This troubles me since, if I accept Mr. Jenko's version of that conversation, I must find that while Mr. Fleckenstein recognized the potential for ambiguity in the term "discretionary special payment", he knew at the time that DBSL intended that term to cover his 1997 bonus. The question of which version of this conversation is correct raises a significant issue of credibility. Mr. Jenko says that when he told Mr. Fleckenstein that the discretionary special payment of \$400,000 was one and the same as his 1997 bonus, Mr. Fleckenstein laughed and said, "I had to try."
- [51] Mr. Fleckenstein denies this, and denies that it occurred to him at any time that the \$400,000 payment referred to in the letter agreement might be his 1997 bonus. He says Mr. Jenko is mistaken in recounting this conversation. He points out that Mr. Jenko has no notes of this telephone call, and says he could not recall precise details of their other discussions. He says the call occurred at a time when Mr. Jenko had many telephone conversations with employees about their severance packages.
- [52] Mr. Jenko was strenuously cross-examined about this call but his evidence remained unshaken. He agreed that his recollection of his calls with Mr. Fleckenstein is not precise but said he vividly remembers this part of their dealings because he taken aback by it. The statement showed Mr. Fleckenstein knew he was getting one payment of \$400,000 and was trying for an additional one to which he was not entitled.
- [53] I found Mr. Jenko's account of the telephone conversation credible. Mr. Fleckenstein was receiving one of the largest payments from DBSL. I accept that if Mr. Jenko heard Mr. Fleckenstein say something which showed he was knowingly trying to claim an additional

and unwarranted \$400,000 payment, this would stand out in Mr. Jenko's memory. I also note that Mr. Jenko discussed this telephone conversation with Ms. Brunelle immediately afterwards and she confirmed her knowledge of it at the time. I believe that discussing the matter with his superior immediately after the call would enforce Mr. Jenko's recollection of it.

- [54] As well, I weigh Mr. Fleckenstein's denial of that comment in the context of his conduct generally in response to the offer of February 23, 1998. In my view, a reasonable employee in Mr. Fleckenstein's circumstances who received a severance package and believed it did not cover a \$400,000 bonus payment payable within days would have made an immediate inquiry of Mr. Cass, Ms. Brunelle, or another human resources representative in Toronto to determine its status. Instead, Mr. Fleckenstein telephoned a DBSL employee in New York and asked when his bonus would be paid. He was told it would be directly deposited in his account on March 2, 1998. Early on March 2, 1998 he confirmed that the \$400,000 was in his account, and then sought legal advice. Later the same day he signed the release and returned it to DBSL with a carefully worded letter in which he thanked DBSL for payment of his 1997 bonus, but did not expressly mention two \$400,000 payments. He also acknowledged he did not write a similar letter of thanks for his 1996 bonus the year before. Moreover, Mr. Fleckenstein did not dispute Mr. Jenko's advice that the \$400,000 special discretionary payment was in fact his 1997 bonus. He testified that after the call, he was scared because he had not made it clear to Mr. Jenko that the money was his. However, if that was so, the logical response would have been to call Mr. Jenko back, or speak to someone else about what Mr. Fleckenstein evidently thought was a serious misunderstanding. Instead, he spoke to no one at DBSL. Nor did he revoke the release he had provided. Between the final telephone call with Mr. Jenko and May 1, 1998 he accepted the payments and other terms set out in the severance agreement with DBSL.
- [55] This pattern of events as a whole leads me to conclude that when Mr. Fleckenstein received the letter of February 23, 1998, he realized that DBSL intended the discretionary special payment of \$400,000 to be his 1997 bonus. However, he also recognized the potential for ambiguity in the phrase "discretionary special payment", and took a series of careful steps to try and place himself in a position from which he could argue a more favourable interpretation. When Mr. Jenko confronted him directly with the fact that the \$400,000 payment was his 1997 bonus, Mr. Fleckenstein conceded that his position was unwarranted.
- [56] Dillon J. in *Zanatta v. Deutsche Morgan Grenfall Canada Limited*, [1998] B.C.J. No. 3039 (QL) (S.C.) heard a Rule 18A application involving one of Mr. Fleckenstein's colleagues who was also dismissed and was making an analogous claim against DBSL. While factual differences between the cases preclude direct application of her findings to Mr. Fleckenstein's circumstances, I nevertheless find her comments at paragraph 9 instructive:

The bonus amount was ascertained and payable as at the end of February 1998. No inquiry was conducted by the plaintiff as to the amount described as a 'discretionary special payment' even though the amount plus the bonus would have resulted in a severance amount considerably in excess of the termination payable under the employment agreement. This plus the coincidence of the amount itself should have put the plaintiff on notice to confirm any subjective view that he held about the nature of the payment.

