
CANADA / JUDGMENT

Sucher v. Immediate Images Inc.

2009 BCSC 1361

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1361 Sucher v. Immediate Images Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sucher v. Immediate Images Inc.,

2009 BCSC 1361

Date: 20091005

Docket: S066017

Registry: Vancouver

Between:

Cal Sucher

Plaintiff

And

Immediate Images Inc., Frank Farr, and Peter Hucul

Defendants

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

Counsel for Plaintiff:

W. Kosteckyj

S. S. Parhar

Counsel for Defendants

Immediate Images Inc. and Frank Farr:

M. J. Weiler

A. Muter

Counsel for Defendant Peter Hucul:

No one appearing

Place and Date of Trial:

Vancouver, B.C.

September 8 to 11 and 16, 2009

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2009

- [1] From March 2004 to June 2006, the plaintiff, Cal Sucher, worked with the defendant company, Immediate Images Inc., to develop a market for a certain kind of digital technology. He claims damages for breach of an oral contract that provided for the payment of management fees, expenses and equity participation in the company.
- [2] The defendants, Immediate Images Inc. and Frank Farr, say that the plaintiff did not reach a binding agreement as alleged and there is no basis to found personal liability on Mr. Farr.
- [3] The defendant, Peter Hucul, filed no defence and did not appear at trial. Plaintiff's counsel advised the Court that he did not know Mr. Hucul's whereabouts and default judgment was taken against him with damages to be assessed.

Background

- [4] Cal Sucher met Frank Farr and Peter Hucul in 2003. For the previous two years, he had been working with an individual who owned a business called DMS Control, which developed software for digital screen technology. The software allowed clients to broadcast advertisements on television screens.
- [5] In October 2003, Mr. Farr incorporated Immediate Images Inc. (Immediate) and purchased licences for the DMS software. Mr. Hucul joined him as an equal partner. Each held one Class A voting share and an equal number of Class B non-voting shares. Initial financing was provided by friends and family investors and shareholder loans. Mr. Farr was the President and General Manager and Mr. Hucul was responsible for marketing and sales. Mr. Farr put a significant amount of his own money into the company; Mr. Hucul did not.

- [6] In November 2003, Mr. Farr contacted Mr. Sucher. He knew that Mr. Sucher had worked with the DMS software and he was interested in discussing whether Mr. Sucher would be interested in working with Immediate. Mr. Sucher was interested. The three began negotiations to define the nature of their business and working relationship.
- [7] Both sides made several things very clear from the beginning. Mr. Sucher said he was only interested in being involved if he had a significant role in both operations and equity. Mr. Farr said that Mr. Sucher would be retained only as an independent contractor and not as an employee.
- [8] In January 2004 the parties began negotiating the terms of an agreement, exchanging draft documents. The last document exchanged was a Letter of Understanding dated March 30, 2004, which included provisions for management fees, equity participation and an agreement to agree on a right to purchase the shares of Mr. Farr and Mr. Hucul. Mr. Sucher said that he did not agree to all of the terms of that document, but on the following day the parties agreed to what was set out in that document with some changes to the equity structure. He understood that Mr. Farr was going to make changes to the Letter of Understanding to reflect the agreed upon changes. Mr. Farr did not do so.
- [9] Mr. Farr denied that there was any oral agreement. He said that the March 30, 2004 Letter of Understanding was Immediate's last proposal to Mr. Sucher and Mr. Sucher declined to sign it.
- [10] Mr. Sucher began working for Immediate on April 1, 2004. He was paid a management fee of \$3,000 per month, which increased to \$3,750 in July 2004. By November 2004, Immediate was operating at a loss and was not able to pay any management fees. Nevertheless, Mr. Sucher agreed to stay on. Immediate offered to pay the interest on any loans Mr. Sucher had to incur during this time. In April 2005, Immediate also agreed to remit 100 percent of fees earned for content production or graphic design to Mr. Sucher up to \$3,750 per month, to provide some remuneration for his work. Between June 2005 and May 2006, Immediate remitted \$13,800 for these fees to Mr. Sucher.
- [11] Unfortunately, Immediate's financial situation did not improve. Although Mr. Sucher and Mr. Hucul were working hard on a number of projects, they were not able to generate sufficient revenue. Mr. Farr injected funds into the company from time to time to keep it afloat. Mr. Hucul and Mr. Sucher wanted to seek further capital from the investors. Mr. Farr disagreed with this approach until the company was able to show some success. Mr. Hucul wanted Mr. Sucher to have a voting share in the company. Mr. Farr was opposed to that. He made it clear that Mr. Sucher would only obtain a voting share if either Mr. Hucul or a third party bought his interest.

- [12] In February 2006, Mr. Farr raised the issue of either partner buying out the other. These discussions were delayed for several months because Mr. Farr suffered serious burns in an accident in March. In late May or early June, Mr. Hucul agreed to sell his interest in Immediate to Mr. Farr. On June 6, 2006, Mr. Farr advised Mr. Sucher and others that Mr. Hucul had agreed to relinquish his position and responsibilities in the company. Shortly thereafter, Immediate and Mr. Sucher parted ways.
- [13] Mr. Sucher said that he was terminated. According to Mr. Farr, Mr. Sucher advised that he was not available to assist with Immediate's urgent issues.

