

CANADA / JUDGMENT

Honey v. Star-FM Radio Inc.

2000 BCSC 832

COURT

Supreme Court of British Columbia

DECIDED

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2000 BCSC 832

Citation:

Honey v. STAR-FM Radio 2000 BCSC 832

Date: 20000529

Docket No.:

C985436

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ERIC G. HONEY

PLAINTIFF

AND:

STAR-FM RADIO INC., FRASER VALLEY

BROADCASTERS, LTD. AND WILLIAM COOMBES

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE BEAMES

Counsel for the Plaintiff: Murray B. Blok

and David Crerar

Counsel for the Defendants: Don P. Baron

Dates and Place of Trial: February 8, 9, 10, 11,

15, 16, 17, 18, 2000

Vancouver, B.C.

March 7, 8, 2000

Kelowna, B.C.

INTRODUCTION

- [1] This case is essentially a wrongful dismissal action. The plaintiff, Eric G. Honey ("Honey"), claims against the corporate defendants, Star-FM Radio Inc. and Fraser Valley Broadcasters, Ltd. (collectively "STAR-FM"), for breach of contract and negligent or fraudulent misrepresentation, and against the individual defendant, William Coombes ("Coombes"), for negligent or fraudulent misrepresentation.
- [2] In brief, Honey claims that he was hired by Star-FM for a fixed three year term and that he was wrongfully terminated after 11 months. Honey and Star-FM executed a written employment agreement, providing that the term would be for three years, subject to termination provisions, both for cause and no cause. Honey claims that the employment agreement was part written and part oral, and that the parties agreed that STAR-FM would not rely upon the no cause termination provisions contained in the written employment agreement. Alternatively, he claims that the defendants made false representations which induced him to enter into the employment agreement, to his detriment.

THE ISSUES

- [3] This case will revolve, to a great extent, around factual issues with respect to whether or not certain alleged oral representations were made by Coombes, personally and on behalf of STAR-FM. The specific representations which Honey claims were made to him by Coombes are as follows:
1. STAR-FM had been given approval to put a transmitter on Mount Seymour which would allow it full access to the Vancouver radio market;
 2. STAR-FM had research done that showed that this venture was a long term project (3 to 5 years) and STAR-FM was committed to this time frame;
 3. STAR-FM had the financial resources to see the project through;
 4. STAR-FM would engage Honey to do the morning show for a period of three years, although this would be the first of many contracts;
 5. A three year commitment from Honey was necessary to realize the expected financial results and the defendants were committed to a three year plan of operations; and
 6. The termination provisions in the written employment agreement meant nothing and should be ignored by Honey.
- [4] If I find that some or all of the alleged representations were made, then the legal issues will be as follows:

1. Is the evidence of the oral representations admissible, or should it be excluded pursuant to the parol evidence rule?
2. Were the oral representations warranties, or alternatively, did they constitute a collateral contract?
3. Was the termination of the plaintiff a breach of contract or of warranty?
4. Were the oral representations negligent, or alternatively, fraudulent misrepresentations, giving rise to a claim in tort?
5. If there is a claim in tort, is Coombes personally liable?
6. Does the fact that Honey cashed the cheque provided to him by STAR-FM as his severance pay give rise to a defence of accord and satisfaction?
7. If Honey establishes a claim in contract or tort, did he properly mitigate his damages?
8. If Honey establishes a claim in contract or tort, what damages should be awarded?

THE FACTS

- [5] The plaintiff is currently 52 years old. He has been employed in the broadcasting industry all his working life, starting with television in eastern Canada, and then moving to radio in Vancouver in the late 1960's. From 1972 to 1997, he was employed at a radio station in Vancouver, known as CKNW, primarily as a radio show host. In his later years at CKNW, Honey was the host for a show that was described at trial as the afternoon drive show, broadcast between the hours of 3:00 and 5:00 p.m., Monday to Friday. The afternoon drive show was the second most important show for CKNW, the most important show being the morning show. For some years prior to 1997, Honey was the relief person for the morning show, and his career aspirations included becoming the regular morning show host for CKNW. He was described as having been the heir apparent to CKNW's long time morning show host.
- [6] In 1997, CKNW decided to change the format of the afternoon drive show to an "all talk" format and on April 7, 1997, Honey was advised that he would be taken off the air effective May 31, 1997. He was advised that his time slot would be filled by two other CKNW employees who would deliver the new format. Honey was advised by representatives of CKNW that he still had employment, that consideration would be given to what his new duties would be and that it was not their intention that Honey would leave CKNW. Between April 7 and May 31, 1997, there were written communications between Honey and other people at CKNW, as well as some informal meetings, with respect to possible job duties for Honey after May 31. Honey was not satisfied with the proposals he was receiving. However, he was receiving reassurance that an appropriate job, with the same pay and benefits, would be created for him in due course.

- [7] On May 30, 1997, Honey's immediate supervisor wrote him to confirm that his position as on-air radio host had been terminated, and that his contract, due to expire on August 31, 1997, would not be renewed. The following is a portion of that letter:

Pursuant to Article 3.1 of your current employment agreement, we wish to notify you that CKNW Radio will not be renewing your current employment agreement which expires on August 31st, and that you should feel free to enter into negotiations with another radio station with a view to finding a new employer.

As a result, we are exercising Article 7.7, to terminate this agreement prior to August 31st, by providing you with six months pay in lieu of notice. Since your last day of employment is May 31, 1997, you will receive a cheque for six months' salary.

- [8] Honey had had written employment agreements with CKNW for some years. The agreements, for several years leading up to 1997, had been for one year terms. It was Honey's evidence that the written agreement was not considered by either himself or CKNW to be particularly relevant or applicable to his employment situation. Notwithstanding those views, the agreements were annually reviewed, renewed and signed, although in the case of the 1996-97 contract year, it is clear that the agreement was not signed by either party until mid-January, 1997.