- [57] In my view, Mr. Fleckenstein's evidence of how he interpreted the two discretionary special payments also sheds doubt on the validity of his position. He said that he thought the discretionary special payment of \$400,000 represented an extraordinary payment for the remaining months of 1998, based on his 1997 income of \$550,000, and he thought the discretionary payment of \$33,526 represented a "bonus" for January and February 1998. First, if he thought this second discretionary special payment was a bonus for work already done, why would he not assume that the term "discretionary special payment" in the context of the \$400,000 was also a past bonus? Second, on this interpretation, the \$400,000 amount would break down to a payment of about \$44,444 per month for the balance of 1998, while the \$33,526 would represent only \$16,763 per month for the first two months of that year. In my view, this large difference in the monthly payments sheds doubt on the plausibility of Mr. Fleckenstein's view that the two payments were to cover the calendar year of 1998.
- [58] Mr. Fleckenstein argues that extrinsic evidence with respect to DBSL's conduct supports his interpretation of the agreement in several respects. First, he says that DBSL's failure to respond to his letter of March 2, 1998 indicated its acceptance of his interpretation of the \$400,000 payment. I do not agree. DBSL admitted it received the letter in the ordinary course of business although its representatives could not recall reading it. Within a week of receipt, Mr. Jenko clearly told Mr. Fleckenstein that the interpretation he had set out in that letter was incorrect. I do not find Mr. Fleckenstein's unilateral interpretation in this letter to be of assistance to him in establishing his claim.
- [59] Second, Mr. Fleckenstein says that when he first called Mr. Jenko about payment of his money, Mr. Jenko told him he would not receive it until DBSL had his documents, referring to the release. Mr. Fleckenstein says this indicates the \$400,000 was subject to the release and formed part of his severance package, as opposed to his bonus. I am unable to agree. Mr. Fleckenstein testified that during this conversation he asked Mr. Jenko where "his money" was. He did not specifically refer to the amount of \$400,000. Mr. Jenko was clear in his evidence that, in his mind, the severance package itemized in the eight points was separate from the \$400,000 payment, and the latter was not dependent on receiving a signed release. While he acknowledged he may have said he would send the cheque when the release was signed, he testified that this would have applied to the entire package, since an employee would have to sign the release to get everything itemized in the severance letter.
- [60] Third, Mr. Fleckenstein argues that DBSL's documents clearly and consistently distinguished special discretionary payments from bonuses. He says his employment contract, correspondence and records concerning his 1996 bonus payment, and the payment records

for the 1997 bonus of \$400,000, all refer to a bonus. Only the severance documents refer to discretionary special payments. He says the latter must therefore be something different. If DBSL intended to use that term to describe a bonus, they should have used clear language to do so. As well, he points to the following evidence from Ms. Brunelle's examination for discovery:

294 Q Right. Now, tell me whether you agree with this statement: To distinguish discretionary special payments from the bonus payments under employee contracts, it was decided to call that amount, as well as other non-salary amounts, "discretionary special payments".

Is that true?

A Is it true that I said that?

295 Q Is that a true statement?

A That I said that?

I'm sorry. Is that what you're asking me?

296 Q Let's do it that way. Did you say that?

A That was - If you are reading from my affidavit, then that's what I would have said, yes.

297 Q And is it true? Is it a true statement?

A It is a true statement.

298 Q All right. And is it also true that the defendant made proposals to employees that were being let go that provided for amounts exceeding the contractual requirements in exchange for a release? Is that true?

A In terms of the description of the separation packages, we requested a release for the separation package.