Issues

- [14] The statement of claim alleges that there was an employment agreement, an equity agreement and a share sale agreement. Mr. Sucher seeks damages for unpaid salary and expenses and breach of contract; damages for intentional or negligent misrepresentation; damages for unjust enrichment or in quantum meruit; an order directing Immediate to pay Mr. Sucher \$1 for 160,000 unissued shares; and an order directing that 50 percent of any shares obtained by Mr. Farr from Mr. Hucul be offered for sale to him.
- [15] The plaintiff's claims are against Immediate, and against Mr. Farr and Mr. Hucul in their personal capacities. I will say at the outset that Mr. Sucher established no legal basis on which to find any liability against the personal defendants. The evidence clearly established that Mr. Farr acted at all times on behalf of Immediate and all of Mr. Sucher's dealings were with the company. The only issues that relate to Mr. Farr and Mr. Hucul in their personal capacities are the claim in misrepresentation and the alleged agreement to agree on a right to purchase the shares of Mr. Hucul or Mr. Farr. The claim in misrepresentation was abandoned at trial and an agreement to agree is not enforceable in any event.
- [16] I will also say that the plaintiff's claim that there was an employment agreement was not borne out by the evidence, nor did plaintiff's counsel pursue this aspect in argument. The evidence was clear that Mr. Sucher was not an employee of Immediate but rather was working as an independent contractor.
- [17] The primary issue in this lawsuit is whether Mr. Sucher and Immediate entered into a binding contract. If so, what were its terms and what amount, if any, is owed to Mr. Sucher? If not, is Mr. Sucher entitled to damages for unjust enrichment or in quantum meruit?
- [18] Credibility is also a central issue, as the evidence of the only two witnesses, Mr. Sucher and Mr. Farr, was diametrically opposed about what happened. Because this case depends on findings of credibility, I will first address this issue in a general way.

Credibility

[19] I have assessed the evidence of Mr. Sucher and Mr. Farr in light of all of the circumstantial evidence, which in this case is primarily the documentary evidence. The importance of assessing credibility in this way was articulated many years ago by O'Halloran J.A. in *Farnya v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 11:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[20] I found much of Mr. Sucher's evidence to be both internally inconsistent and inconsistent with many of the documents and other surrounding circumstances. Mr. Farr, on the other hand, was consistent throughout. I will detail these consistencies and inconsistencies as I review the evidence relevant to the substantive issues.

[21] As I outline below, where the evidence of Mr. Sucher and Mr. Farr conflict, I prefer the evidence of Mr. Farr.

Was there an oral contract?

[22] Mr. Sucher alleges that the parties concluded a contract on March 31, 2004, on terms that were partly written and partly oral. The written portion is contained in the March 30, 2004 Letter of Understanding. Mr. Parhar, counsel for Mr. Sucher, submitted that the terms of the contract were as follows:

1. Mr. Sucher would receive a monthly fee of \$3,000, which would increase to \$3,750 per month (75% of what Mr. Farr and Mr. Hucul received) within a few months.
2. Mr. Sucher would receive 10,000 shares up front and another 150,000 shares would be vested in his favour at 50,000 shares per year over three years.
3. If Immediate terminated Mr. Sucher, the 150,000 shares would vest in his favour and the company, Mr. Farr and Mr. Hucul would purchase his shares at the greater of \$1 per share or market value.
4. If Mr. Sucher left Immediate he would be paid only for the shares that had vested in his favour as well as the initial 10,000 shares at the greater of \$1 per share or market value.
5. Mr. Sucher had the right to purchase up to 50% of any shares offered for sale by either Mr. Farr or Mr. Hucul to each other.

6. All of Mr. Sucher's reasonable business expenses would be paid or reimbursed by Immediate, including phone bills, home office, travel expenses, client meals and a car allowance at \$400 per month.
- [23] As the plaintiff, Mr. Sucher has the burden of proving, on a balance of probabilities, that there was an oral contract on the terms set out above.

The evidence

- [24] Because there is no single document which encompasses this alleged agreement, it is necessary to consider all of the negotiations between Mr. Sucher and Mr. Farr on behalf of Immediate and what each party did after March 31, 2004. I will start with the documentary evidence and supplement this with the evidence of each of Mr. Sucher and Mr. Farr.
- [25] Mr. Farr first sent a "Letter of Intent" to Mr. Sucher on January 19, 2004. In it he proposed that Mr. Sucher join Immediate on a contract basis with compensation by way of commission and an increased role after he had achieved success at developing the business. The increased role was to include a bonus plan in the form of cash or equity or both. In addition, 10,000 non-participating shares would be set aside for Mr. Sucher, which would be convertible to participating shares upon certain triggering events.
- [26] Mr. Sucher was not interested in this proposal. He did not want to join the company strictly as a sales representative. He described this proposal as "not commensurate with the kind of dialogue that preceded it", which focussed on the benefit of his experience working with the DMS system.
- [27] On March 6, 2004 Mr. Sucher responded with a draft "Interim Partnership Agreement" which proposed that Mr. Sucher participate initially as a minority partner, with 10,000 shares to be assigned to him within 30 days and eligibility to hold an equity position of 25 percent when Immediate achieved certain monthly gross revenues. It also proposed that Mr. Sucher receive 25 percent of the gross profits generated by Immediate and a right of first refusal to acquire 50 percent of the shares of Mr. Farr or Mr. Hucul should they be offered for sale.
- [28] Mr. Farr considered this proposal to be "ludicrous" and rejected it.
- [29] Nevertheless, the parties continued to talk and appeared to be optimistic that they would be able to conclude an agreement. On March 18, 2004 Mr. Sucher asked Mr. Farr what paperwork was required for him to submit his management fee. Mr. Farr advised him that until a management services contract was prepared he would need to supply an invoice "for management services as agreed" at \$3,000 plus GST.
- [30] On March 23, 2004, Mr. Hucul sent Mr. Sucher a Letter of Understanding, which had been prepared by Mr. Farr. Mr. Hucul's e-mail stated that he thought it captured everything they had discussed. The proposal may be summarized as follows:

