

CANADA / JUDGMENT

Wright v. Van Gaalen, Van Gaalen v. Wright

2011 BCSC 707

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 707 Wright v. Van Gaalen, Van Gaalen v. Wright

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wright v. Van Gaalen, Van Gaalen v. Wright,

2011 BCSC 707

Date: 20110603

Docket: S111641

Registry: New Westminster

Between:

MARK WRIGHT dba WRIGHT DESIGN CONCEPTS

Plaintiff

And

PETER JACK M. VAN GAALEN, NORTHWEST SPRINKLER COMPANY LTD, AND WRIGHT DESIGN LTD.

Defendants

Docket: S125760

Registry: New Westminster

Between:

BETH VAN GAALEN

Plaintiff

And

MARK WRIGHT dba WRIGHT DESIGN CONCEPTS

AND WRIGHT DESIGN LTD

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraphs [21] and [112] on June 9, 2011

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Plaintiff:

R.J. Cuddeford

Counsel for the Defendants:

S.H.P. Visram

Place and Date of Hearing:

New Westminster, B.C.

March 22-26; June 4, 2010

Place and Date of Judgment:

New Westminster, B.C.

June 3, 2011

I. INTRODUCTION

- [1] This case deals with some consequences of the dissolution of the business relationship between two designers of fire suppression sprinkler systems.
- [2] Mark Wright, the plaintiff, claims that he is entitled to a share of a bonus that the defendant, Peter Van Gaalen, received from a client. He also claims that Mr. Van Gaalen defamed him in an email to one of Mr. Wright's own clients.
- [3] In his counterclaim, Mr. Van Gaalen seeks compensation for his payments for the work of a trainee designer, whose work he says exclusively benefited Mr. Wright during their partnership. He also alleges that Mr. Wright improperly withdrew partnership funds from their bank account, thus requiring him to make good personally some partnership debts that those funds were intended to cover.
- [4] In addition, Mr. Van Gaalen's wife, Beth Van Gaalen, claims from Mr. Wright his share of the cost of bookkeeping services that she provided to the partnership. Her action, originally begun in Provincial Court, has been joined to the main claim and counterclaim by consent.

- [5] Although Mrs. Van Gaalen is a party to this action, her involvement is confined to a single issue. Therefore, when I refer to "the parties" in these reasons, I am referring only to Mr. Wright and Mr. Van Gaalen.

II. EVIDENCE

A. The Business Relationship & the Bonus

- [6] Mr. Wright and Mr. Van Gaalen are both experienced designers of fire suppression sprinkler systems. This work involves designing the systems before they are installed in buildings and also documenting how the systems have actually been installed in what are called "as built" drawings.
- [7] It is common ground that in mid-2005, Mr. Wright and Mr. Van Gaalen decided to form what they described as a partnership to carry out sprinkler system design work. They were professional acquaintances and had worked together previously. They both had long-standing clients for whom they regularly did design work.
- [8] Mr. Wright operated his business through a sole proprietorship called Wright Design Concepts. Mr Van Gaalen operated his through an incorporated company called Northwest Sprinkler Company Ltd. Nothing of substance turns on their use of these entities, so to avoid confusion I will describe the parties' actions as having been carried out by each of them personally.
- [9] Each party saw benefits to entering into a partnership.
- [10] Mr. Wright testified that he had more work than he could handle and was looking to cut back on his excessive working hours to spend more time with his family. Mr. Van Gaalen gave him the impression that he had "time on his hands" to assist in that regard.
- [11] Mr. Van Gaalen described a different situation. He had a long-time major client, TG Fire Systems ["TG"], from which he received a monthly retainer of \$5,000 per month for system design, job estimating and project management work. He testified that when he became too busy to do all of TG's required work within the provided deadlines its principal Trevor Brown would, in consultation with him, refer that excess work to other designers, including Mr. Wright. Mr. Van Gaalen said that he formed the partnership with Mr. Wright in order to have the capacity to recapture, and thereby profit from, some of this work from TG that was being referred to others.
- [12] The parties incorporated a company, Wright Design Ltd., for the purposes of carrying out this partnership.

