

CANADA / JUDGMENT

Urton v. SRI Homes et al

2005 BCSC 1019

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1019 Urton v. SRI Homes et al IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Urton v. SRI Homes et al, 2005 BCSC 1019 Date: 20050705 Docket: S035118 Registry: Vancouver Between: Brian Urton Plaintiff And SRI Homes Inc. and Nelson Group Inc. Defendants Before: The Honourable Mr. Justice Melnick Reasons for Judgment Counsel for plaintiff D.G. Sanderson, Q.C. and D. Rideout Counsel for defendants D.R. Bennett and C.J. Petersen Date and Place of Trial: May 16 - 19, 2005 Vancouver, B.C.

- [1] The plaintiff, Brian Urton ("Mr. Urton"), claims specific performance (or alternatively damages for breach) of an employment agreement with the defendant SRI Homes Inc. ("SRI"). Mr. Urton also claims that the defendant Nelson Group Inc. ("Nelson Group") acted in bad faith in terminating his contract of employment with SRI without cause for which he seeks punitive or aggravated damages.
- [2] There are four issues for determination:
- a) Is Mr. Urton entitled to be paid additional long-term incentive benefits pursuant to the terms of the employment agreement dated May 28, 2001 (the "agreement")?
 - b) Is Mr. Urton entitled to be paid additional short-term incentive benefits pursuant to the terms of the agreement?
 - c) Is Mr. Urton entitled to vacation pay and, if so, in what amount?
 - d) Did Nelson Group act in bad faith in terminating Mr. Urton's contract of employment or was the manner of his dismissal such that he is entitled to be compensated in damages? I.
- BACKGROUND

- [3] SRI has its head office in Kelowna where it builds and sells manufactured homes. In 1993, SRI hired Mr. Urton, who is presently 58 years of age, as a regional sales manager, promoting him to a vice-president, later that year. Subsequently, in May 1999, SRI promoted Mr. Urton to president.

- [4] In May 2001, Nelson Group purchased all the issued shares of SRI. At that time, Nelson Group caused to be created a new employment agreement between Mr. Urton and SRI and R & M Frontier Holdings Corporation (as Nelson Group was then known). Pursuant to the agreement, Mr. Urton was employed by Nelson Group to act as president of SRI. The relevant sections of the agreement for the purpose of this proceeding are as follows:
- SECTION 1 - DEFINITIONS AND INTERPRETATION 1.1 In this Agreement:
- (a) "Benefits" means the benefits and perquisites described in Schedule "A" to this Agreement, together with the right to participate in other benefit plans and the right to enjoy other perquisites which are hereafter made available by Nelson to its officers and employees;
 - (d) "Cessation Date" means the date that the Officer ceases to hold the office of President of SRI;
 - (g) "Incentive Plan" means the SRI Incentive Plan attached as Schedule "B" to this Agreement;
 - (h) "Measurement Deadline" means the 30th day after the acceptance or approval by the Board of the annual audited consolidated financial statements of Nelson and SRI for the immediately preceding financial year;
 - (n) "Term" means the term commencing on the 28th day of May, 2001 and, subject to the provisions of Sections 2.2 and 2.3 ending on the later of:
 - (i) April 30, 2004; and
 - (ii) the Extension date.
- SECTION 2 - EMPLOYMENT 2.1 SRI shall employ the Officer to act as President of SRI and the Officer shall serve as President of SRI until the Term End Date. 2.2 Notwithstanding Section 2.1, the Officer's appointment as President of SRI may be terminated prior to the Term End Date:
- (a) in accordance with Sections 10.1 and 10.2 herein; SECTION 7 - INCENTIVE PLANS 7.1 For the purposes of this Agreement, the Officer shall participate in the Incentive Plans for January 1, 2001. SRI will offer a Short Term Incentive Plan and a Long Term Incentive Plan, as outlined in Schedule "B" to this Agreement. 7.2 Subject to Sections 10 and 11, the right of the Officer to participate in the Incentive Plan will end on the Cessation Date. 7.3 By the Measurement Deadline, the Board shall determine Nelson's and SRI's corporate performance and the performance of the Officer pursuant to the Incentive Plans. 7.4 Any amount earned by the Officer pursuant to the Incentive Plans shall be paid, in the case of the Short Term Incentive Plan, or allocated under the Long Term Incentive Plan to the Officer by the Measurement Deadline. SECTION 10 - TERMINATION 10.1 Without Cause, the Board may at any time remove the Officer as President of SRI, provided that:
 - (a) such removal shall be on prior written notice to the Officer;
 - (b) the Officer shall remain and employee of SRI until the Term End Date, but he shall not be required to perform any of the duties, nor shall he have any of the authority set forth in Schedule "C" from the Cessation Date until the Term End Date; I subject to Section 13, from the Cessation Date the Officer may provide his services to another Person, as an employee or otherwise, and may retain any remuneration received for his own benefit;