- Mr. Sucher would participate as a minority partner actively contributing to the day-to-day business of Immediate, reporting and accountable to Mr. Farr and Mr. Hucul.
 - Immediate would enter into a management services contract on terms to be agreed. Immediate would pay Mr. Sucher \$3,000 per month commencing April 1, 2004 and the fee would be reviewed from time to time and increased as the company's financial circumstances allowed.
 - As a gesture of good faith Immediate would place 10,000 shares in Mr. Sucher's name at no cost to him within 30 days.
 - Immediate would transfer to Mr. Sucher an additional 50,000 shares per year for each of 2004, 2005 and 2006 provided the company achieved 80 percent of its annual budget and provided Mr. Sucher continued in a working relationship with the company. This share transfer plan was to serve as an annual bonus plan for the first three years, after which Mr. Sucher would participate in other discretionary bonus plans if the company attained a positive cash flow position over and above its obligations to debt holders.
 - Mr. Farr and Mr. Hucul would enter into separate agreements with Mr. Sucher whereby, in the event either of Mr. Farr or Mr. Hucul bought all of the shares of the other, they would each agree to sell Mr. Sucher 50 percent of the shares so purchased at the same price, terms and conditions.
 - Either party could terminate the agreement on 30 days notice. On termination, Mr. Sucher would retain the rights to any equity shares previously transferred. If Mr. Sucher terminated, the company would have the right to buy his shares at the higher of \$1 or fair market value. If Immediate terminated, Mr. Sucher would have the right to keep the shares or sell them to the company at the same price.
- [31] Mr. Sucher said that this did not capture everything he had discussed with Mr. Farr and Mr. Hucul. Mr. Farr denied this and said that Mr. Sucher simply did not agree with the March 23 proposal and would not sign it.
- [32] The parties had further discussions. On March 30, 2004, Mr. Farr sent a revised Letter of Understanding to Mr. Sucher. The terms of this proposal differed from the March 23 Letter in the following aspects:
- Instead of transferring 50,000 shares per year based on achieving 80 percent of annual budget, Immediate would grant Mr. Sucher options on 150,000 Class C non-voting shares, which would vest at 30,000 per year and would lapse on December 31, 2010. This was to allow him some flexibility to opt for a cash bonus in lieu of exercising his options in any particular year.
 - Mr. Sucher would be able to receive additional bonuses in specified circumstances.
- [33] Mr. Sucher testified that the March 30, 2004 Letter of Understanding "encapsulated most of what we had agreed to" and they discussed this the next day on a ferry to Victoria. He said that they agreed to an equity provision whereby he would be given 160,000 shares and would participate in a bonus structure of 75 percent of what Mr. Farr and Mr. Hucul took. If Immediate terminated the arrangement, it would purchase all 160,000 shares from him at

the greater of \$1 or market value. If Mr. Sucher terminated he would be subject to a share penalty calculated over a three year period. Mr. Sucher said that they also agreed on a car allowance of \$400 per month. He said that they shook hands on the deal and Mr. Farr promised to take the discussion of that day and put it in writing after he obtained advice about the share structure.

- [34] Mr. Farr was adamant in his denial that any substantive discussion took place on March 31 or that he agreed to document anything else. The parties did meet on the ferry to Victoria and Mr. Farr brought copies of the Letter of Understanding. However, Mr. Sucher did not sign it.
- [35] Mr. Farr testified that Mr. Sucher did not want his right to equity tied to performance and the March 30 proposal reflected their discussions about this on March 29. Mr. Farr said he was getting concerned about Mr. Sucher's approach and he made it clear to Mr. Sucher that the March 30 proposal was the "line in the sand". He was not prepared to make any changes other than minor "tweaking" and he told Mr. Sucher not to make another counter proposal. Mr. Farr was also adamant that he did not agree to a car allowance.
- [36] In any event, Mr. Sucher began working for Immediate on April 1, 2004. He submitted invoices for and received his monthly fee.
- [37] Mr. Sucher testified that after two to three months, Mr. Hucul told him that he valued his services and suggested he receive more compensation by way of bonus shares, in the order of 80,000 shares, perhaps tied to 75 percent of the non-voting shares held by Mr. Farr and Mr. Hucul. Mr. Sucher knew that this would require Mr. Farr's agreement and he acknowledged that there never was an agreement about these additional shares. However, he said that this issue caused confusion in respect of the document that was to be produced evidencing the agreement that was reached on March 31.
- [38] On July 14, 2004, Mr. Farr wrote to Mr. Sucher asking him to get back to him "sooner rather than later" with his proposal regarding the agreement. Mr. Hucul made a similar inquiry on July 19, stating:

you were going to send me the final details of your deal which I have not received yet.

- [39] There was no written response from Mr. Sucher. He testified that both e-mails were referring to Mr. Hucul's bonus share proposal. He said he telephoned Mr. Farr and explained that there were two separate issues and he spoke to Mr. Hucul, who wanted him to outline a summary of their discussions, but later told him not to worry about it.
- [40] Mr. Farr wrote to Mr. Sucher again on September 6, 2004:

I was just checking my records.

