
CANADA / JUDGMENT

Urton v. SRI Homes Inc.

2007 BCCA 372

COURT

British Columbia Court of Appeal

DECIDED

12 July 2007

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2007 BCCA 372 Urton v. SRI Homes Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Urton v. SRI Homes Inc.,

2007 BCCA 372

Date: 20070712

Docket: CA033190

Between:

Brian Urton

Appellant

(Plaintiff)

And

SRI Homes Inc. and Nelson Group Inc.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Low

D.G. Sanderson, Q.C.

Counsel for the Appellant

D.R. Bennett and C.J. Petersen

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

17 May 2007

Place and Date of Judgment:

Vancouver, British Columbia

12 July 2007

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] This appeal concerns the interpretation of an employment contract made between the parties on 28 May 2001.
- [2] The respondent SRI Homes Inc. builds and sells manufactured homes in Kelowna, B.C. The appellant started with the company in 1993 as regional sales manager and soon thereafter was promoted to vice-president. He became president of the company in May 1999.
- [3] In May 2001, R & M Frontier Holdings Corporation, an Alberta company now known as Nelson Group Inc. (the second respondent), purchased all the shares of SRI Homes. The new owners entered into the employment contract with the appellant. Both SRI Homes and R & M Frontier were parties to the contract. On the date of the contract the appellant was 54 years of age.
- [4] The contract had a termination date of 30 April 2004 with a provision for extensions by mutual agreement. However, the appellant was dismissed without cause as president of SRI Homes on 15 May 2003. The parties were unable to agree as to the compensation that flowed to the appellant under the contract as a result of the dismissal and the appellant brought this action.

- [5] The issues at trial concerned long-term and short-term bonuses due to the appellant under the contract, his entitlement to vacation pay under the contract and his claim for damages arising out of the manner of his dismissal. The trial judge rejected the claim for damages. He decided that the appellant had received all the bonuses and vacation pay due to him under the employment contract except for bonuses (although not claimed by the appellant or argued by his counsel) for a period prior to 28 February 2001, the end of the fiscal year of SRI Homes immediately preceding the signing of the contract. The amount of the judgment is \$82,500 plus pre-judgment interest.
- [6] The appeal concerns additional long-term bonuses of \$304,218.75 and an additional short-term bonus of \$78,375 denied the appellant at trial. He says that in rejecting his claims for these bonus monies the trial judge erred in interpreting the legal meaning and effect of certain clauses in the employment contract.
- [7] The respondents defend the dismissal of the additional bonus claims made at trial. In a cross-appeal, they argue that the trial judge erred in extending back the bonus period and giving the appellant judgment for \$82,500 as a result. They say that the judgment should be set aside and that the action should be dismissed.
- [8] The only thing to be considered on appeal is the proper interpretation of the employment contract in order to determine from it what bonuses the appellant was entitled to as a consequence of being dismissed without cause.
- [9] I disagree with the trial judge's interpretation of those clauses in the contract dealing with both short- term and long-term bonuses and conclude that the appellant is entitled, with a small exception, to the bonuses in the amounts he claimed. Therefore, I would allow the appeal.
- [10] I also conclude that the trial judge erred in backdating the bonus period as he did and that the award of \$82,500 cannot stand. Therefore I would allow the cross-appeal.

Applicable contract law

- [11] A court must interpret a commercial contract so as to bring about "a sensible commercial result": see *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*, [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, where Estey J. wrote at p. 901:

Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an

interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation . . . which promotes a sensible commercial result.

[12] In *Eli Lilly and Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1 Iacobucci J., after quoting the above passage in para. 52, stated in para. 54: "The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination." He continued:

[55] Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.):

. . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself . . . [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses . . ."

[13] In *Gilchrist v. Western Star Trucks Inc.* (2000), 73 B.C.L.R. (3d) 102, 2000 BCCA 70 Saunders J.A., with reference to *Eli Lilly* and other cases summarized the fundamental law of contract interpretation:

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

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

[14] In my opinion, in the present case there is only one reasonable meaning to the words in the contract with respect to the appellant's entitlement to remuneration following dismissal without cause. The parties clearly intended that he would be entitled to the short-term bonus for the balance of the fiscal year in which his employment as president was terminated; and that he would also be entitled to all long-term bonuses credited to him as of the date of his dismissal.