- [9] Article 7.7, which was referred to in the CKNW termination letter, read as follows:

Either party may terminate this Agreement without just cause by giving the other party six months notice in writing.

- [10] On receipt of this letter, seemingly terminating his employment completely, Honey sought advice from a labour consultant friend. He was advised by that person to speak to someone more senior at CKNW than Honey's immediate supervisor to clarify his position, and he did so. He was again reassured that he had a position at CKNW, with duties yet to be defined. He was offered the opportunity to take the summer off, with full pay, with the intention that he and representatives of CKNW would continue to work out a job description for him.
- [11] While these developments were taking place, it was public knowledge that Honey was being taken off the air by CKNW. STAR-FM, a radio station based in the Fraser Valley, with transmitters in Abbotsford and Chilliwack, was in the process of developing a new strategic plan. This new plan had its genesis in an approval STAR-FM had received from the Canadian Radio and Television Commission ("CRTC") to install a third transmitter on Mount Seymour. This new transmitter would significantly improve the clarity of STAR-FM's radio signal in the Greater Vancouver Regional District ("GVRD") and in the western reaches of the Fraser Valley. For approximately one year prior to the spring of 1997, STAR-FM had been planning changes to its programming in hopes of increasing its number of listeners in Vancouver and the GVRD, while continuing to serve its existing Fraser Valley audience.

- [12] Barrie McMaster ("McMaster"), the vice-president of STAR-FM, had worked with Honey in the past. When he heard that Honey was being taken off the air by CKNW, he decided to approach Honey about joining STAR-FM. He started making calls to Honey prior to May 31, 1997, but had no success in reaching him. Finally, Honey and McMaster spoke, and arranged for a meeting on June 9, 1997, at the Hotel Vancouver. The meeting was to include Honey, McMaster, and Coombes, the president of STAR-FM. This meeting occurred shortly after Honey had met with his labour consultant friend, and then with the president and general manager of CKNW.
- [13] Honey arrived at the Hotel Vancouver, and told Coombes and McMaster that his advisors had told him he should not be seen talking to anyone until he had finished his discussions with CKNW. Honey testified that he made that up, as he felt it was more socially acceptable to say that than to say, in fact, that he just was not interested in talking to the people from STAR-FM at that time. Coombes and McMaster assumed, logically in my view, that Honey's statement was in reference to negotiations for a severance package from CKNW. The meeting ended, but a few days later, another meeting was set up for Coombes, McMaster, and Honey in Abbotsford, in a meeting room in a hotel.
- [14] At the meeting, which took place June 14, 1997, Coombes gave Honey information about STAR-FM and its background, including information about the CRTC approval to put a third transmitter on Mount Seymour, and the resulting potential for STAR-FM to attract a larger Vancouver audience. He then produced a non-disclosure agreement, which he told Honey would have to be signed before any discussion of STAR-FM's specific plans could occur. Honey signed the agreement, which was kept by Coombes, and the discussion moved to the plan which STAR-FM had to take advantage of this new potential. While no specific job offer was made at this meeting, it became clear that Coombes was interested in employing Honey in an on-air capacity, and particularly as a morning show person, the most important and high profile radio time.
- [15] There is some issue between the parties as to precisely what was said at the meeting. I accept that Coombes asked Honey what it would take to get Honey to join STAR-FM, and Honey responded with \$160,000.00. I also accept that there was some discussion that the plan to expand significantly into the Vancouver market was one that would take several years to bear fruit. I am satisfied that Honey was told that STAR-FM had received the advice of a consultant and understood that it would take at least three years to realize the full goal of the expansion plan. I find that Coombes told Honey that STAR-FM was committed to seeing the plan through. I accept that Honey, at some point during the meeting, advised Coombes and McMaster that he would need a serious commitment, in the nature of three to five years, before he would consider leaving CKNW.

- [16] There is also an issue as to whether Coombes told Honey specifically that STAR-FM had its bank's full support for the project, as Honey testified, or that STAR-FM did not have deep pockets, as Coombes and McMaster testified. I have concluded that Coombes was projecting a positive and enthusiastic attitude about STAR-FM's financial wherewithal to finance the project of expansion of its Vancouver market, but with the clear caveat that STAR-FM was a small company without deep pockets.
- [17] At the conclusion of the meeting of June 14, 1997, both Coombes and Honey were interested in pursuing further discussions, although Coombes thought it unlikely that STAR-FM could pay the kind of remuneration Honey was looking for. Coombes had the impression, which I find was accurate, that Honey "really really wanted to do a breakfast show that could be heard in Vancouver". It was understood that Coombes would consider whether or not STAR-FM could offer Honey the kind of salary that Honey had indicated he would be looking for and then get back to Honey.
- [18] The next meeting involving the parties was a meeting on June 17, 1997, between Honey, Coombes, and McMaster, at Honey's residence. Honey's wife was present for the beginning of the meeting and for the end of the meeting, but not for the majority of the meeting during which business was discussed. There is again some issue as to what occurred at this meeting, although the parties take a common position with respect to parts of the meeting.
- [19] Coombes testified that he took with him to the meeting an outline, or rough agenda, of the issues he wished to cover during the meeting, and that he generally followed the agenda. That agenda is included in the parties' common book of documents. Included in the list of items to be discussed were an in-home broadcast link (as the first item on the agenda), an adjustable income over three years with the intention of making the overall compensation, by year three, comparable to that paid to other morning hosts "in the city" and items to be covered in an employment agreement, including "termination proceedings (sic) - both ways plus right of first refusal".
- [20] The divergence in the evidence between the plaintiff, on one hand, and Coombes and McMaster, on the other, is essentially two-fold. Firstly, Coombes and McMaster testified that the discussion between themselves and the plaintiff on June 17, 1997 included the topic of termination provisions in an employment agreement, whereas the plaintiff denies any such discussion. Secondly, Coombes and McMaster testified that the issue of a home studio was discussed with the plaintiff early in the meeting, and before they were taken on a tour of the plaintiff's home by the plaintiff and his wife. The plaintiff testified that the first time the home studio came up was while the parties were on the tour. His evidence is somewhat collaterally supported by Mrs. Honey, who testified that the plaintiff appeared shocked when the suggestion was made while the tour was taking place.
- [21] I will deal first with the issue of whether or not there was discussion of an employment agreement including a mutual termination provision. Based on the evidence before me, and on my observations during the trial, I am satisfied that Coombes is a person who thrives on