Over five months have gone by since we sent you a letter of understanding, (Mar. 30th.) reflecting our agreement to terms of your relationship with Immediate.

We all felt that letter was very close to what was acceptable to all of us.

About two months ago, Peter told me that you had some minor amendments that you were about to propose and that you would put them in writing within a few days.

I think that it would be in the best interest of Immediate and yourself to have this resolved. While we are all very busy, I would recommend that you set aside an hour or so and get back to us on this.

- [41] Again, there was no written response. Mr. Farr followed up further with similar requests on October 4 and November 5, 2004. Mr. Sucher said that each time he telephoned Mr. Farr, but Mr. Farr continued to confuse the issues regarding the two agreements. Mr. Sucher thought it was up to Mr. Farr to write up a bonus share agreement if he agreed with it, but he also said that it was "up in the air" as to who was to write it up. He also said that he spoke to Mr. Hucul, who said that he would take care of it. Mr. Sucher said he understood that Mr. Hucul would discuss the issues with Mr. Farr, clarify the confusion, and come up with a proposal to which both he and Mr. Farr agreed.
- [42] Finally, in February 2005, the bonus share issue came up again for discussion. Mr. Sucher said he agreed to "take a crack at putting all this stuff on paper" and Mr. Hucul suggested he put both issues into one document. On February 28, 2005, Mr. Sucher sent a new "Letter of Agreement" which, he said, included the language of the main agreement along with the bonus issue.
- [43] Mr. Farr's version of these events was very different. He denied that he was confused about these issues. He said he heard about this bonus share proposal for the first time at trial.
- [44] According to Mr. Farr, about two months after March 30, 2004, he understood from Mr. Hucul that Mr. Sucher had some minor amendments to make to the agreement and was to get back to them. He wrote to Mr. Sucher on July 14, 2004 with this understanding. He agreed that Mr. Sucher did telephone him at one point, wanting to discuss the proposal, but Mr. Farr did not want to have a verbal discussion and told him to put any comments in writing. He denied that Mr. Sucher indicated that Mr. Farr was to prepare the document.
- [45] Mr. Farr said that he raised this issue repeatedly throughout the fall of 2004, but Mr. Sucher did not respond. Finally, on February 28, 2005, Mr. Sucher sent a written proposal. Mr. Farr testified that they did meet to discuss this, but the proposal was completely unacceptable. He said that Mr. Hucul agreed, and they clearly and specifically rejected it.

Assessment of the evidence and findings of fact

- [46] Mr. Parhar submitted that the following evidence is consistent with Mr. Sucher's that an agreement was reached on March 31, 2004:
- (a) Mr. Sucher had advised the defendants that he would not begin working with them until the parties had made commitments and he had security;

- (b) Mr. Sucher began working for the company immediately following the March 31, 2004 meeting, demonstrating his reliance on the oral agreement; and
 - (c) Immediate began paying Mr. Sucher in accordance with the agreement.
- [47] Mr. Sucher's position was always that he wanted a significant role in operations and equity with Immediate, but he did not say that he told the defendants he would not begin working for Immediate until commitments were made and he had security. He did begin working for Immediate on April 1, 2004, but that fact in itself is not necessarily consistent with Mr. Sucher's evidence that an oral agreement was reached on the terms he described.
- [48] For the reasons set out below, I find that Mr. Sucher and Immediate did not enter into a binding oral agreement on the terms alleged by Mr. Sucher. I find that Mr. Sucher refused to agree to the terms offered in the March 30, 2004 Letter of Understanding. He commenced work with Immediate and began receiving the agreed-upon management fees in the hopes of being able to negotiate an agreement that provided him with more equity and control but was unable to obtain such an agreement.
- [49] As I indicated earlier, Mr. Sucher's evidence about these events was internally inconsistent and inconsistent with the documentary record.
- [50] The most significant internal inconsistency relates to the date when the oral agreement was reached. Mr. Sucher said that the only provision of substance that was changed from the March 30 Letter of Understanding was the provision for 160,000 shares without cost. He testified in chief that the negotiations continued throughout March and the oral agreement was concluded on March 31, 2004. Yet, in cross-examination, he also said that the parties came to an agreement about the 160,000 shares on March 15, 2004.
- [51] Until trial, Mr. Sucher's case was premised on an oral agreement made on March 15, 2004. This was made clear many times throughout his evidence at his examination for discovery, which he admitted at trial was true. There, he clearly and unequivocally stated that nothing after March 30, 2004 formed part of the agreement. He provided no explanation for this inconsistent evidence. To allege an oral agreement and provide inconsistent evidence about when and under what circumstances that agreement was reached is extremely problematic for a party who bears the burden of proof.
- [52] Mr. Sucher's evidence about the precise terms of the agreement was both inconsistent and vague. With respect to the equity provision, his evidence in chief was that he was to receive all 160,000 shares up front, with a penalty if he left the company early. In cross-examination, he agreed with his evidence at discovery, which was that he was to receive 10,000 shares up front and another 150,000 shares were to be vested in his favour at 50,000 shares per year over three years. (I note that this latter description is consistent with the pleadings.) With respect to the car allowance, Mr. Sucher said that it was \$400 per month, yet he claims a car and gas allowance of \$250 per month. In his evidence in chief, he provided no specifics about when the agreement was made; in cross-examination he gave the date as March 31.