Employment contract

[15] The contract is 13 pages long and contains numerous clauses. It is apparent that the parties intended to cover all eventualities. There are three schedules to the contract but we are concerned only with Schedule B which contains the two incentive or bonus plans.

[16] The contract started on 28 May 2001 and, barring extensions, would have terminated on 30 April 2004. When the appellant was dismissed on 15 May 2003 there were 11 ½ months left in the term.

[17] The contract provided the appellant with a base annual salary of \$165,000. He received benefits (dental, etc.) that already existed in his previous contract of employment as president of SRI Homes. He was eligible under clause 6.1 to participate in a pension plan offered to the employees of R & M Frontier Holdings (although "Pension Plan" is defined earlier as meaning the plan of SRI Homes). None of the clauses in the contract dealing with these matters affects the issues in this appeal.

[18] Section 7 of the contract is headed "Incentive Plans". It reads:

7.1 For the purposes of this Agreement, the Officer shall participate in the Incentive Plans from 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.

[19] It should be noted that clause 7.4, parsed to refer only to the long-term bonus plan, reads "(a)ny amount earned by [the appellant] pursuant to the Incentive Plans shall be . . . allocated under the Long Term Incentive Plan to [the appellant] ". This language is consistent with the wording of the plan itself (Schedule B to the contract, as described below) that long-term bonus monies would "accumulate" and be "paid into" the appellant's "Long Term Incentive account". I will develop this reasoning further when discussing the long-term

bonus claim.

[20] Where the contract refers to "the Officer" it means the appellant.

[21] Section 1.1 contains definitions of some of the terms used in the contract. Three that are important to this appeal read as follows:

(c) "Cause" has the same meaning that the phrase "just cause", and similar phrases bears in employment jurisprudence, but does not in any circumstance include absence due to illness or disability;

(d) "Cessation Date" means the date that the Officer ceases to hold the office of President of SRI;

...

(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;

I think the terms "Measurement Date" and "Measurement Year" as used in the contract can be defined by inference from the above definition of "Measurement Deadline". The Measurement Date is February 28th each year and the Measurement Year is the fiscal year that ends on that date.

[22] In Schedule B the short-term plan begins with this policy statement:

SRI 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" [sic] level which recognizes achievements in excess of annual targets.

[23] The short-term plan then sets out a formula for bonuses that could be earned by the appellant. It is not necessary to describe the formula except to say that, depending on the level of annual corporate performance, the appellant could earn short-term bonuses of up to 60% of his base salary of \$165,000. If earned, this bonus was payable "within thirty (30) days of acceptance of the annual year-end financial statements by the Board of Directors". The evidence disclosed that the financial statements were usually available by the end of March with the board meeting occurring in April and the bonus payments being made by mid-May.

[24] The appellant received the maximum short-term bonus of \$99,000 for each of the fiscal years ending at the end of February in 2002 and 2003. He was president of the company for 2 ½ months of the fiscal year ending 28 February 2004. Had he remained as president until 28 February 2004 he would have been paid the same short-term bonus for that fiscal year (measurement year) as in the previous two years. He was paid a pro-rated amount for the 2 ½ months between the end of the 2003 fiscal year and the date of dismissal (15 May 2003). Based upon clause 10.1(d)(ii) of the contract (reproduced below), he claims the balance.

[25] Schedule B states the purpose of the long-term plan as follows:

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.

[26] The long-term plan sets out a fairly complex formula for calculating the appellant's bonuses which, like the short-term plan, are based upon annual corporate performance. There is a target which is defined as "the percentage of salary to be paid into the Officer's Long Term Incentive Account" (my emphasis) and is stated to be in addition to the short-term plan. The formula provides for a threshold of 75% of "goals and objectives" after which the plan "will start to accumulate" (my emphasis). The schedule sets out the annual salary percentage of the long-term bonus of up to 100% based upon the level of performance compared to objectives. This is introduced by the statement that the bonus "would . . . accumulate to the following amounts . . ." (my emphasis).