detail and organization, at least with respect to legal matters such as contracts. He made notes in advance of the meeting of June 17, and other notes in connection with planned telephone discussions concerning the draft employment agreement. All three witnesses confirm discussion of the situation of another radio personality in Vancouver with respect to termination processes, or lack thereof, in his contract which became a subject of some of his radio broadcasts. The defendants' witnesses testified that that discussion was in the context of discussing and mutually agreeing that a three month termination clause was appropriate for the parties in this case. It is, in my view, probable that the plaintiff was still maintaining a hope that he might someday be offered the morning show at CKNW which he had coveted for a significant number of years. That being the case, the mutual termination procedures would have benefited the plaintiff as well, if such an offer had been made. On all of the evidence before me, I accept that the issue of mutual termination provisions was discussed at the June 17 meeting, in the context of an employment agreement for the plaintiff, as testified to by Coombes and McMaster.

- [22] Similarly, I am satisfied, notwithstanding Mrs. Honey's perception that the plaintiff was shocked, as she was, when the home studio issue arose during the course of the home tour, that in fact that issue had been discussed by Honey, Coombes, and McMaster early in the meeting. Coombes testified that there was a discussion of a basement location, and that he was told and shown that there was only something more akin to a crawl space, which he was able to describe, including its location, in his testimony. That evidence had a real ring of truth to it, and I accept that as confirmation that the discussion concerning a home studio occurred early. I have concluded that the plaintiff's strenuous denial of that early discussion must relate to some communication between Honey and his wife shortly after the meeting.
- [23] Following the meeting of June 17, 1997, the parties exchanged e-mail messages and then a meeting was set up between Honey and his wife and McMaster and his wife for June 22, 1997, for the purpose of touring the plaintiff through the defendants' facilities in Abbotsford and Chilliwack. Very little of consequence to this action occurred during the meeting and tour. However, I am satisfied, on the evidence before me, that the plaintiff was interested in keeping his discussions with the defendants secret, and that the defendants shared that interest. I am also satisfied that Honey conveyed to McMaster and McMaster's wife that he had decided to leave CKNW.
- [24] The next event of significance between the parties was that Coombes, using a draft employment agreement he had obtained, prepared a draft agreement and faxed it to the plaintiff for review. The evidence does not establish the precise date the draft agreement was faxed, although it is clear that it was faxed on or before June 26, 1997. Coombes believed that he faxed the agreement on June 23 or 24, 1997, and I conclude that he is likely correct. On June 26, 1997, the draft agreement was discussed, over the telephone, by Coombes and the plaintiff. I find, notwithstanding the plaintiff's denial, that McMaster was party to the conversation by way of the call being conducted over the speaker phone in Coombes' office. Coombes made notes of the conversation, which notes are part of the parties' joint book of

exhibits.

[25] The plaintiff testified that before the telephone conversation of June 26, 1997, he had read and reviewed only the portions of the draft agreement dealing with compensation and job duties, as those were the matters Coombes had asked him to review, and that, in particular, he had not read the termination provisions. I find this evidence to be incredible, and inconsistent with the notes Coombes made of the conversation. It is also inconsistent with the first remark alleged by Coombes and McMaster to have been made by the plaintiff, reflected in Coombes' notes, namely that "the tone and texture [of the agreement] favours protecting STAR-FM". I am satisfied that the plaintiff had reviewed and read the entire draft agreement and that he made the comment attributed to him by the defendants and included in Coombes' notes of the conversation of June 26, 1997.

[26] Included in the draft employment agreement were the following terms:

2. TERM OF EMPLOYMENT

2.1 This Agreement and E.G.'s employment under it shall commence on August 1, 1997 and continue until July 31, 2000, unless earlier terminated pursuant to Article 6 of this Agreement (the "Term").

...

6. TERMINATION

6.1 STAR-FM may terminate E.G.'s employment and this Agreement at any time without notice, pay in lieu of notice or severance compensation of any kind, if STAR-FM has just cause for termination. ...

6.2 In the absence of just cause, STAR-FM may terminate E.G.'s employment and this Agreement by giving E.G. three months prior written notice (herein referred to as the "Employer Termination Notice Period") of termination or pay in lieu of notice as follows ...

6.3 E.G. may terminate this Agreement and his employment at any time upon giving three months prior written notice (herein referred to as the "Employee Termination Notice Period") to STAR-FM. ...

(my emphasis)

[27] I am satisfied that the entirety of the draft agreement was discussed between the plaintiff and Coombes during the course of the telephone conversation, with McMaster simply listening in for the most part.

[28] Following the telephone conversation, the plaintiff sent an e-mail message to Coombes and McMaster. That e-mail message confirmed that he had spoken on the telephone to both Coombes and McMaster on June 26, 1997. It also contained the following:

I realized that although I had covered most points, I wanted to add one that got missed in my counter to your proposal. I would like to keep the first year as you have proposed with regard to compensation. It does not live up to Major Market Morning Program standards, but I believe that with a three year deal in place, there should be room for birth before the real growth begins. I would however like to modify the second and third year basic pay package ...