[53] Mr. Sucher's evidence about his proposal of February 28, 2005 was also internally inconsistent. This was an important document. However, Mr. Sucher did not mention it at all in his direct evidence. In cross-examination, he testified that he used the language of the main agreement with the bonus share issue and was trying only to "reflect the events of the previous seven to eight months." While this proposal contained some similar provisions as the March 30 Letter of Understanding, it included different equity and bonus provisions, provisions for expenses, including a car allowance, and a new proposal to partner with a separate company owned and controlled by Mr. Sucher. The equity and partnership proposals were as follows:

Equity

Immediate Images Inc. has established Class A "voting" shares and Class B "equity" shares. There are two (2) Class A "voting" shares issued and are held by the two "Founders". At this time, both Frank Farr and Peter Hucul also hold 325,000 Class B shares each. You will be assigned Class B equity shares in an amount totalling no less than 75% of the individual Class B shares held by each of the respective "Founders". At this time, this would equal 243,750 Class B shares. Should any changes/additions occur in the Share structure of Immediate Images Inc. your equity share holdings will be adjusted accordingly to maintain this ratio relative to the "Founders".

Of the 243,750 Class B shares assigned to you, we will vest 60,000 Class B shares to you at no cost upon signing of this agreement. The remaining balance of 183,750 Class B shares will be vested to you at no cost annually over the next two years (91,875 shares on March 30, 2005 and 91,875 shares on March 30, 2006).

Partnerships

In recognition that you are not offered to hold a Class A voting share position with Immediate Images Inc., the "Founders" are prepared to join with you in a separate company in which you will hold the single principal position/voting share. It is agreed that all content and creative related business that may be derived in support or result of, the primary service product of Immediate Images Inc. (the DMS system), will be directed through this company.

[54] These provisions are considerably different from Mr. Sucher's description of the oral agreement reached on March 31 whereby he would be given 160,000 shares up front, with a penalty requiring him to forfeit these shares over a three year period if he terminated the contract. Moreover, the proposal does considerably more than attempt to incorporate an additional number of bonus shares, and the termination provision reflected a share vesting period of two years rather than three. In my view, Mr. Sucher's evidence about trying to reflect the events of the previous seven to eight months is not consistent with his own document.

- [55] In contrast, Mr. Farr's e-mails to Mr. Sucher were clear and consistent. He was urging Mr. Sucher to respond to the March 30 proposal. Mr. Farr's testimony was also clear and consistent. He thought they had been close to an agreement. He wanted to conclude the negotiations with Mr. Sucher with a written agreement, but he was not prepared to consider anything other than minor amendments to the March 30 proposal.
- [56] Mr. Sucher's evidence about the bonus share offer from Mr. Hucul and Mr. Farr's apparent confusion is simply not credible. Right from the start, the negotiations were based on written proposals. Mr. Sucher admitted that it was important to him to have the March 31 agreement described in writing, yet he did nothing to ensure that this was done. He was allegedly waiting for Mr. Farr to write up the oral agreement for months. However, when Mr. Farr wrote to him in July, and again in September, October, and November, asking him to get back to them about the Letter of Understanding, Mr. Sucher made no attempt to set the record straight with a written response. His evidence that he telephoned Mr. Farr to clarify the two issues and that Mr. Farr continued to confuse them makes absolutely no sense. His reliance on Mr. Hucul to straighten it all out was, in my view, an implausible explanation. I do not accept his evidence that he was waiting for Mr. Farr to get back to him or that Mr. Farr confused the issue of the bonus shares with the issue of the main agreement.
- [57] Mr. Farr struck me as an intelligent and experienced businessman who was very straightforward about how far he was prepared to go to reach an agreement with Mr. Sucher. He did not strike me as a man who had confused these issues and his e-mails to Mr. Sucher do not reflect this. He said that his practice was to put everything in writing and the documentary record reflects this. On this issue, Mr. Farr's evidence is entirely credible and consistent with the written record. I accept his evidence that he knew nothing about a proposed bonus share agreement until he heard Mr. Sucher's testimony in court and that he was "not confused at all during this period of time".
- [58] I have other concerns about Mr. Sucher's evidence.
- [59] He insisted that he attained considerable success working with DMS, mainly in finding opportunities in a new marketplace. It was because of this that he felt his value to Immediate justified a monthly fee of \$10,000 per month. Yet, he earned no income during 2002 and 2003, the two years he did this work, and his resume includes no mention of DMS at all. His explanation that he would describe his experience with DMS "if probed" simply makes no sense if that work was so significant. I also found it surprising and disturbing that Mr. Sucher was unable to produce any of his income tax returns from 2001 to 2006.
- [60] Mr. Sucher was also vague about the nature of his business relationship with DMS. He said that it was defined in a letter of intent but he could not recall the terms, saying "nothing was set in stone." Clearly, Mr. Sucher had previously worked for some two years without any formal agreement and apparently without any remuneration. It appeared to me that he continued to take a similar approach to establishing his business relationship with Immediate.