- (d) in full and final satisfaction of all obligations of SRI to the Officer, SRI shall:
- (i) (A) continue to pay to the Officer the Salary for such period of time as shall be the lesser of:
 - 1) two (2) years from the date that the Board provides the Officer with notice that he has been removed as President of SRI; and
 - 2) the greater of:
 - (a) that portion of the Term remaining to the Term End Date; and
 - (b) 12 months salary, and (B) continue to provide the Officer with all Benefits for such period of time as shall be the lesser of:
 - (a) two (2) years from the date that the Board provides the Officer with notice that he has been removed as President of SRI; and
 - (b) that portion of the Term remaining to the Term End Date; (ii) continue to include the Officer in the Short Term Incentive Plan until the end of the Measurement year in which the Cessation Date occurs and, forthwith following the applicable Measurement Date, pay to the Officer the amount earned or accrued by the Officer in respect of that Measurement year; and (iii) continue to include the Officer in the Pension Plan until the date which shall be the lesser of: (A) two (2) years from the date that the Board provides the Officer with notice that he has been removed as President; or (B) that portion of the Term remaining to the end of the Term End Date, provided that the Officer has elected to participate in the Pension Plan according to Section 8.1 hereof. (iv) pay the balance of any Long Term Incentive accrued to the benefit of the officer to the date of cessation.
- SCHEDULE "A" Schedule of Employment Benefits and Perquisites Statutory Holidays Vacation Entitlement - 4 weeks per year
- SCHEDULE "B" Incentive Plans SHORT TERM INCENTIVE PLAN Policy Statement SRI
- Homes Inc. wishes to maintain an annual incentive/bonus plan that is competitive with the marketplace, and which recognizes both corporate profitability targets and other less tangible objectives that the Board may establish. The SRI Incentive Plan incorporates a minimum "threshold" level which must be met before any bonus is payable, as well as an "overattainment" level which recognizes achievements in excess of annual targets.
- | Threshold Target | Maximum President SRI Bonus as % of Salary |
|------------------|--|
| 20% | 40% |
| 60% | Percentage of Goals Attained (75%) (100%) (125%) |
- LONG TERM INCENTIVE PLAN Purpose: In addition to the Short Term Incentive Plan SRI wishes to offer incentives to certain designated officers that will align their actions with the longer term growth in value of SRI and will encourage and reward long term commitment to SRI as well as good performance. President Threshold Target Maximum Long Term Incentive as % of Salary 5% at a rate of roughly 1% for each 5% by which targets are missed 10% Up to 100% at rate of 1% for each of the first ten percentile points over target, 2.5% for each of the next ten percentile points and 3% thereafter
- | Percentage of Attained Goals | 75% | 100% | Up to 140% |
|--|---|------|------------|
| Goal attainment between 75% and 100% and between 100% and 140% | should result in a pro rata calculation to determine the Long Term Incentive Plan payout. The ratios for performance above target will increase a greater | | |