- [13] There is no issue on the evidence that the basis on which the partnership was formed was that the two designers would take in work under their separate business names, provide invoices to the partnership for the work done and, after paying the expenses of the partnership, divide all profits equally, regardless of who had done each individual piece of work. I am satisfied that this arrangement was the clear understanding of the parties, both at the time of the formation of their business relationship and throughout its operation.
- [14] After the partnership was formed, difficulties arose between the parties as a result of a bonus arrangement that existed between TG and Mr. Van Gaalen.
- [15] Since the beginning of the retainer agreement, TG would provide Mr. Van Gaalen, in addition to a monthly payment, with a bonus in December of each year. Trevor Brown of TG testified, and I accept, that he based this bonus on how well TG had done over the previous year and on how much Mr. Van Gaalen, or others who did work for him and also received bonuses, had contributed to TG's success. Determination of the specific amount of the bonus was at Mr. Brown's discretion, based on his assessment of these factors. There was never any entitlement to receive a bonus.
- [16] The parties agree that there was no discussion of these bonuses to Mr. Van Gaalen from TG at the time they formed their business relationship.
- [17] Mr. Van Gaalen disclosed to Mr. Wright in December 2005 or January 2006 that he had received a \$20,000 bonus from TG for his work in 2005. Mr. Wright told him that this bonus was his to keep. Nevertheless, Mr. Van Gaalen deposited \$10,000 of it in the business account and Mr. Wright received \$5,000 of that amount.
- [18] Mr. Van Gaalen said that he had contributed this portion of the bonus because he felt it would be conducive to a good partnership; in other words, it was a purely gratuitous act. Mr. Wright claims that he decided to accept his share after Mr. Van Gaalen explained to him that the bonus was for work for TG that they had not invoiced.
- [19] This event leads to the second important matter that was not addressed in the agreement to form a partnership, or indeed discussed at all at the time of its formation - the services that were actually included in Mr. Van Gaalen's monthly retainer from TG.
- [20] Mr. Wright testified that he understood that only project management work was covered by the retainer and that design work was to be paid for separately by TG. His correspondence in the evidence is filled with assertions of this position. Mr. Van Gaalen does not agree that he ever left Mr. Wright with that impression.
- [21] Mr. Wright also asserts that Mr. Van Gaalen promised him repeatedly that he would take up with Mr. Brown the need to reflect the value of design work that the partnership was doing for TG, over and above the retainer amounts.

- [22] What is clear is that over the life of the partnership, Mr. Wright came to understand that Mr. Van Gaalen was regularly including design work within the scope of the retainer. Mr. Wright objected to this, with increasing vehemence over time, on the basis that Mr. Van Gaalen, and thereby their partnership, was doing work for TG that he (and ultimately the partnership) was not getting paid for.
- [23] Mr. Brown testified, and I also accept, that the monthly retainer was paid for all of the work that was done for him by Mr. Van Gaalen - job estimating, project management and design. If additional projects needed to be done that exceeded Mr. Van Gaalen's capacity, Mr. Brown would seek out other designers and pay for them separately. His first choice in that situation was Mr. Wright. The evidence contained billing details for several projects that were referred directly by TG to Mr. Wright in this manner during the currency of the partnership and that were completed by Mr. Wright.
- [24] Mr. Brown testified that Mr. Van Gaalen's initial explanation to him of the partnership was that he was bringing Mr. Wright in to assist him. He later came to understand that they were working as a partnership. The thrust of his evidence was that he did not particularly care about these arrangements as long as the work he was requiring of Mr. Van Gaalen under the retainer agreement was getting done. He did not demonstrate any awareness of the fact that Mr. Van Gaalen was receiving a share of the payments for work that had been referred to Mr. Wright because it exceeded Mr. Van Gaalen's capacity under the retainer agreement. I infer from the evidence that Mr. Van Gaalen would not have wanted him to know this, for fear of being seen as profiting indirectly from his own lack of capacity to handle the excess work. Some of his correspondence with Mr. Wright reflects a strong concern that Mr. Wright not reveal the details of their partnership to Mr. Brown.
- [25] The partnership did not ultimately function as well as the parties had envisioned.
- [26] Mr. Van Gaalen described himself doing a disproportionate amount of the work and said he experienced frustration at having to deal with clients of Mr. Wright's who could not reach him because he was busy renovating his house or training as a volunteer firefighter.
- [27] In addition to dissatisfaction with Mr. Van Gaalen's unwillingness to invoice TG separately for design work, Mr. Wright was upset by an incident in which a project that he had received separately from TG was taken away from him and completed by Mr. Van Gaalen because he had been unable to complete it within the required time periods.
- [28] In August 2006, Mr. Wright advised Mr. Van Gaalen that he wished to end the partnership.
- [29] The parties agreed that following the dissolution, they would begin to keep separate all new work that either received, under their respective business names. Outstanding work that had been taken in by either of them during the partnership would be completed, invoiced and collected on and the profits after payment of expenses would be divided equally as before.