- [61] Mr. Sucher was vague about other important matters and unwilling to agree on even the most obvious facts.
- [62] For example, it was not disputed that Immediate had offered to pay interest on any loans Mr. Sucher was required to take during the time he was not receiving a monthly management fee. Mr. Hucul had suggested that Mr. Sucher borrow money, loan it to Immediate, and Immediate would use that to pay Mr. Sucher his fees. Mr. Farr did not agree with this approach but did agree to have Immediate pay interest on Mr. Sucher's loans. However, Mr. Sucher never followed up on this and never provided any loan documentation to Mr. Farr.
- [63] Mr. Sucher denied this, saying that the interest was to be added on to what the company owed him. Yet, he makes no claim for this interest. He also said that he advised Immediate regularly how much money he was borrowing, but he provided no evidence about the terms of these loans and he was vague about how much he actually borrowed. He said that he borrowed funds from his family. When asked in chief about the amount, he said "only a couple thousand in the first month". In cross-examination, he added that he borrowed "around \$35,000".
- [64] Mr. Sucher was not even prepared to acknowledge that he knew the company was in financial trouble. This obvious fact is clearly apparent in all of the reports he received from Mr. Farr about Immediate's cash flow problems. Yet Mr. Sucher said that he knew Mr. Farr had the personal resources to loan money to the company or "bring capital to bear" when it was necessary. He did, however, admit that if the company was doing well, this would not have been necessary.
- [65] Finally, counsel for Mr. Sucher challenged Mr. Farr's credibility by suggesting that Mr. Farr had obtained the DMS licences in an improper manner and that he had planned to take over Immediate by "starving" Mr. Hucul and Mr. Sucher out of the company. Mr. Sucher also tried to downplay Mr. Farr's role in the company, saying he was portrayed as a bookkeeper and responsible for the company's finances.
- [66] I will say first, that Mr. Sucher's attempt to minimize Mr. Farr's role in Immediate has no basis. Mr. Farr clearly had a very significant role not only to manage the company's finances, but also to direct all of its activities, and Mr. Sucher was aware of all of this.
- [67] I also reject counsel's suggestions of improprieties by Mr. Farr.
- [68] Mr. Farr, who was semi-retired, had acted as a consultant for DMS in the spring of 2003. He had been retained to provide advice about how to structure the company on the expectation of substantial financing. However, in June 2003, it became apparent that the financing was not going to come through, so Mr. Farr terminated his consulting contract. He advised DMS that in the absence of the anticipated financing, it could proceed to develop its software and sell licenses to others. DMS did proceed to sell licenses.

- [69] Mr. Farr had been intrigued by the DMS product. Some months later, he thought that he would like to acquire a DMS license and he had discussions with DMS representatives about this. In October 2003, he acquired several licenses and incorporated Immediate.
- [70] Mr. Farr said he first met Mr. Sucher in June 2003 while he was doing a financial and personnel audit as part of the consulting contract with DMS. Mr. Sucher had been described as a "re-seller" and Mr. Farr wanted to confirm whether there was a contractual relationship in place. That is how Mr. Farr became aware of Mr. Sucher's work with DMS.
- [71] Counsel for Mr. Sucher argued that Mr. Farr ended his consulting contract with DMS prematurely so that he could pursue his own interest in obtaining a license and he sought out a team to do this, which included Mr. Sucher. The evidence does not support such an inference. I accept Mr. Farr's evidence about how he came to acquire the DMS licenses.
- [72] With respect to the allegation that Mr. Farr planned to take over Immediate by "starving" out the others, again, the evidence does not support such an inference. Mr. Farr was very clear about his intentions for Immediate and how he and Mr. Hucul parted ways. He said that his initial plan was to have Mr. Hucul take over the company after three years, but after he put in substantial amounts of capital without any corresponding revenue, things changed. There are numerous reports to both Mr. Hucul and Mr. Sucher about the company's cash flow problems from April 2005 forward and the money Mr. Farr had to provide. On May 1, 2005, Mr. Farr provided a "Cash Flow - 2005 Outlook" showing anticipated monthly shortfalls to the end of the year. He provided regular updates by e-mail every month and there were also monthly meetings.
- [73] Mr. Farr said that by December 2005 or January 2006 he was telling Mr. Hucul that the business could not continue like this. Things came to a head in February 2006. By this time, Mr. Farr had injected approximately \$100,000 of his own funds into the company. Mr. Hucul supported Mr. Sucher's request to have an equal share and voting power in the company. Mr. Farr disagreed. He advised them that the only way Mr. Sucher would have a voting share in the company would be if Mr. Hucul or a third party purchased his interest, and he was prepared to consider a fair offer.
- [74] According to Mr. Farr, Mr. Sucher told him that in the circumstances, he would "not be around". Mr. Farr interpreted this as an ultimatum. He was worried that Mr. Hucul and Mr. Sucher could leave at any time and he began making inquiries of others about possibly joining Immediate on short notice. Mr. Sucher denied giving an ultimatum. He said that Mr. Hucul had proposed that he be made an equal partner and he left the meeting while Mr. Hucul and Mr. Farr argued about this. He did acknowledge, however, that he told Mr. Farr that he could not continue to work for nothing and he understood that things were "coming to fruition".