rate than the ratios for below target performance. Vesting: Any amounts in an Officer's Long Term Incentive account will vest in the Officer at the rate of 25% on each anniversary date of the date that the Long Term Incentive award was allotted. The account will vest 100% in the Officer in the event of the death of the Officer and upon his retirement date. "Retirement date" is the earlier of the first of the month following the date on which the which Officer achieves his 65th birthday or a date agreed to between the Company and the Officer, which will not be earlier than the date on which the Officer achieves his 60th birthday. Any amounts vested in the Officer shall be paid to the Officer as he might direct, subject to statutory deductions. [This sentence deleted in Amended Schedule "B"] Other Matters: The Long Term Incentive program is designed to reinforce behaviour and actions that will enhance the long term value of the Company. The Company reserves the right to adjust the amount of long term bonus for Officer's who are within three years of their "retirement date". February 6, 2003 To: Frank Proto From: Brian Urton Re: Acknowledged change to my contract Dear Frank: This letter serves as my acknowledgement that effective March 1, 2003 the part of my contract entitled Schedule "B" Incentive Plans will be replaced by the attached revised schedule. I understand that my bonus calculations (short and long term) for the fiscal year end February 28, 2003 will be based on the original Schedule "B" but thereafter and until the conclusion of my contract will be now based on the revised Schedule "B". All other aspects of my contract are unchanged. "Signature"_____ Brian Urton LONG TERM INCENTIVE PLAN [AMENDED] President Threshold Target Maximum Long Term Incentive as % of Salary 5% at a rate of roughly 1% for each 5% by which targets are missed 10% Up to 45% at rate of 1% for each of the first ten percentile points over target, 1.5% for each of the next ten percentile points and 2.0% thereafter. Percentage of Attained Goals 75% 100% Up to 125%

- [5] In fact, Mr. Urton's performance during the course of his employment by Nelson Group as president of SRI was excellent. Immediately before the termination of his employment following on Mr. Urton sending a memorandum I will refer to later, there were no complaints whatever with respect to his performance. SRI more than achieved its most optimistic sales targets with the result that Mr. Urton qualified for the maximum short term incentive plan ("STIP") and long term incentive plan ("LTIP") bonuses.
- [6] In November 2002, Nelson Group decided to sell certain of its assets, including SRI. The principal shareholder of Nelson Group, Mr. Ray Nelson ("Mr. Nelson"), suggested that senior employees of SRI and Nelson Group be given the opportunity for an employee buy-out of that company. Mr. Brian Holterhus ("Mr. Holterhus"), at the time Chief Financial Officer of Nelson Group, Mr. Robert Adria ("Mr. Adria") who occupied a similar position with SRI, Mr. Dennis Patterson, and Mr. Urton were suggested as an appropriate group to purchase SRI. However, Mr. Urton was not interested because of his age and the financial commitment that would be required. Perhaps not surprisingly, thereafter the other three did not include him in many of their confidences. This led Mr. Urton to feel as if he were being left out of the loop with respect to certain matters.

- [7] Mr. Urton had met Mr. Nelson on a number of occasions and had a lot of respect for him. Mr. Nelson was then in his early 80's. Mr. Nelson had mentioned to Mr. Urton the possibility of his being asked to assume certain responsibilities at Nelson Group. It thus undoubtedly came as a surprise to Mr. Urton when Nelson Group decided to sell SRI, given that it had just so recently been purchased.
- [8] Mr. Urton had had a difficult year in 2002 due to the death of a daughter. I do not accept that this affected his relations with SRI or his fellow employees in a way that negatively impacted on SRI's financial performance, but it may have created some difficult times with some of his co-workers. In any event, that tragic event, while unfortunate for Mr. Urton and his family, is of no consequence, ultimately, with respect to the outcome of these proceedings.
- [9] What is of consequence is that on April 14, 2003, Mr. Urton wrote a memorandum to Mr. Holterhus raising questions about why SRI had taken certain accounting decisions which, in his view, negatively impacted on the value of SRI at the time when Nelson Group had SRI for sale. Mr. Holterhus and Mr. Adria, both accountants, took Mr. Urton's memorandum to be an attack on their integrity and honesty. Mr. Urton says that he never intended it that way but, in the circumstances at the time, it is difficult to accept that Mr. Urton was suggesting anything other than that the accounting changes and the recording of obligations were being made by the very individuals who were seeking to buy the company, thus depreciating it for their own benefit. In my view, at that time Mr. Urton probably saw himself as a protector of Mr. Nelson's interests. This was despite the fact that Nelson Group had a board of directors which included independent directors without any financial interest in either Nelson Group or SRI, one of whom was the chair of the board and the other was chair of the audit committee.
- [10] In his April 2003 memorandum, Mr. Urton questioned an accounting decision to reduce the value of SRI's inventory, and decisions to indicate accruals of a loss with respect to transactions involving one of its retail dealers as well as amounts representing SRI's exposure for LTIP allotments with respect to Mr. Urton and Mr. Adria. These latter obligations were recorded as "corporate restructuring" so that other staff would not be aware of the extent of the earnings of Mr. Urton and Mr. Adria.
- [11] The surprising thing is that all three of these issues were known to Mr. Urton prior to his writing his memorandum and had not been raised by him as a concern at any board meeting that he attended or with any other senior person in SRI or Nelson Group. It is suggested by the defence that his reason for doing so at the time when the company was for sale was in order to hamper the sale of the company because he was comfortable with the job that he had. I do not accept that theory. I accept that Mr. Urton's intentions were good, although unjustified and without foundation.
- [12] That the reaction to his memorandum was so strong appears to have come as something as a surprise to Mr. Urton. It should not have. There followed exchanges between Mr. Holterhus, Mr. Adria and Mr. Frank Proto ("Mr. Proto"), an independent board member and board chair,

