
CANADA / JUDGMENT

Hall v. Quicksilver Resources Canada Inc.

2015 BCCA 291

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 291 Hall v. Quicksilver Resources Canada Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hall v. Quicksilver Resources Canada Inc.,

2015 BCCA 291

Date: 20150626

Docket: CA42218

Between:

Kenneth Andrew Hall

Respondent

(Plaintiff)

And

Quicksilver Resources Canada Inc.

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia,

dated September 18, 2014 (Hall v. Quicksilver Resources Canada Inc.,
Vancouver Docket No. S141640).

Counsel for the Appellant:

J. A. D'Andrea, Q.C.

L.M. Gill

Counsel for the Respondent:

M. Sheard

Place and Date of Hearing:

Vancouver, British Columbia

June 4, 2015

Place and Date of Judgment:

Vancouver, British Columbia

June 26, 2015

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Savage

Summary:

Plaintiff (P) was employed at a pulp mill owned by "Catalyst" for over 24 years. The mill was decommissioned and the site was eventually sold to the defendant for use as an LNG plant. Catalyst advised P in the fall of 2012 that his job at the site would be ending and offered to consider him for other positions in Catalyst, or to pay him "severance" after closing of sale of site. P seemed to opt for latter alternative and reached an agreement with Catalyst under which he received \$125,345. The parties referred to the payment as "severance" at various times but P asked that this word be deleted from the written agreement, and Catalyst complied. P also agreed to execute a release of liability in favour of Catalyst and did so upon receipt of his payment under agreement. Catalyst terminated his employment on closing of the sale and P began working for defendant in May 2013 until February 2014, when he was dismissed without cause. Summary trial judge found the payment rec'd from Catalyst had not been severance but was instead a "retention bonus", and that on the authority of *Sorel v. Tomenson Saunders* (1987), defendant was liable for damages for wrongful dismissal based on P's 25 years of service. He was awarded 18 months' pay in lieu of notice. Alternatively, judge concluded that if he was wrong finding P's employment had

been "continuous" since he started with Catalyst, P would have been entitled to seven months' notice.

Held: Appeal allowed. Despite the fact the agreement with Catalyst did not refer to severance, the substance of the agreement and the surrounding circumstances all suggested that it was a form of severance payment. The principle established in *Sorel* did not apply where the former business in which the employee worked was not sold as a going concern. Summary trial judge was clearly wrong in concluding otherwise and in finding release was invalid for lack of consideration. He also erred in his alternative conclusion that P was otherwise entitled to seven months' notice, which fell outside the usual range of 2-3 months for employees in similar circumstances. P is entitled to three months' pay in lieu of notice.

Discussion of *Prenn v. Simmonds*, *Sorel* and *Ansari v. BC Hydro*.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The plaintiff/respondent Mr. Hall was employed by the defendant/appellant ("Quicksilver") from May 25, 2013 to February 5, 2014, when his employment was terminated without cause. He received pay in lieu of one week's notice. He sued for wrongful dismissal, asserting that he was entitled to notice commensurate with the length of his service (over 24 years) to his previous employer, Catalyst Paper Corp. ("Catalyst"). In 2013, Quicksilver had purchased from Catalyst the site of the decommissioned Elk Falls pulp mill, where Mr. Hall had been employed all his working life. Quicksilver intended to use the site for the construction of an LNG plant.
- [2] After a summary trial, the trial judge found that the \$125,345 Mr. Hall had received from Catalyst on the termination of his previous employment had not been, nor had it included, "severance" pay; that Quicksilver had hired Mr. Hall "recognizing his past service"; and that accordingly, on the authority of *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987) 15 B.C.L.R. (2d) 38 (C.A.), he was entitled to pay in lieu of 18 months' notice from Quicksilver. Mr. Hall received damages of \$102,253.32.
- [3] Quicksilver appeals on several bases, including that the trial should have not proceeded as a summary trial. For the reasons that follow, I agree with the appellant that the trial judge did err in fact and in law, although it was in my view possible to decide the case summarily. I would allow the appeal, set aside the trial judge's order, and reduce Mr. Hall's damages to an amount equal to pay in lieu of three months' notice.

Factual Background

The Agreement

- [4] Many of the facts of the case are not disputed. Mr. Hall was 42 years old at the time of his dismissal. He has a high school education and had worked for Catalyst since 1989 at the site of its Elk Falls pulp mill near Campbell River. His last position was that of "Facilities Manager". Once the mill was decommissioned in 2011, he was the only employee remaining

on site. The trial judge described Mr. Hall's job as "important, highly specialized, and unique". He found that Mr. Hall had had responsibility for "things such as regulatory compliance, managing the various contractors on the site, site security and site safety, and importantly secondary effluent treatment". (Para. 6.)