- [75] In March, Mr. Farr told Mr. Hucul that one of them had to buy the other out. It was not until later in May, after Mr. Farr had recovered from his injuries, that he and Mr. Hucul resolved the issue. Mr. Farr paid Mr. Hucul \$60,000 for his shares and \$40,000 for expenses. They agreed to keep their agreement confidential. Mr. Hucul left for Ontario.
- [76] There were urgent issues that needed to be addressed, particularly with one account. On June 5, 2006, Mr. Farr tried to contact Mr. Sucher about a number of these issues. On June 6, he advised Mr. Sucher and others that he and Mr. Hucul had arrived at an "amicable agreement" whereby Mr. Hucul had "relinquished his position and responsibilities" with Immediate. He also met with Mr. Sucher. He needed information about the status of various accounts. He said that Mr. Sucher told him he was doing other work and could not offer urgent support for Immediate's clients. He said that he asked Mr. Sucher to get back to him in writing about any outstanding issues with Immediate, but Mr. Sucher did not.
- [77] Mr. Sucher said that he was terminated and he met with Mr. Farr to hand over certain materials. He said that he asked Mr. Farr why he was not informed about Mr. Hucul's departure, indicating that he had a right of first refusal for Mr. Hucul's shares.
- [78] I appreciate that Mr. Sucher was in a difficult position once Mr. Hucul left the company and he was not informed about the situation for perhaps two weeks. However, nothing in the evidence supports a finding that Mr. Farr planned to take over control of Immediate by "starving out" Mr. Hucul and Mr. Sucher. To the contrary, Mr. Farr was keeping the company alive, and he was very clear with both Mr. Hucul and Mr. Sucher about what he would and would not agree to on behalf of the company. It is not entirely clear if Mr. Sucher was terminated, but it is clear that Mr. Sucher could not continue working for Immediate once Mr. Hucul left. Mr. Farr had made this clear to him long before June 2006. In any event, it is not necessary to make a specific finding on this point given my conclusion that the parties did not enter into a binding agreement on the terms alleged by Mr. Sucher.

Management services

- [79] Mr. Sucher claims in the alternative that he should be paid compensation in quantum meruit for the services he provided to Immediate and expenses he incurred for which he was not paid, on the basis of unjust enrichment. He says that the value of his services should be based on a monthly management fee of \$10,000 for the 20 months he was not paid, less the \$13,800 he received as fees from clients, or on a lesser monthly fee of \$3,750 and \$160,000 for the value of the equity shares he should have received for agreeing to a discounted fee.
- [80] Immediate says that there was a binding oral agreement to pay Mr. Sucher management fees of \$3,750 per month, but that Mr. Sucher agreed for valid consideration to defer payment of his compensation until the company was able to pay. It says, in effect, that its obligation to pay management fees to Mr. Sucher was contingent on its financial ability. Immediate also says that Mr. Sucher has not properly proved his claimed expenses.

Management fees

- [81] I have found that Mr. Sucher commenced work with Immediate on April 1, 2004 in the hopes of being able to negotiate an agreement that provided him with equity and control but was unable to obtain such an agreement. He commenced work on the understanding that he would be paid management fees in accordance with what was outlined in the March 30, 2004 Letter of Understanding. That Letter provided that Immediate would pay Mr. Sucher a fee of \$3,000 per month for his services, commencing April 1, 2004, to be increased to 75 percent of the fees paid to the "Founders" as soon as the company's finances permitted. It also provided that Immediate would enter into a management services contract with Mr. Sucher on terms to be agreed.
- [82] Mr. Sucher began invoicing Immediate beginning April 1, 2004 and was paid management fees in accordance with this term in the Letter of Understanding. His fees were increased to \$3,750 in July 2004, which was 75 percent of what Mr. Farr and Mr. Hucul were paid, also in accordance with this term.
- [83] Mr. Farr said that they were acting on the assumption that there was a management services contract in place, with the terms to be worked out. He was going to prepare a written contract. In November 2004, he asked Mr. Sucher to provide a brief summary of his services, which he could incorporate into a management services contract. Mr. Sucher said he would put something together, but never did. He asked Mr. Farr for an example of the descriptions for him and Mr. Hucul. He said that Mr. Farr did not send him anything. He thought this was a curious request because Mr. Farr knew what kinds of activities he was doing for the company and could easily have described them.
- [84] In any event, the parties did not enter into a written management services contract. The evidence is clear, however, that Immediate and Mr. Sucher agreed about management fees. Mr. Sucher commenced work on April 1, 2004 on the understanding, shared by Immediate, that he would be paid management fees of \$3,000, to be increased in time to 75 percent of the management fees paid to Mr. Hucul and Mr. Farr. The parties conducted themselves in accordance with this agreement. I find that there was a binding agreement for management fees on these terms.

Payment deferral

- [85] Immediate paid management fees to Mr. Sucher in accordance with their agreement until November 2004, when the company ran out of funds. After that, it ceased paying any management fees at all. Mr. Farr testified that the company could not pay any management fees without sufficient revenues coming in. He said he told Mr. Hucul and Mr. Sucher that he did not think the company would have money available for management fees in the foreseeable future, at least through to the end of 2007. He told them if they had to leave the company, they could, but he was going to "hang in" due to obligations to the investors.