explaining to Mr. Urton that these decisions had been taken for good accounting reasons, had been discussed at the board level, and had been in the works for some time. These exchanges, while reflecting what I would characterize as somewhat of an over-reaction from Mr. Adria and Mr. Holterhus, also provided a forum for the venting of certain dissatisfaction with Mr. Urton, particularly by Mr. Adria, that may or may not have been wholly justified. By that I mean these events were not used by SRI and Nelson Group to justify dismissing Mr. Urton with cause. Rather, they created a situation in which Mr. Holterhus and Mr. Adria did not have a sufficient level of comfort to continue working with Mr. Urton. Given the tone and content of Mr. Urton's April 23, 2003 memorandum, that is understandable. In that respect, I also reject the theory of Mr. Urton that his dismissal without cause from SRI was engineered to attempt to avoid having to pay to him portions of his LTIP bonuses and not expose the Holterhus group (who ultimately purchased SRI) to the financial obligations inherent in Mr. Urton's contract.

- [13] In any event, it was decided by Nelson Group to dismiss Mr. Urton from his employ without cause effective May 15, 2003. In my view, the reason for his being terminated was that Nelson Group and SRI had lost confidence in, and comfort with, Mr. Urton as a consequence of the allegations raised in the April 23, 2003 memorandum. It was not because of the way in which Mr. Urton may or may not have been acting with fellow employees as a consequence of the emotional fallout from the death of his daughter nor was it because they were trying to engineer his departure for financial benefit.
- [14] On May 15, 2003, Mr. Holterhus and Mr. Proto flew to Kelowna and, unannounced, attended at Mr. Urton's office and told him of the decision of the defendants. Mr. Proto was the individual who principally communicated with Mr. Urton on this occasion. Both Mr. Proto and Mr. Holterhus stayed in his office while Mr. Urton cleaned his effects from his desk. Although I accept that he may have been initially reluctant to do so, Mr. Proto did permit Mr. Urton the opportunity to say goodbye to senior staff to whom he was close.
- [15] He was offered the opportunity to announce his leaving as a resignation if he wished to do so; he was offered the opportunity to consult with financial advisers with respect to how certain funds which were properly owed to him could be paid so as to minimize any tax consequences; an announcement was made to staff simply indicating that as of May 15, 2003, Mr. Urton was stepping down as president of the company. There was, ultimately, a disagreement as to what Mr. Urton was entitled to receive by way of financial benefits as a consequence of the termination of his employment. That is the reason for this lawsuit.
- [16] Through negotiation, the defendants have paid to Mr. Urton the following:
- a) 12 months salary, or \$165,000;
 - b) benefits under the agreement to April 30, 2004, including life insurance, accidental death and dismemberment insurance, health, dental, long-term disability and pension benefits;
 - c) accrued vacation pay to May 15, 2003 of \$18,480;

- d) payments under the STIP for 2003 and 2004 of \$119,625; and
- e) payment under the LTIP to May 15, 2003 of \$41,250.