- [5] It appears that Catalyst was close to reaching an agreement to sell the Elk Falls site to an unknown purchaser in the late summer of 2012. Evidently, one of the terms being discussed was whether a qualified person would carry on managing the site for the purchaser after the deal closed. On August 24, 2012, Mr. Boniferro, Catalyst's Vice- President, Human Resources, wrote to Mr. Hall as follows:

Ken, as you know, the company has entered into an agreement to sell the Elk Falls site. While the company is prepared to continue your employment and transfer you to an equal or greater position at another of our sites we understand you may wish to accept employment with the new owner of the Elk site. If that is the case, we would be willing to provide you with special payment based on the time remaining on our commitment to have you work in Elk Falls to the end of 2012 and the start date with the new owner of Elk Falls. Would you please let me know your intention so I can prepare the necessary documents for either option. Feel free to contact me if you have any questions or require further information.

- [6] On September 14, 2012, Mr. Hall replied to Mr. Boniferro, asking Catalyst to:

formally let me know what my options are.

- Transfer - To which Division, In what role & position and what are the details associated to the transfer package,
- "Special Payment" - Severance of my employment with Catalyst. With the permanent closure, sale of the property and inevitably my position eliminated, what does my Severance amount to considering my Company Service of over 24 years at the Elk Falls Div.

I am willing to meet and discuss options in a formal meeting if needed. [Emphasis added.]

- [7] On September 26, 2012, Mr. Boniferro wrote again to Mr. Hall, referring to a proposal that had been sent to him earlier by a Mr. Stepusin. Mr. Boniferro proposed the following "changes":
1. Your employment will terminate upon the completion of our 30 day contractual obligation to the new owner.
 2. You will be paid a lump sum equal to 14 months salary and benefits at the time of termination or on a mutually agreeable date in January 2013 if the termination date is in 2012 and if allowable under CRA rules.
 3. The company will take all reasonable steps to make the payment as tax efficient as possible.

4. You will execute the company's standard form of release.

I believe this is very close to what you have asked for with the exception of establishing a trust and specifying the exact termination date. [Emphasis added.]

- [8] Two days later, Mr. Boniferro forwarded the forms of agreement and release proposed by Catalyst. The agreement, which Mr. Hall referred to as the "Termination Agreement" in his correspondence, contemplated that his employment would terminate "upon the completion of our 30-day contractual obligation to the new owner"; that he would be paid a "lump sum severance payment [my emphasis] equal to 14 months' salary, pension contribution and employer health benefit costs at the time of termination or a mutual agreeable date"; that his acceptance of "this severance" would not preclude him from "accepting employment elsewhere nor are you required to mitigate your loss"; that Catalyst would take all reasonable steps to make the payment tax-efficient; and that Mr. Hall would execute the company's standard form of release when his termination became effective.
- [9] On October 2, 2012, Mr. Hall replied by email, saying he would sign the agreement, but had one question - "is it possible to remove or change the word "severance"? I'm considering my best options for the taxable portion." Three days later, Mr. Boniferro sent him another form of agreement from which the word "severance" had been removed and replaced with "payment". I set out the final terms below:
1. Your employment will terminate upon the completion of our 30 day contractual obligation to the new owner.
 2. You will receive payment of any outstanding vacation entitlement excluding STIP vacation at the time of your final regular pay.
 3. You will be paid a lump sum payment equal to 14 months salary, pension contribution and employer health benefit costs at the time of termination or on a mutually agreeable date in January 2013 if the termination date is in 2012 and if allowable under CRA rules.
 4. Acceptance of this payment does not in any way preclude you from accepting employment elsewhere nor are you required to mitigate your loss.
 5. The company will take all reasonable steps to make the payment as tax efficient as possible.
 6. You will execute the company's standard form of release.

[Emphasis added.]

Mr. Hall signed and returned the agreement (the "Agreement") on October 11, 2012.

The Release

- [10] Mr. Hall's evidence is that accompanying the form of agreement sent to him for his comments in September was a one-page release, which he refers to as the "Agreed Release", that contemplated his release of "all claims arising out of or in any way related to my

employment, or the termination of my employment with Catalyst". It was unsigned and dated the "___ day of January, 2013". Mr. Hall deposed that although he agreed to this release, he never signed it, "though I did sign the Completion Bonus Contract (which refers to the Agreed Release) on or around October 11, 2012". He gave no explanation as to why he did not sign the first form of release provided.