- [30] In August of 2006, in anticipation of the year-end of the company through which they operated their partnership (and before Mr. Wright had announced his wish to dissolve it) Mr. Van Gaalen prepared a "tally sheet" of what he considered to be the respective contributions of the parties and the work that remained to be invoiced. In the "to be invoiced" section, he listed "TG Fire Protection 8/12 promised bonus of \$40,000 \$26,666.67".
- [31] There is no dispute that Mr. Van Gaalen anticipated receiving a bonus of \$40,000 from TG for 2006 and that he had communicated that previously to Mr. Wright. He said that he included it on the tally sheet as a promise to place it in the revenue of the partnership. He said that he did not expect Mr. Wright to do anything to earn a share of that bonus and that he had "gifted" it to him. The 8/12 share was a reference to the eight months of 2006 that would have elapsed at the company's year end. He denied the suggestion in cross-examination that it was shown on the tally sheet because it was an additional part of the payment for the work done under the retainer - rather he said that it was intended to demonstrate to Mr. Wright how well the partnership was doing.
- [32] In relation to the anticipated bonus for 2006, Mr. Wright emphatically expressed his understanding that the bonus was intended to cover the additional design work done for TG that was not included in the retainer amount. In an email to Mr. Van Gaalen on May 16, 2007, Mr. Wright wrote:

Last fall we went over this and agreed that all the work that you did for TG was worth somewhere around \$40,000 and that it would be paid as a bonus at Christmas. I assume that this never happened and that you and I made less as a result.

- [33] In an email to Mr. Van Gaalen on June 13, 2007, Mr. Wright wrote:

Your bonus is yours until you start doing work for free. We had a meeting about this and you told me we would get paid for it. Are you now telling me you lied? Did you get your bonus? And did you just keep it to yourself? Can I not trust what you say. You are the one that said that TG would be splitting the \$40000 bonus and we would be splitting it, not me. I did not make this up! But what ever works for you.

- [34] As it turned out, Mr. Van Gaalen had actually received a \$30,000 bonus from TG for 2006 in December of that year. He did not tell Mr. Wright about this bonus and he did not share any of it with him. His position at trial was that Mr. Wright had done nothing to earn this bonus and was not entitled to a share of it.
- [35] When Mr. Wright learned in August 2007 that the bonus had been paid, he invoiced TG directly for what he asserted was work that had been done by the partnership outside the scope of the retainer, but which TG had not paid for. The amount of the invoice was \$35,722. Mr. Brown responded that he had fulfilled his obligation to the partnership for the work that had been done and that the issue was one that had to be resolved between the former partners. He did not pay the invoice.

B. Work for the Partnership by Dave Ryan

- [36] It is common ground that during the partnership, Mr. Wright employed Dave Ryan, who was seeking to learn the business of sprinkler design, to assist him with some of his work.
- [37] Mr. Ryan had formerly worked as an employee of TG, installing sprinkler systems, but had apparently been injured on the job and was receiving some form of compensation in relation to that injury.
- [38] Although Mr. Ryan himself did not share this opinion in his evidence, the parties appeared to agree that his work was at a basic level, consistent with his experience. While the partnership was in existence, he worked out of Mr. Wright's home office in Whonnock. After it broke up, he worked for a period of time at Mr. Van Gaalen's home office in Coquitlam.
- [39] During its existence, the partnership paid Mr. Ryan \$11,630 for his work.
- [40] Mr. Van Gaalen's evidence was that he paid the invoices involving work by Mr. Ryan only reluctantly and that he had expressed his concerns to Mr. Wright about this cost forming part of the common expenses of the partnership.
- [41] The tally sheet that he prepared for discussion with Mr. Wright in August 2006 lists the amounts paid to Mr. Ryan as of that date as separate items.
- [42] Mr. Wright denied that Mr. Van Gaalen had ever expressed such concerns.