[17] In the view of the defendants, they have satisfied all of their obligations to Mr. Urton. However, Mr. Urton claims that he is still entitled to be paid:

- a) STIP benefits through to the end of SRI's measurement year on February 28, 2004;
- b) portions of the LTIP benefits recorded in the financial statements of the company as accruing to him for the first two years to the extent that those amounts have not already been paid;
- c) LTIP benefits accrued between March 1, 2003 and May 15, 2003; and
- d) statutory holiday and contractual vacation pay from May 15, 2003 to the term end date of the contract.

[18] In his statement of claim, Mr. Urton also advanced a claim for pension benefits to the term end date although that does not appear to have been an issue pressed during the trial. II. DISCUSSION A. Long Term Incentive Plan

[19] With respect to the payment of the LTIP, the relevant part of the agreement is section 10.1(d) (iv), which, for convenience, I repeat, in part: 10.1. Without Cause, the Board may at any time remove the Officer as President of SRI provided that:

- (b) the Officer shall remain an employee of SRI until the Term End Date, but he shall not be required to perform any of the duties from the Cessation Date until the Term End Date;
- (d) in full and final satisfaction of all obligations of SRI to the Officer, SRI shall (iv) pay the balance of any Long Term Incentive accrued to the benefit of the officer to the date of cessation. [Emphasis added]

[20] With respect to interpreting section 10.1(d)(iv), Mr. Urton submits that "accrued" means that the entire amount allocated to the LTIP pool under section 7.4 should be paid out to him. The defendants, on the other hand, submit that Mr. Urton's argument is inconsistent with the stated purpose of the LTIP and would simply duplicate the STIP with the exception that it is paid out over time. The defendants submit that the proper interpretation is found in the vesting provisions of the LTIP and the stated purpose of the LTIP is achieved through the vesting provision: Any amounts in an Officer's Long Term Incentive account will vest in the Officer at the rate of 25% on each anniversary date of the date that the Long Term Incentive award was allotted. The account will vest 100% in the Officer in the event of the death of the Officer and upon his retirement date.

- [21] The definition of "vest" is "to give someone the legal right to power or property" or to "confer or bestow power or property" (Concise Oxford English Dictionary, 11th ed. (New York: Oxford University Press, 2004) at p. 1608). Taking this definition into consideration, the vesting provision for the LTIP provides that Mr. Urton will be given the legal right to any amounts in the LTIP pool, being 25 per cent on each anniversary date or 100 per cent upon death or retirement.
- [22] I agree with the argument of the defence that to interpret para. 10.1(d)(iv) in isolation from the rest of the contract, particularly the provisions with respect to vesting, is illogical. For example, it makes no sense that Mr. Urton would have a greater right to the entire LTIP account upon his employment being terminated without cause than he would have had if the defendants had simply not renewed the agreement. There is a feature of the LTIP that is notably absent in the STIP. That is, not just that the efforts of Mr. Urton would have resulted in SRI achieving its financial goals, but also that he remain with SRI. The focus of the LTIP was to encourage him not to go elsewhere. The plan recognized two instances only when it would be unfair not to pay out the full amount otherwise than in accordance with the 25 per cent per annum vesting schedule: in the event that he died or retired. The parties did not agree that if the agreement was not renewed or if some other, as yet unforeseen, event occurred, such as the termination of Mr. Urton's employment without cause, the full balance would be paid.
- [23] In my view, the fact that SRI's auditors and financial officials deemed it prudent to show on its financial statements an accrual for corporate re-organization (potential obligation for LTIP payments to Mr. Urton and Mr. Adria) makes good accounting sense but does not convert that amount to a debt irrevocably payable to Mr. Urton and Mr. Adria. It was simply a provision by SRI to give notice to readers of the financial statements of the potential for an obligation payable if the terms contained in the contracts of employment with Mr. Urton and Mr. Adria otherwise made it payable.
- [24] Having said that, however, I find that Mr. Urton is entitled to a greater share of the LTIP approval than has been, to date, paid to him by the defendants. As the vesting provision states, "[a]ny amounts in an Officer's Long Term Incentive account will vest in the Officer at the rate of 25% on each anniversary date of the date that the Long Term Incentive award was allotted". Thus, the amount in Mr. Urton's LTIP account is to vest in him at the rate of 25 per cent on each anniversary date of the date that the LTIP award was allotted. Thus, the question becomes when the anniversary date of the LTIP takes place. Mr. Urton began work on May 28, 2001 and his employment was terminated on May 15, 2003. However, according to section 7.1 of the agreement: "[f]or the purposes of this Agreement, the Officer shall participate in the Incentive Plans from January 1, 2001 ". Thus, the anniversary date of the LTIP is January 1. Mr. Urton was an active employee for two anniversary dates of the LTIP, being January 1, 2002 and January 2, 2003. Therefore, he is entitled to 25 per cent of the LTIP pool that was allotted on January 1, 2002 and 25 per cent of the LTIP pool that was allotted on January 1, 2003. The definition of "allot" is "to give or apportion something to