[29] The e-mail message also contained the following paragraph, which I consider significant, given Honey's adamant position at trial that he did not decide to leave CKNW until sometime after June 30, 1997:

I have now spoken with the principals at CKNW and made my point clear with them that I will not return. They have left a door open for me, as I would only expect. I leave with their good wishes and without a harsh word spoken. My relationship with CKNW shall remain in my past, and I will bring to my new employers some of the advantages I have in working as a major player in a major market, and past marketing director for CKNW Radio.

(my emphasis)

[30] On June 28, 1997, Coombes had another telephone discussion with Honey with respect to the agreement and other matters. Again, Coombes made notes in advance of the discussion, for use by him during the discussion. Coombes noted, during the conversation, that Honey advised him that the situation with CKNW was now settled, and that Honey would sign the STAR-FM employment agreement on Monday, which was June 30, 1997. I accept that Honey did tell Coombes that he would sign the agreement. I am satisfied that by this stage in the negotiations, all of the significant terms of the agreement, including the termination provisions, had been reviewed, discussed and accepted by both parties.

[31] Having heard all of the evidence, I am satisfied that the next meeting between the parties was a meeting at Honey's residence on June 30, 1997, attended by Coombes, McMaster, Peter Alpen ("Alpen"), Honey, and Honey's wife. Honey and his wife testified that there was a meeting between Coombes, Alpen, Honey, and his wife which took place between June 22 and June 30, 1997, but I do not accept that evidence.

[32] I am satisfied that the employment agreement, as revised by Coombes following the telephone conversations he had with Honey on June 26 and June 28, 1997, was brought by Coombes to the plaintiff's home on the expectation, at least of Coombes and McMaster, that the agreement would be signed by all parties. Coombes and McMaster testified that during the meeting of June 30, 1997, the final draft of the employment agreement was reviewed by Coombes and Honey, on a page by page and clause by clause basis, through to the end of the contract. Honey and his wife testified that the agreement was reviewed on a clause by clause basis until Clause 6, Termination, was reached. That clause was the same, save for the insertion of the plaintiff's name in place of the initials "E.G.", as it had been in the draft agreement, and portions of it are quoted above. Honey and his wife testified that when this portion of the agreement was reached, Honey indicated he wanted to ask Coombes a question about the clause, to which Coombes replied with words to the effect that Honey

should just ignore the clause, it did not matter or mean anything, and that this contract was the first of many contracts.

- [33] Alpen recalls being at the meeting, and recalls that he and Honey's wife spoke from time to time while Coombes, McMaster, and Honey dealt with the contract. Beyond that, he has little useful recollection of what occurred.
- [34] In respect of the conflicting evidence of Coombes and McMaster on one hand, and of Honey and his wife on the other, I prefer the evidence of Coombes and McMaster. As I have already said, I am satisfied that the issue of a mutual termination provision was discussed by the parties at the meeting of June 17. I am satisfied that Honey had read the termination provisions in the draft contract by not later than June 26, and that on June 26, the entire contract was reviewed and discussed by Coombes and Honey by telephone. Further, the contract was discussed by Honey and Coombes again on June 28, 1997, by telephone. Less than one month earlier, Honey had received a termination letter from his immediate supervisor at CKNW, and had sought advice in that regard. He was, I find, in the throes of negotiating a severance package with CKNW. He had four days between the telephone conversation of June 26 and the meeting of June 30 in which to consider the contract, and raise any issues. He advised Coombes on June 28 that he would sign the contract on June 30. As I have already said, I am satisfied that Coombes would have been the type to chronologically review the contract. The no cause termination provision was mutual, which could well have been to Honey's benefit. McMaster recalls, and I accept his evidence that, the clause was discussed by Coombes with Honey as being necessary, in case either party needed to terminate the agreement. Taking all of the evidence into consideration, I have concluded that the contract was reviewed in full at the meeting of June 30, 1997, and that there was no statement by Coombes to the effect that the plaintiff should disregard the no cause termination provisions, as they would have no effect.
- [35] I will add here that I do not accept Honey's evidence that he did not understand, at all, the no cause termination provisions. I do not accept that he is as unsophisticated as his counsel submitted. Although the no cause termination provisions are somewhat lengthy, the essence of the clauses is clear and readily understandable in my view. Further, as I have said, I find that Honey had been told, before he ever received the draft contract, that there would be mutual no cause termination provisions and that the issue was discussed between the parties. That clearly would have aided Honey in understanding at least the essence of the clauses in question when the draft was received and reviewed, and when the final version was reviewed on June 30, 1997. It makes no sense that Honey, if he truly did not understand the effect of the no cause termination clause, would wait to raise his question or questions about it until the very meeting at which he had said he would sign the agreement. I also do not accept that Honey believed that he could not get legal advice about the agreement as a result of the confidentiality agreement he signed at the meeting of June 14, 1997. Similarly, I reject the suggestion of counsel for Honey that Coombes deliberately removed the Independent Legal Advice clause from the draft contract he worked from for some nefarious

purpose.