[27] It was agreed between the parties in writing in February 2003 that, effective 1 March 2003, the maximum long-term bonus the appellant could earn was to be 45%, rather than 100%, of his annual salary. A new schedule B was drafted. The formula is worded differently than in the old schedule but not so as to affect the issues in this appeal. Of course, it was the new schedule B that governed after the appellant's dismissal.

[28] It can be seen that the long-term bonus plan created an account for the appellant to which the long-term bonuses earned by the appellant were to be credited annually.

[29] When was this accumulated credit to be paid to the appellant from his Long Term Incentive account? Schedule B provides the answer. It contains a paragraph under the heading "Vesting" which reads (in both the 2001 and the 2003 versions):

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 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.

[30] I pause here to observe that one effect of the vesting clause was to accelerate payment to the appellant of the balance in his bonus account at retirement, his retirement age being 65 years or at any age after age 60 to which there might be agreement. Under the vesting clause, death of the appellant would have accelerated payment of the entire account to his estate.

[31] The disposition of the bonus account in the event of dismissal for cause, dismissal without cause, illness or disability of the appellant, or termination of the contract by the appellant are dealt with in various sections of the contract itself.

[32] Clause 10.1 of the contract contemplates termination without cause. It reads:

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 of the Officer;
 - (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, nor shall he have any of the authority set forth in Schedule "C" from the Cessation Date until the Term End Date;
 - (c) 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.

[Emphasis added]

- [33] At common law, in cases in which there is no written contract of employment, there is an implied term of the relationship that an employee who is dismissed without cause is entitled to reasonable notice or, in lieu thereof, to compensation for the income he or she would have earned during the period of reasonable notice. Clause 10.1 is a contractual substitute for that law. It is apparent from the whole of the clause that the parties intended to quantify the compensation the appellant would be entitled to in the event of dismissal without cause, including base salary, benefits and bonus income.
- [34] The argument of the respondents is that the contract provided that the appellant would receive post-dismissal remuneration during the notice period of only his base annual salary of \$165,000 and nothing for bonuses during that period. This is in contrast to potential annual earnings of \$429,000 (base salary plus maximum bonuses).
- [35] Clause 10.1(d)(i)(A) fixes the notice period at a minimum of one year and a maximum of two years. Because there was less than one year left in the term of the contract, the appellant was entitled to his base salary of \$165,000 for one year. He received that payment. Under sub-clause (B) the appellant was entitled to a continuation of benefits for the 11 ½ months remaining in the term. Therefore, salary and benefits continued after the cessation date.
- [36] Salary and benefits were only part of the future remuneration the appellant would have received during the period of notice had he not been dismissed without cause. He also would have received his bonus money. In my opinion, it is clear from a reading of clause 10.1 as a whole that its purpose was to determine the appellant's entitlement to future remuneration following dismissal without cause. It was not, as argued by the respondents, to declare his entitlement as of the cessation date. That entitlement was determined by other parts of the contract, particularly Schedule B. The interpretation of the contract in general, and sub-clauses 10.1(d)(ii) and (iv) in particular, that was urged by the respondents and accepted by the trial judge would render those sub-clauses redundant to the remainder of the contract and therefore unnecessary.
- [37] I will discuss below each of the two sub-clauses and what I consider to be their correct interpretation.

Short-term bonus claim

- [38] I will repeat clause 10.1(d)(ii):

10.1 Without Cause, the Board may at any time remove the Officer as President of SRI, provided that:

...

- (d) in full and final satisfaction of all obligations of SRI to the Officer, SRI shall:

...

(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

[39] In June 2004 SRI Homes, through counsel, paid the appellant \$20,625 (less withholding tax) as a pro-rated amount of the short-term bonus calculated to 28 February 2004. Had he remained as president to that date the appellant would have earned the maximum short-term bonus of \$99,000 under Schedule B (60% of \$165,000).

[40] The trial judge noted the appellant's position that he was entitled to receive this bonus for the whole of the measurement year ending 28 February 2004 (9 ½ months after the cessation date); and the position of the respondents that payment of that bonus had to be pro-rated by a factor of 2 ½ over 12 as per the payment it made in June 2004.

[41] The trial judge did not resolve these competing positions and did not interpret clause 10.1(d) (ii). Instead he referred to Schedule B and found that there was no evidence that the appellant had reached the "threshold level" of "75% of goals and objectives" during "the 2.5 months that he worked in the 2003-2004 measurement year". He concluded his rejection of the appellant's short-term bonus claim as follows:

[33] . . . 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.