someone" (Concise Oxford English Dictionary at p. 35).

- [25] The right of Mr. Urton to participate in the LTIP ended on the cessation date, being May 15, 2003 (See section 7.2 of the agreement). Thus, he is only entitled to the amount in the LTIP which had vested as of the cessation date. Specifically, section 10.1(d)(iv) of the agreement states that the defendants must "pay the balance of any Long Term Incentive accrued to the benefit of the officer to the date of cessation".
- [26] The British Columbia Court of Appeal dealt with the meaning of "accrued benefits" in *Canadian Association of Smelter and Allied Workers, Local 1 v. Garvin*, 2001 BCCA 303 [Garvin]. In Garvin, the Court considered whether an employer's change to a pension plan constituted a change to an employee's "right to benefits which had accrued". The pension plan provided for the calculation of benefits based on an employee's highest average earnings. In 1990, the employer amended the definition of earnings to omit overtime earnings. Madam Justice Levine, for the Court, held at para. 26: In my view, a plain reading of the words "right to benefits which had accrued" prior to January 1, 1990 is that the appellants had a right to have their pension benefit calculated taking into account their highest average earnings, including overtime earned prior to January 1, 1990. They had no right to any benefits resulting from anything that occurred after that date, whether those things were additional earnings, service contributions or anything else that had not yet occurred.
- [27] Thus, accrued benefits are those that have accrued at a certain date and do not include benefits resulting from anything that occurred after that date. Therefore, Mr. Urton has a right to the vested parts of his LTIP as of the cessation date of May 15, 2003 and not the end term date of April 30, 2004. That is, he is entitled to 25 per cent of the LTIP pool that was allotted on January 1, 2002 and 25 per cent of the LTIP pool that was allotted on January 1, 2003.
- [28] In its letter of May 27, 2003 outlining the amounts Nelson Group was prepared to pay to Mr. Urton upon the termination of his employment, there is included \$41,250 for an LTIP payment to May 15, 2003. This would appear not to have taken into account that, as noted above, the timing of Mr. Urton's termination triggered two additional 25 per cent (in both cases of \$165,000) LTIP benefits. Thus, he is entitled to a further \$82,500 for LTIP benefits. Liberty to apply if either party is of the view that I have not taken the correct view with respect to the \$41,250 payment. B. Short Term Incentive Plan
- [29] As noted above, s. 10.1(d)(ii) of the agreement provides that upon termination SRI shall: Continue to include the Officer in the Short Term Incentive Plan until the end of the Measurement year in which the Cessation Date occurs and, forthwith following the applicable Measurement Date, pay to the Officer the amount earned or accrued by the Officer in respect of that Measurement year; [Emphasis added]