- [11] Another form of release was forwarded by a Ms. Bileski to Mr. Hall some months later - on May 27, 2013. By this time, the sale of Elk Falls to Quicksilver had completed and he was employed by Quicksilver. This release was slightly longer and wordier than the original form sent in September 2012, but was very similar in substance. It contained a general release of all claims against Catalyst Paper arising out of Mr. Hall's employment and the termination thereof, and included the following:

in particular, but without limiting the general nature of this Release, I release Catalyst Paper from any and all claims for damages for termination of my employment, loss of position, loss of status, loss of future job opportunity, the timing of the termination and the manner in which it was effected, loss of bonuses, loss of benefits, including life insurance and short and long term disability benefits coverage, claims pursuant to human rights or employment standards legislation and any other types of claims. [Emphasis added.]

The signed document (which I will refer to as the "Release") also contained Mr. Hall's acknowledgement that he had had an opportunity to obtain independent advice regarding the "Settlement" and had accepted it "for the purpose of making a full and final settlement of all claims described above."

- [12] Unlike the earlier version, however, the final release stated in its opening paragraph that:

I, Ken Hall, of , Campbell River in the Province of British Columbia, for and in consideration of the terms of the severance package as per the letter from Steve Bonifero dated September 28, 2012 (the "Settlement"), release Catalyst Paper in partnership of Catalyst Paper Corporation and Catalyst Pulp Operations (Limited) and each of Catalyst Paper Corporation, Catalyst Pulp Operations Limited, their employees, directors, officers, agents, [Emphasis added.]

- [13] Accompanying the release sent by Ms. Bileski to Mr. Hall on May 27, 2013, was a "Severance Election Form" under which he could elect to transfer part of his payment to his RSP as a "retiring allowance" for tax purposes. Mr. Hall wrote back to Ms. Bileski asking among other things "whether the severance would be transferred on June 15th?" (My emphasis.) It appears he received the payment on or about that date. (Soon after, he elected to deposit some \$14,000 into the RSP. We were referred to an Interpretation Bulletin issued by CRA which specified that a "completion bonus" does not qualify.)

- [14] The trial judge made the following observations concerning the Agreement and Release:

... The contract is signed by Hall sometime in October of 2012, and I accept Hall's evidence, because it is uncontradicted, that the contract had an attached release which he has attached to his affidavit. Hall says when he signed the contract, it had an attached release which is Exhibit F

to his affidavit. Hall calls this contract a retention bonus contract. He says he agreed to stay in consideration for a lump sum payment after any sale, as well as his regular wages ongoing. He says that the contract he signed in October of 2012 was the deal, a deal which he negotiated, and it is clear from the evidence before me that in negotiating the agreement the word proposed by Catalyst "severance" was removed from both the contract and from the release. That was the deal that Catalyst made with Hall to retain him; a deal in which the words "severance" did not appear in either the contract or in the proposed release.

I note that this assertion by Hall is not directly disputed by Steve Boniferro, a Catalyst human resource manager, who negotiated with Hall, though for reasons which will become clear, if there is a conflict between the affidavit of Mr. Boniferro and Mr. Hall, I prefer the evidence of Mr. Hall.

. . .

Quicksilver relies on a subsequent release signed by Hall and in that subsequent release the word "severance" is in it. But I note that this release is not what Hall and Catalyst earlier agreed to. Hall says he never agreed to that release when he signed the contract, and this is not disputed by Boniferro. Hall says that when he did sign the new release he was now employed by Quicksilver, he was anxious to get his retention bonus, and he signed the release without much thought or legal advice.

I note again that when the original contract was made the contract included a release form. There is in fact no new consideration provided to Hall by Catalyst for this new release.

I accept Hall's explanation as contained in his affidavit for signing the new release especially in light of the fact that I have serious concerns about the somewhat duplicitous actions of Catalyst which I will discuss shortly; but also because I am satisfied on the evidence that I believe, the better evidence, that the deal between Hall and Catalyst was in fact a deal for a retention bonus to keep Hall there, and the deal, when it was signed by Hall, had attached, as Hall swears, and as is not denied, a proposed release, none of which contain the word severance. And again I note there is no new consideration provided to Hall for this new release. [At paras. 30-1, 33-5; emphasis added.]

[15] With respect to Quicksilver's evidence, the trial judge noted that when the company had approached Mr. Boniferro about approaching Mr. Hall, Mr. Boniferro knew:

that he had negotiated with Hall and signed a contract, a contract which had an attached release. This was done in September and October of 2012. Mr. Boniferro knew that from his discussions with Hall and from the negotiations over the language of the contract that the word "severance" had been expressly removed from the agreement. Yet despite this it appears that Mr. Boniferro told Ms. Grinnell Price that Catalyst and Hall had agreed on severance; and they had not. [At paras. 40; emphasis added.]