[42] With respect, the test is not whether the pro-rated payment made by SRI Homes was unfair. The test is what the appellant was entitled to under the contract objectively interpreted.

[43] The trial judge appears to have incorrectly interpreted the short-term incentive in Schedule B to be based on the appellant's personal performance. However, it is clear from a reading of the schedule that bonuses were to be calculated upon corporate performance, not personal performance. It states that the "main measure of SRI Homes corporate performance goal is 'net earnings before corporate charges' as compared to the Board approved annual budgets". Although the schedule refers to "an evaluation of the contribution to the Personal Goals" (not defined), it is clear that the calculation of the short-term bonus was based entirely on corporate performance. Therefore, there was no onus upon the appellant to prove that he had achieved any assigned personal goal from 28 February 2003 to the cessation date.

- [44] In my opinion, it is clear from the wording of clause 10.1(d)(ii) that the appellant was entitled to all short-term bonus monies he would have earned during the balance of the measurement (fiscal) year in which he was dismissed without cause. The clause explicitly kept him in the short-term plan until 28 February 2004 and the language employed did not pro-rate his entitlement, as contended by the respondents. Had pro-rating been intended it would have been a simple matter for the parties to state that the appellant would receive the bonus for that portion of the measurement year that had elapsed to the cessation date. The clause does not say that. Rather, by clear language it maintained the appellant as a member of the plan for the year in which the cessation date occurred. The cessation date was 15 May 2003, the date of his dismissal. Therefore, the appellant was included in the short-term plan until 28 February 2004. This interpretation of sub-clause 10.1(d)(ii) is consistent with the common law approach in cases of dismissal without cause.
- [45] This interpretation of the contract by no means amounts to a windfall to the appellant. The contract uses a simple formula for calculation of lost future income. It would have been better for the appellant if it had provided that he was to receive short-term bonuses for the same period during which he was to receive his base salary following dismissal without cause (one to two years). This is so because the later the cessation date fell in the measurement year, the more the short-term bonus would be for past service and the less it would replace post-dismissal income loss.
- [46] The evidence disclosed that corporate performance during the measurement year in question yielded entitlement to the full bonus of \$99,000. The appellant should recover that sum less the amount paid (\$20,625) for a net amount of \$78,375.

Long-term bonus claim

- [47] I will repeat clause 10.1(d)(iv):

10.1 Without Cause, the Board may at any time remove the Officer as President of SRI, provided that:

...

- (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.

- [48] The first sentence in the vesting clause in Schedule B reads:

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.

- [49] SRI Homes paid the appellant \$41,250 representing the amount of the long-term bonus it claims he was entitled to for the measurement year ending on 28 February 2002. In so doing, as I understand it, the company was paying the first instalment due under the vesting clause in Schedule B which spread payments of long-term bonuses earned over the ensuing four years at 25% each year. The respondents contend that this was all SRI Homes was required to pay the appellant under clause 10.1(d)(iv) of the employment contract.
- [50] The appellant claimed additional long-term bonus money of \$304,218.75. This sum has three components. The first part is the maximum bonus earned for the measurement year ending on 28 February 2002. That amount is \$165,000 less the first instalment of \$41,250 that was paid, or \$123,750.
- [51] The second part is the maximum long-term bonus of \$165,000 earned for the measurement year ending 28 February 2003.
- [52] The third part is for the measurement year ending 28 February 2004 for which period the bonus was reduced from a maximum of 100% of base salary to 45%. The full bonus would have been \$74,250 (45% of \$165,000). The appellant claimed this bonus to the cessation date, or (2 ½ over 12) times \$74,250, yielding \$15,468.75.
- [53] In accepting the argument of the respondents as to the entitlement of the appellant to long-term bonuses, the trial judge said this:
- [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.
- [54] I respectfully disagree with this interpretation of the contract. I find it to be clear in the contract as a whole that the appellant was entitled to receive the balance in his Long Term Incentive Account by way of annual payments, in accordance with the first sentence in the vesting clause, even after the end of the contract term. To conclude that it was a condition precedent to receipt of these monies that the appellant remain with the company is to read into Schedule B a term that is not there. It is not so stated in the vesting clause.