However, those questions and answers must be considered in the context of the paragraph from her affidavit which was being put to her, which had been filed in the Zanatta decision. This reads:

The plaintiff was one of nearly 100 people across Canada whose employment was terminated by the Defendant and Deutsche Bank as part of their global restructuring. The terminations were coincident with the payment out of any bonuses to employees remaining in the employ of the Defendant. The Defendant made proposals to the employees that were being let go that provided for payment of amounts and provision of benefits at or exceeding their contractual requirements in exchange for a release. In the letters that went out to each employee being terminated, the compensation was broken down into separate categories, for example, salary continuation, benefits continuation, vacation pay, reimbursement of expenses and outplacement services. In addition to these categories of compensation on termination, an amount in lieu of the bonus they would have otherwise received around that time had they remained employed was also included in the proposals. To distinguish those payments from the bonus payments under employee

contracts, it was decided to call that amount, as well as other non-salary amounts, "discretionary special payments". (emphasis added)

[61] As well, counsel for Mr. Fleckenstein read in questions 285 and 286 from Ms. Brunelle's discovery:

285 Q Okay. My understanding of the approach you were taking to Mr. Fleckenstein and others at this time was to give them some compensation upon their termination. Is that true?

A Yes.

286 Q And your approach was to give them an amount in lieu of the bonus that they would have otherwise received had they remained employed. Is that true?

A Yes.

[62] On the whole of the evidence I find it clear that DBSL intended the term "discretionary special payment" to include payments in lieu of the 1997 bonuses for those employees who were being dismissed. Most of these employees were dismissed effective February 23, 1998, immediately preceding the time for payment of these bonuses, and so those payments were set out in the severance letter as "discretionary special payments." Mr. Fleckenstein's position was slightly different as he had the option to work through the transitional period, which he accepted. He was therefore still working for DBSL when his 1997 bonus was paid. However, that does not change the character of the discretionary special payment in his case. It represented his 1997 bonus of \$400,000.

[63] I accept the evidence of DBSL's representatives at trial that they chose to use the term "discretionary special payment" as a generic phrase to describe payments which were outside the salary and benefits owed under the employment contract, and intended it to cover a variety of items including these payments in lieu of bonuses. While one might wish DBSL had used clearer language to convey this, on all of the evidence, I find DBSL's intent consistent: the discretionary special payment of \$400,000 to Mr. Fleckenstein referred to his 1997 bonus.

[64] Finally, Mr. Fleckenstein argues that extrinsic evidence of industry standards with respect to severance payments, as well as Mr. Jacobson's representations to him about employment security in September 1996, support his position that it was reasonable to interpret the \$400,000 as being severance pay. He says that a \$400,000 severance payment would be within industry standards for someone with his experience and skills, pointing to the fact that he received a severance package of \$330,000 from Canada Trust in April 2000 after working for them for less than two years.

[65] These arguments must be looked at in the context of the employment contract between Mr. Fleckenstein and DBSL. It is clear from his letter to DBSL of March 2, 1998 that Mr. Fleckenstein was consulting that contract during these events. Paragraph 5(b) deals with his entitlement to severance pay on termination. The minimal payments available to him under that paragraph in my view would cause a reasonable person to make inquiries about the nature of a payment substantially in excess of those amounts.

[66] In considering Mr. Fleckenstein's arguments, I have in mind the rule of *contra proferentem*. The letter agreement was clearly drawn by DBSL and any ambiguity must be construed against it. However, that rule is insufficient to assist Mr. Fleckenstein in establishing his interpretation on a balance of probabilities, given my previous findings.

I find the extrinsic evidence available leads to a conclusion that the discretionary special payment of \$400,000 is properly construed as Mr. Fleckenstein's 1997 bonus. There is no doubt that DBSL intended this to be the case. While Mr. Fleckenstein may have perceived some ambiguity in the term "discretionary special payment," I find that he was aware DBSL intended it to mean his 1997 bonus, and he accepted the terms of his severance with that knowledge.

[67] Accordingly, I find that on a proper construction of the letter agreement of February 23, 1998, the reference to the discretionary special payment of \$400,000 was intended to refer to Mr. Fleckenstein's 1997 bonus. The parties are bound by their agreement and Mr. Fleckenstein is not entitled to a further payment of \$400,000 from DBSL. His action is dismissed.

[68] With respect to the counterclaim put forward by DBSL based on the release signed by Mr. Fleckenstein, this was not pursued at trial and unless counsel wish to make submissions to the contrary, I would dismiss it.

"K.E. Neilson, J."

The Honourable Madam Justice K.E. Neilson

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