[16] The judge rejected Mr. Boniferro's sworn statement that he had explained to Mr. Hall the payment he was to receive from Catalyst under the Agreement "included" any severance that he would be entitled to receive based on his length of service with Catalyst and that he

would be required to sign a release. (Para. 44.) The judge described Mr. Boniferro as "duplicitous" by reason of his having told Quicksilver that Catalyst had "resolved the severance issue" with respect to Mr. Hall. The judge was also critical of Mr. Boniferro for failing to explain why he told Quicksilver that "Catalyst and Hall had agreed on severance when they had not" and for failing to "justify and explain or show any consideration for the new release when the earlier release was agreed to." These were unusually strong findings of (lack of) credibility to be made on the basis only of affidavit evidence.

- [17] Ultimately, the Court found that the second (signed) Release was invalid because there had been "no severance aspect to the retention bonus negotiated by Catalyst and Hall." The judge concluded:

As there was no express discussion, between Quicksilver and Hall on the issue [of] continued employment, never mind a release or a notice of a refusal to recognize seniority or service. I conclude that when Quicksilver employed Brian Hall they did so in law, recognizing his past service. As such when he was dismissed I find, without cause, he was a 24- to 25-year employee. [At para. 49; emphasis added.]

Employment by Quicksilver

- [18] The sale of the Elk Falls site took some months to complete and, according to affidavit evidence filed by Quicksilver, it was not immediately informed of the termination arrangements made by Catalyst and Mr. Hall in the fall of 2012. On April 12, 2013, Mr. Hall wrote to Mr. Lindstrom at Catalyst, to advise that he had "put his name in the hat for the Fibre Coordinator [of Catalyst] position in Powell [River]" - a development not consistent with any commitment on his part to 'continue' working at Elk Falls upon the closing of the sale. Mr. Lindstrom wrote back to say he would keep Mr. Hall posted "on the sale process" but reminded him that "there is no severance [my emphasis] with taking another position in the company." Again according to Quicksilver's evidence, once it learned of Mr. Hall's interview for another position, it moved quickly with Catalyst's consent to contact Mr. Hall to discuss the possibility of employing him if and when the event the proposed transaction closed. Mr. Hall supplied his resume and related information to Quicksilver and by May 21, 2013, he wrote to Mr. Boniferro as follows:

I understand that QRInc has had discussions with Catalyst (you) regarding my future employment. They are making me an offer which would have me working for them as a QR employee starting May 25th. They believe that having me as an employee at the close date of the sale would be an advantage to them. I will be taking the offer home for review this evening and making the decision for tomorrow morning.

If I agree to the offer, can you walk me through the termination details from the Catalyst side?

- Severance pay-out timing and detail
- Benefits

Mr. Boniferro replied:

Hi Ken, I have advised them that they could employ you as soon as the deal closes but not before. If that were to be May 25th we would pay your severance within 30 days but most likely on the June 15th pay. Benefit coverage except for life insurance, LTD and STD would continue to the end of the month. They will need to advise us they are waiving our 30 day contractual obligation to them. If you need further info or detail please let me know. [Emphasis added.]

[19] Again, one wonders why Mr. Hall would have been mulling over whether he would stay on with Quicksilver if he understood the Agreement was a "retention" contract or that his employment was being "continued". Quicksilver had various discussions with Catalyst and received assurances that Catalyst was settling with Mr. Hall "completely" and that he "shouldn't be coming to [Quicksilver] with expectations of service recognition." Having obtained these assurances, Quicksilver wrote to Mr. Hall on May 21, 2013 offering him employment as "Superintendent, Elk Falls", at a salary of \$125,000 per year plus specified benefits. This offer was subject to the closing of the Catalyst/Quicksilver transaction on May 24, 2013. On May 22, Mr. Hall accepted Quicksilver's offer of employment by executing the letter agreement. The letter was silent as to any termination of Mr. Hall's new employment, whether with or without cause.

[20] The final event in this narrative took place on February 5, 2014, when Quicksilver terminated Mr. Hall's employment immediately and without cause. Quicksilver paid him the sum of \$2,403.85, being payment in lieu of one week's notice. Mr. Hall commenced this proceeding for wrongful dismissal by notice of civil claim filed on February 27, 2014.