- [55] The policy statement cannot be said to make remaining with the company a condition precedent to receipt of the account balance over time. The entire language of Schedule B, read alone or in conjunction with clause 7.4 of the contract, is to the effect that these were earned monies credited to the appellant in a separate account set up for that purpose. They accrued to his benefit. They were monies earned but not yet paid and could not be unearned or forfeited except by clear language in the contract.
- [56] Clause 10(1)(d)(4) of the contract entitles the appellant to monies accrued. Black's Law Dictionary, 7th ed. defines "accrued compensation", "accrued income" and "accrued salary". The first term is defined as "remuneration earned but not yet paid", the second as "money earned but not yet received", and the third as "salary earned but not yet paid". These are examples of the ordinary use of the word "accrued" and they apply to the monies in the appellant's Long Term Incentive account as of the cessation date.
- [57] I do not accept the argument of the respondents that the parties intended the term "vest" as used in the vesting clause in Schedule B to be synonymous with the term "accrued" in clause 10.1(d)(iv). The parties must have intended the two terms to have different meanings or the latter clause would have been unnecessary.
- [58] "Vest" is a word usually used in connection with pensions, interests in land, testamentary rights or the acquisition of an official position. It does not appear to be used often in commercial contracts. A definition of "vest" that states the ordinary, as opposed to a technical, use of the term is found in the Canadian Oxford Dictionary, 1st ed.: "3. intr. (foll. by in) (of property, a right, etc.) come into possession of (a person)". In the context of the contract as a whole, when the parties in Schedule B used the phrase "will vest in" they simply meant "will be paid to".
- [59] I conclude that the first sentence in the vesting clause was merely a deferred-payment provision. The balance of the vesting clause accelerated payment in the event of death or upon retirement. The purpose of clause 10.1(d)(iv) was to accelerate payment of the account balance as a consequence of dismissal of the appellant without cause. This clearly was the intention of the parties. Therefore the appellant was entitled to the balance in his Long Term Incentive account on the cessation date.
- [60] There is one qualification. The balance in the account was for bonuses earned to 28 February 2003 as credited at the measurement deadlines (see the definition of that term in para. 21 above). Under my interpretation of clause 10.1(d)(iv), it cannot be said that on the cessation date there had been any accrual to the account for the measurement year that commenced on 1 March 2003. That "allotment" would not have occurred until at or after the end of that measurement year on 28 February 2004. Therefore, the third component of the appellant's long-term bonus claim had not been allotted to his account under Schedule B as of the cessation date; and it had not accrued to his benefit under clause 10.1(d)(iv) of the contract.

[61] The appellant should recover \$288,750 for long-term bonuses.

Cross appeal

[62] The trial judge awarded the appellant \$82,500 for long-term bonuses he found were earned during the fiscal year of SRI Homes that ended on 28 February 2001, prior to the date of the contract. He based this on clause 7.1 which provided that the appellant would "participate in the incentive plans from January 1, 2001". The judge concluded that the appellant had earned the full bonus as of 28 February 2001 of which he was entitled to be paid 25% at the end of each of the ensuing two years.

[63] The appellant did not make a claim for these monies and did not defend the awarding of them with any vigour. The award is not supported by the evidence. The contract was dated 28 May 2001 and was for a four-year term from that date. There was no evidence of any administration of the bonus plan or any corporate performance assessment for any year prior to the year commencing 1 March 2001. If the parties understood the plan to be in operation for the year ending on 28 February 2001 then the first instalment would have been due to the appellant a year later. There was no evidence that he claimed payment of this bonus instalment at any time.

[64] No entitlement to a long-term bonus prior to 1 March 2001 has been proven and the \$82,500 award cannot stand.

Conclusion

[65] I would allow the appeal and the cross appeal, set aside the order made and replace it with judgment for the appellant in the amount of \$367,125 plus court order interest on that sum, from 15 May 2003 on the long-term bonus monies and from 28 February 2004 on the short-term bonus monies. I would order that the appellant recover his costs in the trial court and of his appeal; and that the respondents recover costs of the cross appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Madam Justice Saunders"

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