- [36] After the review of the contract, Coombes and McMaster signed each copy, and then, to their great surprise, Honey indicated that he was not yet prepared to sign the contract. Honey testified that he wanted to have one more conversation with his superiors at CKNW before he finally decided whether or not to accept employment with STAR-FM. I am satisfied, on the evidence before me, that Honey had already advised the president of CKNW that he would be leaving CKNW, and that he had negotiated a severance package. Apparently unexpectedly, at least to Honey, the documentation with respect to the severance package had not yet been completed by CKNW by June 30, 1997, and in fact, was not completed until July 2, 1997. The terms of the severance package provided that Honey would be paid six months salary and, in addition, would receive his regular monthly income for a period of 12 months, unless he was able to find work within the broadcast industry during those 12 months, in which case, if his earnings were higher than his CKNW monthly income, he would receive a single payment in the amount of 50% of the remaining 12 month balance.
- [37] I find that Honey wanted his severance package with CKNW documented before he signed a contract with STAR-FM, and his hiring with STAR-FM had been made public, so as to maximize his recovery from CKNW. He did sign the agreement with respect to the severance package on July 2, 1997, and on or about that same date, he signed the employment agreement with STAR-FM. On July 14, 1997, he notified the president of CKNW that he had accepted a position in the broadcast industry, and that, as he had received two months mitigated salary at that point, he wished to be paid 50% of the balance, namely a "five month wage cheque".
- [38] Honey then commenced employment with STAR-FM. There is no issue in this case that Honey did his job, and did it well. The defendants have not plead, nor attempted to establish, that there was any cause to justify Honey's eventual termination.
- [39] Before I deal with the termination of Honey, I will comment briefly on the evidence of Kerry Proudfoot, one of the defendants' witnesses. She was hired to be the plaintiff's co-host for the morning show. She no longer works for the defendant, STAR-FM. Although she and the plaintiff had some conflict during their working relationship, I am satisfied that she gave her evidence in a forthright manner, and that she was an independent witness. She testified that she had a conversation in the fall of 1997 with the plaintiff, and that he confirmed to her that he had a three month termination clause in his contract, as she disclosed she had in hers. This evidence supports the conclusion I have arrived at with respect to the plaintiff's knowledge of the termination provisions in his contract, and the effect of them.
- [40] On July 2, 1998, Coombes advised Honey, in person, that his employment was coming to an end. Coombes testified that he terminated Honey's employment because the morning show was not working, the expected ratings increase had not occurred, and there was no doubt in his mind that the show was not going to produce the kind of ratings needed to offset its expense. In essence, Coombes testified that he was unable to continue to justify the expense

of the show against its revenues. Honey did not, at the meeting with Coombes, make any kind of statement to the effect that he had a three year contract or that he could not be terminated.

[41] On July 15, 1998, Coombes wrote an e-mail to Honey, advising him that it would not be necessary for Honey to report to work during the 90 day termination period, and inquiring whether Honey wished to stay on the payroll until October 15, 1998, with full benefits, or receive a lump sum payment out, which would be calculated under the terms of the employment agreement.

[42] On July 16, 1998, Honey sent an e-mail to Coombes, including the following paragraph:

I was shocked with your news to me, of course. I will forever believe that you were on the right track and that it was going to work. But it was never going to work in 11 months and one real rating period. I received positive feedback everywhere on the sound of the station, the players, the format, music, etc. I bear no grudge against you or anyone there for what has happened. I was a willing participant in your gamble.

(my emphasis)

[43] I consider this communication from Honey to Coombes to be significant and a true reflection of events. Both Coombes and Honey had been enthused and optimistic about the morning show to be hosted by Honey, but I am satisfied that both knew that there were no guarantees it would be successful. Honey knew, I find, that leaving CKNW to become the morning show host for STAR-FM was a gamble, particularly given the termination provisions in the contract, but he accepted that gamble as a result of his personal confidence that his show would be a success.

[44] On July 23, 1998, Coombes wrote to Honey, formally confirming the notice of termination which had been given verbally on July 2, 1998 and by e-mail on July 15, 1998. On August 12, 1998, Coombes wrote to Honey setting out his calculation of severance pay and enclosing a cheque for salary over the balance of the termination period, a 6% retirement allowance over the balance of the termination period and a lump sum for benefits over the balance of the termination period. That cheque was cashed by Honey on August 17, 1998. On August 18, 1998, the solicitors for Honey wrote to Coombes indicating that due to financial difficulties, Honey would cash the cheque, without prejudice to his claims for amounts due to him under the contract and for misrepresentations, and that the amount would be credited towards any such claims.

[45] Since the plaintiff's termination by STAR-FM, he has been unable to secure employment in the broadcast field, and indeed, has been unable to find any employment.

ANALYSIS

[46] In terms of the specific representations which Honey claims were made to him by Coombes, I accept that Coombes made representations as follows:

1. STAR-FM had been given approval to put a transmitter on Mount Seymour which would allow it full access to the Vancouver radio market;
2. STAR-FM had done research that showed that this venture, of expanding its Vancouver market, was a long term project (3 to 5 years) and that STAR-FM was committed to seeing the project through;
3. STAR-FM would engage Honey to do the morning show for a three year term, with mutual termination provisions.

I do not accept that a representation was made to Honey by Coombes, or anyone else, that the termination provisions in the written employment agreement meant nothing and should be ignored by Honey, or that Honey's term of employment was for a fixed three years.

[47] I will deal now with the legal issues set out earlier in my reasons.

Is the Evidence of the Oral Representations Admissible, or Should it be Excluded Pursuant to the Parol Evidence Rule?

[48] In *Ahone v. Holloway*, [1988] B.C.J. No. 1603 (B.C.C.A.), McLachlin, J.A., as she then was, said this:

The parol evidence rule is formulated in *Corbin on Contracts* (1952) p. 534 as follows:

When the terms of a contract have been embodied in a writing to which both parties have assented as the definite and complete statements thereof, parol evidence of antecedent agreements, negotiations and understandings is not admissible for the purpose of varying or contradicting the contract so embodied.