Assessment of Damages

[21] The trial judge first assessed the damages payable by Quicksilver on the assumption that Mr. Hall's employment had been continuous since he had joined Catalyst in 1989. The judge considered the "Bardal" factors (see *Bardal v. Globe & Mail Ltd.* [1960] O.W.N. 253, 24 D.L.R. (2d) 140 (Ont. S.C.J.)), noting in particular the "unique set of job skills" associated with Mr. Hall's job and the difficulty of finding anyone else to do it; the fact he worked at what the judge viewed as an "isolated" location; his age; and length of service. The judge found that 18 months' notice would be reasonable. (Para. 54.) He found it unnecessary to consider a "double recovery" argument advanced by Quicksilver, again on the assumption that the amount Mr. Hall had received from Catalyst had been a "retention bonus".

[22] The trial judge found that it had been reasonable for Mr. Hall to turn down an offer of employment he had received post-dismissal, given its location and the fact the offered salary was about 70% of his earlier pay. Mr. Hall did accept a second offer, which he received after about six months of unemployment. The amount he had earned at that job during the 18-month notice period was credited against his damages for dismissal by Quicksilver.

[23] The trial judge also considered what would be an appropriate period of notice in the event he was wrong and Quicksilver was required to consider only the 8.5-month period of Mr. Hall's employment by Quicksilver. On this point, the Court again emphasized the "unique factual matrix" of Mr. Hall's skills and Quicksilver's need for those skills at the Elk Falls site. The judge observed:

... He was initially crucial to them for the purchase. Though the details of the regulatory requirements which Mr. Hall was responsible for are scant, the job description which is detailed, and the knowledge of government's concerns about environmental health hazards, about environmental clean-up, and about regulations related to toxic substances on industrial land, are all suggestive, frankly, that Quicksilver would likely not have been able to successfully complete and maintain its regulatory obligations it had assumed when it purchased the Elk Falls site absent Mr. Hall.

Additionally, I note that Quicksilver pursued him, having identified him as critical. They provided him with a significant increase in salary to keep him. [At paras. 64-5.]

[24] Referring to *Ansari v. British Columbia Hydro and Power Authority* (1986) 2 B.C.L.R. (2d) 33 (S.C.) and to *Ostrow v. Abacus Management* 2014 BCSC 938, he formed the view that the notice requirement should be increased to reflect "managerial responsibility" and the fact that Mr. Hall was "critical for the employer's needs." The judge's alternate conclusion was that Mr. Hall should have received damages for seven months' notice, or \$76,081.68.

On Appeal

[25] In addition to arguing that the case should not have been resolved summarily, the appellant asserts that the summary trial judge erred:

- (b) in making findings of fact based on conflicting Affidavit evidence alone without other supporting evidence before the Court, and in particular:
 - (i) by finding that the payment to Mr. Hall from Catalyst was a "completion bonus" and not a severance payment;
 - (ii) in failing to consider the evidence as to the agreement between Mr. Hall and Catalyst and the tax treatment of the payment from Catalyst;
 - (iii) by finding that the actions of Catalyst were "duplicitous"; and
 - (iv) by finding that it would have been difficult, if not impossible, for Quicksilver to find anyone else to perform Mr. Hall's role at the Property;
- (c) in finding that Mr. Hall's employment was continuous;
- (d) in finding the Release to be invalid;
- (e) in extending Mr. Hall's reasonable notice period on the basis of an irrelevant factor, namely how important Mr. Hall's job was to Quicksilver;

- (f) by failing to consider or not giving sufficient weight to the availability of similar employment when determining the reasonable notice period; and
- (g) by finding in the alternative that an employee employed for 8.5 to 9 months is entitled to 7 months' reasonable notice even though Mr. Hall obtained employment at Howe within 6.5 months of his termination from Quicksilver.

Most of the alleged errors stem either from the manner in which the Court interpreted the Agreement signed by Mr. Hall on October 11, 2012, or from the Court's application of *Sorel v. Tomenson Saunders*.