- [86] Mr. Sucher acknowledged that no one received management fees from the company after November 2004 and he accepted that the company was not able to pay him. He said, however, that he was told the shortfall was expected to be short term. He said that Mr. Hucul encouraged him to stay and offered to compensate him with interest on funds he would need to borrow. He disagreed that the company was deferring his fees. He said that Immediate acknowledged there were outstanding fees owed to him by specifically earmarking fees earned for content production to him.
- [87] Mr. Weiler submitted that an agreement was made whereby Mr. Sucher could provide his services as he wished and Immediate would only be obligated to pay for those services if and when the company's financial circumstances reversed and it was able to afford them. Since the financial circumstances have not yet improved, the company is not in breach. He also submitted that Mr. Sucher lost nothing by staying with Immediate because he had no other income opportunities; in fact he was able to generate some income from the fees the company received for his content production and graphic design.
- [88] Mr. Parhar submitted that Mr. Sucher stayed on the understanding that he was not going to be paid for a short time and the company remained obligated to pay his management fees.
- [89] While Mr. Sucher carried on working for Immediate for a considerable period of time without being paid, I am not satisfied that there was an agreement as alleged by the defendants. I accept that Mr. Farr acknowledged that Mr. Sucher could leave, but I do not accept that Mr. Sucher agreed to carry on with the understanding that the company's obligation to pay him for his management fees was contingent on its financial circumstances. In my view, Mr. Sucher agreed to wait, but the company continued to be indebted to him for the unpaid fees.
- [90] Immediate acknowledged its indebtedness to Mr. Sucher by offering to pay interest on loans, by remitting graphic design fees to him and by acknowledging that he should be given priority for his management fees. Mr. Farr said that out of concern for Mr. Sucher, he agreed that the company would pay him first when there was enough for management fees.
- [91] In some of Mr. Farr's e-mails about the company's cash flow problems he did on occasion make reference to putting back the time when they could expect to "earn management fees", and I noted that the company's financial statements after 2004 did not record what would have been Mr. Sucher's fees as a management expense. However, these were unilateral actions by Mr. Farr on behalf of the company and they are not evidence of an agreement.
- [92] The next question is: how long did Mr. Sucher agree to wait? The only reasonable answer to that question, based on the evidence, is until the company could afford to pay his management fees or until he left the company, whichever occurred first. This was, at the very least, an implied term. Once the relationship was severed, the unpaid management fees became due and payable.

[93] I appreciate the evidence about Immediate's current financial circumstances. Mr. Farr said that it was still operating at a loss in the order of \$12,000, which may be larger by the end of the year. However, I find that Immediate is obligated to pay Mr. Sucher the management fees owing under the terms of the agreement, less the fees Mr. Sucher retained in lieu of his fees.

Expenses

[94] Mr. Sucher claims unpaid expenses in the amount of \$14,537.79 for cellular phone, phone, fax and internet, long distance, car and gas, home office, meals, and travel.

[95] Mr. Farr testified that Immediate had a policy to reimburse for reasonable business expenses and it was expected that these would be claimed on a monthly basis with proper receipts. On January 2, 2006 he sent an e-mail to Mr. Sucher as follows:

Just to clarify my previous e-mail re Expense Policy.

In order to maintain accurate accounts, we need to have reimbursable expenses claimed and documented on a monthly basis.

We do not have the cash to make those reimbursements and I would not want to forecast when we will be in a position to do so. If you need to incur an expense, please do so with this reality in mind.

[96] Mr. Farr said that Mr. Sucher submitted some expenses, which were paid. However, none of the expenses he now claims had ever been submitted.

[97] Mr. Sucher testified that Mr. Farr and Mr. Hucul told him to keep a record of his expenses and when Immediate had the money available he was to submit them as a summary and they would be reimbursed. He acknowledged that he received Mr. Farr's e-mail of January 2, 2006 but said that this was a policy implemented in 2006. And in any event, he said that he relied on Mr. Hucul's advice to keep a record and submit expenses when there was money to pay them.

[98] Again, I do not accept Mr. Sucher's evidence about this. He claims expenses dating back to March 2004, before the company's cash flow problems started, and he has not provided proper invoices to support these expenses. The only evidence provided are copies of redacted Visa statements showing charges for BC Ferries, parking and some hotel, travel or entertainment. There is one receipt for a hotel charge in July 2004. He also claims a car allowance that I have found was never agreed to.

[99] Mr. Farr's evidence about the company's expense policy is entirely reasonable. There are obvious reasons for a company to record expenses on a monthly basis with proper supporting documentation.

[100] I find that Mr. Sucher has failed to prove the expenses claimed.

Unjust enrichment

[101] A claim for unjust enrichment requires three elements: (1) an enrichment or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment or benefit: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629. The existence of a contract, which is a juristic reason for the enrichment or benefit to the defendant, results in a denial of recovery for unjust enrichment. This is what occurred in *Scott v. Noble*, [1994] 99 B.C.L.R. (2d) 137; *Kosaka v. Chan*, 2008 BCSC 123, 165 A.C.W.S. (3d) 365; and *Life Innova Capital Inc. v. Perceptronix Medical Inc.*, 2008 BCSC 1132.

[102] In my view, the claim in unjust enrichment must fail for similar reasons. Mr. Sucher and Immediate had a contract for management services, which provides a juristic reason for the benefit to Immediate. Even if the absence of payment under that contract could be characterized as a corresponding deprivation of Mr. Sucher, given my findings, his remedy can only be in contract.

Conclusion

[103] The plaintiff's claims as set out in the statement of claim are dismissed, with the exception of a claim for damages for breach of the contract for management services.

[104] There will be judgment for the plaintiff in the amount of \$61,200, being unpaid management fees in the amount of \$3,750 per month from November 1, 2004 to June 30, 2006 (20 months), less the \$13,800 in fees Mr. Sucher retained between June 2005 and May 2006.

Costs

[105] While I have awarded judgment for the plaintiff in this case, Mr. Sucher has been largely unsuccessful in proving his claims against the defendants. Immediate did not dispute that there was a binding agreement about management fees. It was not successful only with respect to its argument about the contingent nature of that agreement.

[106] Mr. Weiler raised the issue of costs, submitting that if Mr. Sucher is successful for any of his claims, costs should be apportioned under Rule 57(14) and (15).

[107] This may be an appropriate case to consider apportioning costs. However, this issue was not fully argued before me. Accordingly, leave will be given to the parties to make submissions on costs if they cannot otherwise agree.

"Fisher J."

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