The parol evidence rule is not absolute, as pointed out by Lambert, J.A. in *Gallen v. All State Grain Co.* (1984), 9 D.L.R. (4th) 496 at p. 506. Thus evidence of an oral agreement or representation may be admissible notwithstanding the existence of a written document to establish a collateral agreement which, although oral, is enforceable.

A collateral contract is an oral agreement ancillary to a written agreement. As with any contract, the party alleging it must establish the agreement of all parties to its terms. He must also establish consideration, which in the case of a collateral contract consists in entering into or promising to enter into the principle contract.

The Supreme Court of Canada has repeatedly held that a collateral contract -- which is one way of characterizing the agreements as to interest and accommodation in this case -- cannot contradict the main written contract: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 ... *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 ...; and *Carmen Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958 ...

This rule has not been abrogated or altered, despite criticism by some of its inflexibility, and is binding on this court. The furthest the courts have been willing to go in alleviating its stringency is to read down clauses excluding liability of one of the parties by interpreting them in the light of the oral representations: *J. Evans and Son (Portsmouth) Limited v. Andrea Merzario Limited*, *Gallen v. All State Grain Co.*, *supra*. But that approach, insofar as I have been able to ascertain, has not been extended beyond cases involving exclusion clauses, and offers no help to the plaintiff in this case.

It follows that the only avenue open to the plaintiff is to show that the terms of the oral agreements he alleges are not inconsistent with the terms of the written contract.

[49] In *Gallen v. All State Grain Co.*, referred to above, which case is also referred to as *Gallen v. Butterley et al*, Lambert, J.A. said, with respect to the parol evidence rule:

So the rule does not extend to cases where the document may not embody all the terms of the agreement. And even in cases where the document seems to embody all the terms of the agreement, there is a myriad of exceptions to the rule.

[50] Included in his list of exceptions are the following: for the purpose of showing that a contract is invalid because of fraud or misrepresentation; to establish a collateral agreement, in support of an allegation that the document itself was not intended by the parties to constitute the whole agreement; and in support of a claim in tort that the oral statement was in breach of a duty of care. (*Gallen v. Butterley et al* (1984), 53 B.C.L.R. 38 at 49-50.)

[51] Given the claims made by the plaintiff in this case, including the claim for fraudulent misrepresentation, I have concluded that all of the evidence which was led at trial with respect to the meetings and conversations between the parties leading up to the signing of the employment contract is admissible evidence.

Were the Oral Representations Warranties, or Alternatively, Did They Constitute a Collateral Contract?

[52] The process of determining whether or not pre-contractual representations are warranties is also addressed in *Gallen v. Butterley*, *supra*. Mr. Justice Lambert, in that decision at p. 51, relied on the reasons of Robertson, J.A. in *Yorke v. Duval* (1953), 9 W.W.R. (N.S.) 523 (B.C.C.A.). He distilled from those reasons the following:

They [the reasons] contained two guides for determining whether a pre-contractual representation is a warranty. First, at pp. 524-25, Robertson J.A. said that the way to decide is to look at the contract in the light of all the surrounding circumstances and that one of the first things to look to is to what extent the accuracy of the statement - the truth of what is promised - would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. Then, second, at p. 525, Robertson J.A. said that the essence of a warranty is that it becomes plain by the words and actions of the parties that it is intended that, in the purchase, the responsibility of the soundness will rest upon the vendor.

[53] I am satisfied that the first two representations which I found were made were of a nature that would be likely to affect the substance and foundation of the adventure. In other words, I am satisfied that Honey wanted to work on-air for a radio station which could be heard in the Vancouver market. Indeed, his off-air status at CKNW is what I have concluded led him to decide to leave CKNW. Had STAR-FM not been given CRTC approval which allowed it full access to the Vancouver radio market, and had it not been committed to seeing through its project of increasing its share of the Vancouver market, Honey would not have been interested in accepting employment with STAR-FM. Similarly, had STAR-FM not been embarking on this new project, it is improbable that it would have been interested in offering employment to Honey.

[54] Consequently, I am satisfied that the first two representations I have found were made were collateral contracts or warranties, the breach of which would give rise to a claim.

Was the Termination of the Plaintiff a Breach of Contract or of Warranty?

[55] As I will say later in these Reasons, I am satisfied that STAR-FM did have CRTC approval to have a transmitter on Mount Seymour, and that as a result of that approval and the installation of the new transmitter, STAR-FM did have full access to the Vancouver market. I am also satisfied that STAR-FM was fully committed to the three to five year project of expanding into the Vancouver market. It must be emphasized that the project to which I find STAR-FM was committed was the expansion into the Vancouver market, and not the Honey morning show. STAR-FM had to make business decisions as to how to advance its project, and how best to effect its expansion into the Vancouver market. One of the business decisions it made was to terminate Honey as a result of the failure of the morning show to attract listeners.

[56] I am unable to find that the termination of Honey's contract amounted to a breach of collateral contract or of warranty with respect to the CRTC approval or its commitment to expand into the Vancouver market.

Were the Oral Representations Negligent, or Alternatively, Fraudulent Misrepresentations, Giving Rise to a Claim in Tort?

[57] In order to establish a claim for negligent misrepresentation, the plaintiff must prove five elements, set out in *Queen v. Cognos Inc.* (1993), 45 C.C.E.L. 153 at 171 (S.C.C.) as follows:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said misrepresentation;
- (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Essentially the same elements must be proven to establish a claim for fraudulent misrepresentation, with the exception that the third element requires proof that the representor made the misrepresentation knowingly, or recklessly, not caring whether the misrepresentation was true or not.