- [26] Dealing first with contractual interpretation (which is now to be treated as a matter of mixed fact and law), it is clear that the words of written agreements are not to be determined according to evidence of the parties' subjective intentions, but on an objective examination of the words used in the contract, interpreted in the "factual matrix" known to the parties at the time. A written agreement must be understood not in a vacuum but with a "knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating." (Quoted at para. 47 of *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 from *Reardon Smith Line Ltd. v. Hansen-Tangen* [1976] 3 All E.R. 570 (H.L.), at 574.) British Columbia courts have long admitted evidence of the "matrix of facts" to "see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances which the persons using them had in view." (*Prenn v. Simmonds* [1971] 3 All E.R. 237 (H.L.) at 240; see also *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997) 49 B.C.L.R. (3d) 317 (C.A.); *Ahluwalia v. Richmond Cabs Ltd.* (1995) 13 B.C.L.R. (3d) 93 (C.A.).) At the same time, the surrounding circumstances must not be permitted to overwhelm the words of a contract: see *Hayes Forest Services Ltd. v. Weyerhaeuser Co.* 2008 BCCA 31 and *Black Swan Gold Mines Ltd. v. Goldbelt Resources* (1996) 25 B.C.L.R. (3d) 285 (C.A.) at para. 19, and *Sattva* at para. 57.
- [27] If this proceeding had been between Mr. Hall and Catalyst, Mr. Hall's references to the Agreement as the "retention bonus contract" might be seen as evidence of his subjective intention that would not be properly admissible for purposes of construing the Agreement. The same might be true of the evidence of the negotiations that led to the Agreement. Evidence of this kind is generally not considered relevant and is therefore excluded: see *Prenn v. Simmonds* at 240-1. In this way, parties who form an agreement and reduce it to writing can be certain that the express terms thereof will be the 'final word' as to what was agreed. Otherwise, there is little point in having a written contract.
- [28] In this instance, however, we are not concerned with a dispute between the parties to the Agreement itself. Instead, the question in this case was how to characterize the payment made by Catalyst under the Agreement in order to determine whether Mr. Hall was compensated properly for his dismissal by a third party, Quicksilver. It, the defendant, was not privy to the Agreement. In these circumstances, the negotiations between Catalyst and Mr. Hall are of assistance in characterizing the Agreement and in particular, the nature of

the payment. As stated by G.H.L. Fridman in *The Law of Contract in Canada* (6th ed., 2011) at 445, "while it is not possible to admit parole or other extrinsic evidence to alter the contract by adding to or subtracting from its terms as written, such evidence may nevertheless be introduced to explain, without contradicting, the language of the contract, for example, by showing the true nature of the transaction or legal relationship of the parties." (Emphasis added; citing *Royal Bank v. Hale* (1961) 30 D.L.R. (2d) 138 (B.C.S.C.); *Canadian Fur Auction Sales Co. v. Neely* [1954] 2 D.L.R. 154 (Man. C.A.) and *Mabey v. Mansonville Plastics Ltd.* (1978) 24 N.B.R. (2d) 689 (N.B.Q.B.).) Perhaps on this basis, the evidence was not objected to by counsel below or in this court.

- [29] The trial judge reviewed at some length the "factual matrix" surrounding the making of the Agreement, as I have above. He gave a great deal of weight to the fact that although the parties themselves referred to the making of a "severance payment" in their oral discussions, when the word "severance" appeared in the proposed written contract, Mr. Hall requested that it be replaced with something else, and Catalyst accommodated this request. He explained that he wanted to keep his "options" open for tax purposes and this evidence was not challenged. Did the resulting accommodation by Catalyst reflect a change in the parties' intentions regarding the payment of severance to Mr. Hall? In my respectful view, the answer to this question must be 'no'. The parties had no discussions that would suggest such a change and indeed as I have noted above, Mr. Hall himself continued to use the word "severance" in reference to the payment he received, in correspondence with Catalyst. More importantly, the terms of the Agreement continued to reflect a termination arrangement.
- [30] The trial judge also seems to have assumed that the Agreement must be either a "retention" agreement or a "severance" agreement, but that it could not be both. But there is no reason in law or principle why Mr. Hall could not have agreed to stay on at the site until the sale closed and to accept 14 months' pay in lieu of notice for his termination in one written contract. The reference in Mr. Boniferno's email to making "special payment based on the time remaining on our commitment to have you work in Elk Falls to the end of 2012 and the start date with the new owner" would appear to support the "retention" idea. However, the termination aspect assumed primary importance in the parties' subsequent discussions and in the final Agreement - notwithstanding the replacement of "severance" with "payment". Again, Mr. Hall continued to use the word "severance" before and after he executed the Agreement.
- [31] In my respectful view, then, the trial judge was clearly wrong in finding that the deletion of the word "severance" from the first draft of the Agreement somehow transformed it into a "retention" or "continuation" agreement. The "factual matrix" is simply inconsistent with the Agreement's being anything other than primarily a termination agreement, as are the terms of the Agreement itself. It makes no mention of Mr. Hall's remaining after the completion of the 30-day "contractual obligation [of Catalyst] to the new owner." It contemplates a "payment" equal to 14 months' salary and benefits obviously in line with what would normally be payable on a dismissal. It clarifies that Mr. Hall will not be required to mitigate

his loss - a provision that would not be necessary in a "retention" agreement. This view of the Agreement is consistent as well with what Catalyst told Quicksilver about the Agreement; with the evidence of Mr. Boniferro, of whom the trial judge was so critical; and with Mr. Hall's payment of part of the proceeds into an RSP as a "retiring allowance" for tax purposes.