- [30] The end of the measurement year in 2003 was February 28, 2003. Thus, a new measurement year began on March 1, 2003 and would end on February 28, 2004. As Mr. Urton's employment was terminated on May 15, 2003, in accordance with section 10.1(d)(ii), he would continue to be included in the STIP until the end of the measurement year in which the cessation date occurred, being until February 28, 2004.
- [31] The defendants submit that Mr. Urton is only entitled to a pro-rated amount on the STIP for the 2.5 months that he worked into the measurement year. The defendants justify this position by arguing that "earned or accrued" in section 10.1(d)(ii) refers to the amount "earned or accrued" during the amount of time he worked in that measurement year.
- [32] Mr. Urton submits that to interpret the agreement in the way that the defendants suggest would render the first sentence of the provision, stating that he was to remain in the STIP for the remainder of the year, meaningless. Mr. Urton submits that he is entitled to be paid the entire amount of his STIP for the 2003-2004 measurement year.
- [33] However, it is important to note that as part of the STIP plan, "the SRI Incentive Plan incorporates a minimum 'threshold' level which must be met before any bonus is payable..". The threshold level is "the percentage of salary payable as bonus once 75% of goals and objectives have been reached". If Mr. Urton had reached that threshold level then he would be entitled to a bonus accordingly. However, there is no evidence to suggest that Mr. Urton had achieved that goal in the 2.5 months that he worked in the 2003-2004 measurement year. If he did not achieve the threshold level then he is not eligible to receive any benefits under the STIP for the 2003-2004 measurement year. If he did achieve the threshold level, then he is entitled to any benefits which accrued to him from March 1, 2003 to February 28, 2004. In the absence of any evidence as to the extent of Mr. Urton's contribution during the measurement year in which his employment was terminated I have no way of saying that the formula chosen by the defendants, to pro-rate the STIP to reflect the amount of time he worked during that year, was unfair. C. Vacation Pay
- [34] There is no suggestion that Mr. Urton suffered any loss or expense with respect to vacation benefits other than the opportunity to work, and be paid for it, instead of taking vacation. This is apparently what he commonly did although, I accept, that was not in accordance with the policy of SRI. It wanted its employees to take vacation. After his employment was terminated, Mr. Urton was not working. There is no indication that his time was consumed with searching for a new job or that he had other commitments that, consequent on the termination of his employment, prevented him from going for a vacation. He clearly was not without the money to do so. In my view, to award Mr. Urton statutory holiday or vacation pay from May 15, 2003 to April 30, 2004 would be to provide double indemnity in these circumstances. (See *Scott v. Lillooet School District No. 29* (1991), 60 B.C.L.R. (2d) 273 at para. 27 (C.A.)).

- [35] I add that this is not a case such as in *Moody v. Telus Communications Inc.*, 2003 BCSC 471, where, at para. 48, Mr. Justice Cullen found that the plaintiff in that case had an entitlement to work through vacation time so as to bank or accrue the time to extend his term of employment and thereby engage or seek to engage pension entitlement or to lengthen the service by which the amount of the benefit was determined. In this case, Mr. Urton commonly did work instead of take vacation, but that was not something he was "entitled" to do pursuant to the terms of the agreement. D. Bad Faith and the Manner of Termination
- [36] In *Wallace v. United Grain Growers Ltd. (C.O.B. Public Press)*, [1997] 3 S.C.R. 701, the Supreme Court of Canada indicated that where an employer terminates the employment of an employee without cause, the employer does not need to demonstrate that it acted in good faith in doing so (see paras. 75 to 77). The obligation of the employer to act in good faith and fair dealing, however, extends to the manner of the termination by the employer. I take that to be the case notwithstanding the discussion in *Duprey v. Seanix Technology (Canada) Inc.*, 2002 BCSC 1335 at paras. 48 to 53. However, as I have already indicated above, I am satisfied that the defendants did not act in bad faith in terminating the employment of Mr. Urton nor does the manner in which that termination was effected call for any punitive sanction by way of damages. The termination of the employment of a senior officer of a company is not, I am sure, an easy task. In this case, I am satisfied from the evidence of Mr. Proto that, in all of the circumstances, he handled the task fairly and reasonably, if, perhaps, not with as much generosity in terms of conditions with respect to Mr. Urton leaving the premises as he may have.
- [37] I would not award Mr. Urton any damages with respect to the circumstances of the termination of his employment. III. CONCLUSION
- [38] Subject to liberty being given to the parties to clarify whether I have in any way misapprehended the basis for the \$41,250 LTIP payment, Mr. Urton is entitled to judgment against the defendants for additional LTIP benefits in the amount of \$82,500. Mr. Urton's other claims against the defendants are dismissed.
- [39] Counsel may address the question of costs at a time to be arranged or, if more convenient, in writing. "T.J. Melnick, J." The Honourable Mr. Justice T.J. Melnick

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