- [58] In this case, I find that the plaintiff has failed to prove that the representations which I have found were made were untrue, inaccurate or misleading. With respect to the first representation I have found was made, it is clear from all of the evidence at trial that STAR-FM had been given approval to put a transmitter on Mount Seymour, which new transmitter would allow it full access to the Vancouver radio market. The plaintiff makes much of the concerns expressed by the CRTC, in the course of the hearing of the application for the new transmitter and before approval was granted, as to STAR-FM's intentions concerning continued service to the Fraser Valley. In particular, some restrictions were put on the approval, including the placement of permanent studio facilities. I cannot find that anything STAR-FM did was in breach of its license, nor, for that matter, contrary to the representations it made to the CRTC in the course of its application. It is, in my view, perfectly understand-able that having received the license for the new transmitter, STAR-FM would naturally evolve its plans, including giving consideration to having a larger presence in the Vancouver market. I cannot find any misrepresentation on the part of STAR-FM to the CRTC or to the plaintiff in this regard.
- [59] Similarly, I accept the evidence of the witnesses from STAR-FM that they had done research with respect to expanding its Vancouver market. It was conceded by all witnesses that such a project was necessarily a long term project, and I am satisfied that STAR-FM was committed to seeing the project through. Indeed, STAR-FM continued with the project after Honey's employment was terminated. I cannot find that any portion of the second representation I have found was made was untrue or inaccurate. I cannot accept that STAR-FM's commitment to the project should be understood as having been a commitment to Honey's morning radio show for three years. That was only a small part of the overall program to expand the station's Vancouver market.

- [60] Finally, with respect to the third representation, namely that STAR-FM would engage Honey to do the morning show for a three year term, with mutual termination provisions, that clearly is precisely what STAR-FM did.
- [61] Having found that the representations were not misrepresentations, I need go no further with respect to the required elements for a successful claim of negligent misrepresentation. However, I will make two further comments.
- [62] Firstly, I have some doubt with respect to Honey's reliance on the representations, particularly with respect to his resignation from CKNW. I am satisfied that Honey decided to resign from CKNW prior to the conclusion of his negotiations with STAR-FM. However, I do accept that the representations may have formed part of the plaintiff's assessment of the risk involved in leaving his employment at CKNW and joining STAR-FM.
- [63] In terms of risk assessment, I am drawn to the reasons of McLachlin, J. (now C.J.C.) in *Queen v. Cognos Inc.*, supra, at 194-5, where she stated:

When a person is deciding to enter a contract with terms governing termination, he or she makes an assessment as to the risk of such termination occurring. A stringent term as to termination may not deter the person from entering into the contract if he or she is satisfied that the risk of termination materializing is low. The representation at issue in this case concerned the risk of termination coming about. The representation was not that Cognos would not have the discretion to terminate or transfer the plaintiff on one month's notice. Rather, by implying that the Multiview project was a reality, that it had the financial support of Cognos, and that it has passed through the feasibility and costing stage, Johnston on behalf of Cognos caused the plaintiff to be misled as to the level of the risk to the plaintiff that Cognos might at some point choose to exercise its termination power under the employment contract. The plaintiff, believing Johnston, concluded that the risk of being transferred or terminated was low.

To elaborate, a number of situations can be envisaged in which Cognos might have decided to terminate the plaintiff's employment:

- (i) his employment not working out in the Multiview project, for reasons that did not amount to just cause for dismissal (e.g., say his work was mediocre, but not incompetent);
- (ii) unanticipated serious financial difficulties being encountered by Cognos, such that a decision might be made to lay off staff;
- (iii) the situation that actually developed, of Cognos' Corporate Management Team deciding, when the Multiview project reached the end of the feasibility and costing stage, not to make a financial commitment to proceeding with the full development of the Multiview line of products;
- (iv) Cognos' Corporate Management Team deciding after a financial commitment had been made to scale back or terminate the development of the Multiview line of products.

The representation excluded the third reason for dismissal, thereby reducing the risk of termination. As found by the trial judge, the plaintiff relied on that representation in deciding to enter into the contract. It turned out to have been negligently made and false.

[64] As I have said earlier, I am satisfied that both Coombes and Honey were enthused and optimistic about the likelihood of success of Honey's morning show. However, both also knew they were "taking a gamble". I am satisfied that Honey, knowing of the termination clauses, made his own assessment of the risk of accepting employment at STAR-FM and signing the employment contract. I do not find that anything Coombes or McMaster said to Honey misled him as to the level of risk.

[65] Lastly, it must be noted that I can find no evidence in this case to support a claim for fraudulent misrepresentation.

If there is a Claim in Tort, is Coombes Personally Liable?

[66] Having already determined that there is no basis for the plaintiff's claim for misrepresentation, I will not address this issue.

Does the Fact that Honey Cashed the Cheque Provided to Him by STAR-FM as His Severance Pay Give Rise to a Defence of Accord and Satisfaction?

[67] The defendants take the position that as the plaintiff cashed the cheque sent to him on August 12, 1998, the defence of accord and satisfaction arises.

[68] As stated by Ruttan, J. in *Gregov v. Canoecean Resources Ltd.*, [1987] B.C.J. No. 2014, a decision upheld by the Court of Appeal, [1989] B.C.J. No. 438:

Accord and satisfaction involves an agreement, and the question whether an accord has been arrived at is one of fact, not of law. The accord is the agreement to discharge the existing obligation, and the satisfaction is the consideration required to support it.

[69] In essence, the question to be considered by the court, as one of fact, is whether the parties reached an agreement whereby STAR-FM would pay a certain sum, in exchange for which the plaintiff would release any claims he may have had against the defendants. As set out earlier, the plaintiff had not, prior to cashing the cheque, raised an issue with respect to the termination having been wrongful. His lawyer did not write to STAR-FM until the day after the cheque was cashed indicating that the plaintiff's rights to make a claim were being reserved. Notwithstanding that sequence of events, upon which the defendants rely, I cannot find that the cashing of the cheque amounted to an agreement between the parties. There was no negotiation leading up to the determination of the amount of the payment. There is no suggestion that Honey was not entitled to at least that sum of money. There was nothing in the covering letter to suggest that cashing the cheque would amount to a release of claims, or an acknowledgement of satisfaction of any claims Honey may have.