[32] The second pillar of the trial judge's reasoning was his interpretation of *Sorel v. Tomenson Saunders*. In that case, Chief Justice Nemetz for the Court summarized the applicable law as follows:

1. When a purchaser acquires a business as a going concern, there is an implied term in the contract of employment between it and those employees continuing in the service of the business, that the employees will be given credit for years past service with the vendor for purposes of such incidents of employment as salaries, bonuses and notice of termination.
2. This implied term may be negated by an express term to the contrary. In other words, the purchasing employer may, at his option, advise the employees that he does not intend to give them credit for past services to the vendor. If this is done, the employees have the option of entering into the new contract of employment on these terms or of declining to work for the purchasing company and suing the vendor for wrongful dismissal and damages in lieu of notice.
3. Where the new employer does not advise the employees that he is unwilling to contract on the basis that the employees have credit for past years of service, the employer is deemed to have contracted with the employees on the basis that the employees will be given such credit. (At 40-1; emphasis added.)

The Chief Justice added that the purpose of implying the term is to:

prevent employees from being faced with the unjust result that after years of employment with the new employer and after lapse of any rights to notice they might have against their former employer, they find themselves faced with the proposition that they lose the benefits arising from their years of employment prior to the take-over. [At 41.]

[33] The trial judge observed in his discussion of *Sorel* that Catalyst's sale of the Elk Falls site was best characterized as an "asset sale with an ongoing business or responsibility associated with it." (Para. 19.) With respect, the principle for which *Sorel* stands does not depend on the form of sale, but on whether the business in which the employee is working is intended to be carried on as a going concern after the sale.

[34] I agree with counsel for the appellant that *Sorel* is entirely distinguishable from this case. Quicksilver did not acquire a business as a going concern: Catalyst's pulp mill had long since ceased operation and had been decommissioned some months before Catalyst and Quicksilver even began their discussions for the sale and purchase of the site. Mr. Hall was given full credit in the termination payment for his 24-5 years of service to Catalyst; and indeed, he received something extra - the right to seek employment elsewhere during the

notice period and the assurance that he need not mitigate his damages during that period. Finally, no implied term was necessary in this case to prevent Mr. Hall from being faced with the "unjust result" of losing the benefits arising from his years of employment prior to the sale. He was fully compensated on the basis of his 24-5 years of service, even though he did receive notice of his termination (which he chose over a transfer to another job at Catalyst) some months before his employment with Catalyst ended.

- [35] I conclude, then, that the trial judge made a palpable and overriding error in finding that the payment received by Mr. Hall from Catalyst was a "completion bonus" rather than a severance payment; in failing to give effect to the evidence that explained why "severance" was deleted from the final form of the Agreement; and in finding that Catalyst's actions were "duplicitous". The judge also erred in law in ruling that it was an implied term of Mr. Hall's employment contract with Quicksilver that he would on termination be given credit for his service to Catalyst since 1989.
- [36] With respect to the invalidity of the Release, I do not agree that "fresh consideration" was necessary to support the new form of release or that it was otherwise invalid. We were not referred to any evidence to suggest that the form signed by Mr. Hall was not a "standard form" of Catalyst - which he had agreed to sign several months before - and Mr. Hall's past service had been fully recognized in the payment he received. He proceeded to sign the Release in consideration of the "settlement" and did not plead non est factum or seek rectification. The use of the word "severance package" in the preamble to the Release was, in my view, of no substantive importance in the circumstances of this case.
- [37] I turn finally to the question of what notice should have been given by Quicksilver to Mr. Hall on the termination of his employment in February 2014, assuming his employment had not been continuous since 1989 but had commenced in May 2013. The seminal authorities in this province are Bardal and Ansari, supra.
- [38] In Bardal, Chief Justice McRuer rejected the then prevailing notion that in cases of indefinite hiring, the appropriate notice period was generally six months. Instead, he noted:

In every case of wrongful dismissal the measure of damages must be considered in the light of the terms of employment and the character of the services to be rendered. In this case there was no stipulated term during which the employment was to last. Both parties undoubtedly considered that the employment was to be of a permanent character. All the evidence goes to show that the office of advertising manager is one of the most important offices in the service of the defendant

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant. [At paras. 10, 21.]

[39] In *Ansari*, Chief Justice McEachern refined these very general principles somewhat, observing that:

While the character of employment and levels of responsibility are important, it does not appear to me that the courts have been seriously concerned with the minutia of the employment being terminated or with the specific competence or incompetence of the employee. Perhaps proceeding on the biblical direction that "the labourer is worthy of his hire", the law does not seem to treat special competence or the lack of it as a particularly important factor in the determination of the notice period, although Courts have occasionally commented upon the performance of the dismissed employee

Further, it does not appear useful to attempt nice distinctions between the comparative employment functions of these employees. Thus, in my view, it is not necessary minutely to investigate the degree or level of specialization of these plaintiffs. It is enough to observe that they are all highly skilled graduate engineers whom B.C. Hydro was satisfied to employ in responsible positions. Those factors alone are sufficient to entitle these employees to a longer notice period than in many other cases.

Also, I do not consider it useful to make distinctions between these professional employees who did or did not supervise other employees. Such a concept is pervasive in some disciplines, but it is not a particularly relevant consideration when employees are professionally skilled and are employed because of such skill

The next important factor in fixing the period of reasonable notice is length of service. This is the only important factor that does bear directly upon the employee's prospects for future employment although long service may add materially to the age of the employee which does bear upon employment possibilities.

For reasons which are largely subjective and which I would not presume to disturb, the law requires a longer notice period for a long-term employee even though discharged employees of the same age, skill and responsibility suffering under the same economic factors must be assumed to require an equal period to obtain equivalent employment. The reasons for this anomaly may be that a long-term employee has a moral claim which has matured into a legal entitlement to a longer notice period. [At 38-9.]

[40] The Chief Justice also acknowledged that the economic circumstances that might have made dismissal necessary or that might affect the likelihood of finding alternative employment remained factors to be considered, although he emphasized that as stated in *Hunter v. Northwood Pulp and Timber Ltd.* (1985) 7 C.C.E.L. 260 (B.C.C.A.), the length of notice is not equivalent to the period required to find new employment. The fact that an employee plays an "important" role in the employer's corporate structure was not said to be a factor, presumably because it is reflected in the rate of pay.

- [41] In the case at bar, the trial judge in reaching his "alternate" conclusion as to reasonable notice, emphasized the importance of Mr. Hall's "skill set" to Quicksilver at the time it took over the site. Indeed, this was the main factor considered and little attention was given to the fact that the prevailing "economic circumstances" appeared to be quite favourable (Mr. Hall found new employment fairly quickly), or to the fact that although he had a "unique" skill set, Mr. Hall could not be described as having management or executive duties. The importance of Mr. Hall's duties seems to have been considered as a factor that added to his damages, erroneously in my opinion.
- [42] Of course, courts of law must also look to what awards have been given in similar cases. In this regard, Ms. Gill referred us to a number of cases involving employees with short-term periods of service in which notice periods of two or three months were selected: see especially *Jimmo v. Chief Hauling Contractors Ltd.* [2009] C.L.A.D. No. 129 and *Allen v. Assaly Holdings Ltd.* [1991] 34 C.C.E.L. 81 (Ont. S.C.J.) We were also referred to this court's decision in *Saalfeld v. Absolute Software Corp.* 2009 BCCA 18, in which a "norm" of five to six months' notice in "short service cases for employees in their thirties or early forties whose function is significant for their employer, but not one of senior management," was rejected. (Para. 15.) The Court suggested that British Columbia precedents indicated a range of two to three months for a nine-month employee in the shoes of the plaintiff in *Saalfeld*.
- [43] Counsel for Mr. Hall responded that reasonable notice is a discretionary finding that attracts a high degree of deference and that the trier of fact is generally in the best position to make such an assessment. On this point, Mr. Sheard cited *Marchi v. Superior Bakery (1985) Ltd.* 1999 BCCA 621. In that instance, the plaintiff was 50 years old when he was dismissed as the manager of a bakery in the context of a "very limited market" for bakery production managers. The Court said it would interfere with a trial judge's finding only if the award was outside the range of reasonableness. Since the plaintiff had been employed for some 24 years, a notice period of 16 months was found not to be unreasonable.
- [44] In this case, the trial judge's choice of seven months as the appropriate period of notice did fall outside the usual range, which as we have seen is generally around two to three months in cases involving short periods of employment and skilled employees who are in their forties. I would allow the appeal on this ground as well.
- [45] In the result I would allow the appeal, set aside the trial judge's order and grant judgment to Mr. Hall for damages in lieu of three months' notice.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Mr. Justice Savage"

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