[70] Consequently, on all of the evidence, I cannot find an agreement and if the plaintiff had been successful in contract or in tort, I would not find that the defence of accord and satisfaction had been made out.

If Honey Establishes a Claim in Contract or Tort, Did He Properly Mitigate His Damages?

[71] Although I have found against the plaintiff in contract and in tort, I will deal with mitigation. The plaintiff submits that, as a result of policy changes made by the CRTC, there has been limited hiring by radio stations since his termination. He testified that he made efforts to make contact with people he knew in the industry, to advise them that he was available, and to inquire with respect to possible positions. He also attempted to obtain speaking engagements, which he had regularly done in the past. Contained in the joint book of documents are letters he wrote in that regard, letters from people he contacted, and the list of contacts he made. There is also evidence before me that for a period of time, following his termination, the plaintiff was unwell, and would not have been able to look for work or take on work if work had been offered.

[72] The defendants submit that the plaintiff has not made sufficient effort to find new employment, but have offered little if any evidence to show that the plaintiff has failed to mitigate. As the Supreme Court of Canada said in *Red Deer College v. Michaels and Finn*, [1975] 5 W.W.R. 575 at 579-580:

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge's assessment of the plaintiff's evidence on avoidable consequences.

(my emphasis)

[73] I am not able to find, on the evidence, that the plaintiff did not properly mitigate his damages, and consequently, I would not reduce his damages, if any were awarded, for any failure to mitigate.

If Honey Establishes a Claim in Contract or Tort, What Damages Should be Awarded?

[74] Although I have concluded that the plaintiff has not proven his claim in either contract or tort, I will proceed to assess damages as if he had been successful.

- [75] It is trite that the damages to be awarded in contract are not always the same as the damages to be awarded in tort. In contract, the plaintiff is entitled to be put in the position that he would have been in had the contract not been breached. In the case of a negligent or fraudulent misrepresentation, the plaintiff is entitled to be put in the position he would have been in but for the misrepresentation.
- [76] I am satisfied that had the plaintiff established that he had a fixed three year term contract, he would have been entitled to the amount calculated and set out in Exhibit 3, in the amount of \$324,661.91.
- [77] With respect to the damages to be awarded in tort, the plaintiff claims \$213,849.70, representing two years of average earnings from CKNW, on the premise that but for the representations of the defendants, the plaintiff would have remained employed at CKNW. In addition to that sum, the plaintiff claims for \$75,000.00, representing \$25,000.00 per year, over three years, for income from outside speaking engagements.
- [78] I cannot accept the plaintiff's tort damage calculation. I am of the view that the appropriate calculation for damages in tort is three years of earnings from CKNW, less the CKNW severance pay and the sums earned by the plaintiff while employed by STAR-FM, plus some allotment for outside speaking engagements.
- [79] Three years of earnings with CKNW would have amounted to \$320,774.55. The plaintiff received pay and benefits of \$144,877.08 from STAR-FM, plus severance pay of \$25,997.58, for a total of \$170,874.66. In addition, there must be deducted the 11 months of pay received by the plaintiff from CKNW as severance pay. As far as I am able to determine from the evidence before me, the severance pay was calculated on the plaintiff's monthly salary only, excluding benefits and potential bonuses. According to the plaintiff's employment contract with CKNW for the 1996-97 year, the plaintiff's basic annual salary was \$89,500.00. Eleven months pay would amount to \$82,041.67. The plaintiff's net loss then, with respect to salary, would total \$67,858.22.
- [80] To that, something must be added for the loss of speaking engagement revenue. I have taken into account the evidence before me of the plaintiff's practice, while he was employed by CKNW, of earning extra revenue from speaking engagements. The demand for his services as a speaker was apparently dependent on his high profile as an on-air radio personality with CKNW. He estimated his earnings from this source at \$25-30,000.00 per year. He advances a claim of \$75,000.00, for his loss in this regard.
- [81] On the assessment of damages in tort, the plaintiff is entitled to be put in the position that he would have been in had he remained at CKNW. However, had he remained at CKNW, he would not have been working in a regular on-air capacity. I find that his profile in the community would necessarily have dropped, even taking into account the "ambassador" type role that may have developed for him at CKNW. A lower profile, on the plaintiff's own evidence, would have resulted in reduced speaking engagement opportunities. Further, the plaintiff was ill for a period of time, which clearly would have adversely affected his ability to

perform speaking engagements. Taking into account all of the evidence, I would, had I found for the plaintiff in tort, have awarded him damages of \$50,000.00 for lost speaking engagement revenue, representing the best assessment I can make on the evidence before me

[82] In summary, I conclude that the plaintiff's damages in tort would be \$117,858.22.

SUMMARY

[83] I am satisfied that STAR-FM was entitled to dismiss the plaintiff, pursuant to the terms of the written employment agreement, by giving the plaintiff three months notice. Having given the plaintiff three months notice, and having, I find, made all of the payments required to be made pursuant to the terms of the written agreement, I am satisfied that the defendant, STAR-FM, fulfilled all of its contractual and other obligations to the plaintiff. Consequently, I dismiss the plaintiff's claim. The defendants' counterclaim was withdrawn during the course of the trial.

[84] Either counsel may make arrangements to have the issue of costs addressed by this court if they are unable to agree that the usual rule, of costs following the event, should apply.

"A. J. Beames, J."

The Honourable Madam Justice A.J. Beames

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