C. The Email of October 23, 2007

- [43] As some of the evidence dealing with Mr. Wright's entitlement to a share of the 2006 TG bonus indicates, in 2007, the communications between the parties concerning the process of winding-up the partnership became increasingly hostile. I have previously quoted from Mr. Wright's heated accusations about the 2006 TG bonus in May and June 2007, which accurately capture the tone of their communications during this period. It is also clear that Mr. Wright's attempts to collect directly from TG were embarrassing to Mr. Van Gaalen. The correspondence placed in evidence is replete with accusations and recriminations about how the partnership had been or should have been conducted.
- [44] It is not disputed that on October 23, 2007 at 2:57 am, Mr. Van Gaalen sent an email to Chris Williams, the principal of Ablaze Fire Protection and other related fire protection companies. Mr. Williams was a long-standing and valued client of Mr. Wright's and significant work had been done for his companies by Mr. Wright during the life of the partnership. Although it was sent to Mr. Williams, within the body of the email itself it was addressed to "Trevor", which I am satisfied was a reference to Trevor Brown.
- [45] In this email, Mr. Van Gaalen wrote:

Trevor

You can see why mark doesn't like doing TG Fire's high-rise work. he claims in this email to do warehouse work for Ablaze and make almost 1,000\$ per hour! nice work if you can get it. I will reiterate what i told you before. Don't use WDC for design work. between what his buddy Dave Ryan owes you and what Mark is pulling on the TG/Northwest BS invoices, he has shown himself to be unreliable, and we're asking for trouble if we use him. If Chris Williams is happy paying those crazy fees they deserve each other and I see no reason to get involved further with Mark Wright. Call me if you want to discuss this further.

Pete

[incorrect punctuation in the original]

- [46] Given the context, I am satisfied that "WDC" is a reference to Wright Design Concepts, Mr. Wright's sole proprietorship and that the "TG/Northwest BS invoices" refers to Mr. Wright's unsuccessful attempts to collect what he perceived to be the previously unbilled work done by the partnership for TG. The reference to "what his buddy Dave Ryan owes you" appears to describe an aspect of Mr. Ryan's previous employment with TG.
- [47] Attached to that email was an earlier one that had been sent by Mr. Wright to Mr. Van Gaalen on June 12, 2007, in which Mr. Wright demanded payment for certain completed projects and expressed his concerns about what he believed to have been the unpaid work by the partnership for TG outside the retainer. Towards the end of that email, Mr. Wright had written:

Think of how much more you could have been making if you just let go of that \$5000 a month. Think about the money we made on the Cora and how much you made on the Lotus [projects done by the partnership for TG that were paid for by TG separately]. Ablaze has mailed me a cheque because I did not go see him on Friday. instead I stayed home and did a warehouse (8 hours - \$8000). [incorrect punctuation in the original; emphasis added]

- [48] Mr. Williams was called as a witness by Mr. Wright and testified that before receiving this email Mr. Wright had done 85% to 90% of the design work for Ablaze and its associated companies. He said he was shocked and upset after he received this email. He felt that he and his business were being abused and that it raised a trust issue between Mr. Wright and himself. He described that issue as being "huge". The consequence was that, as of the time of trial, Mr. Wright received less than 1% of the available design work from Mr. Williams.
- [49] In cross-examination, Mr. Williams agreed that what shocked him was the statement in the email about Mr. Wright charging \$8,000 (I infer, for so few hours of work), which made him feel he was being taken advantage of. This comment by Mr. Wright, I conclude, was what raised the "trust issue" between them.

- [50] The financial effect on Mr. Wright of the loss of much of Mr. Williams' business was significant. He had been paid over \$47,000 by Ablaze in 2007 but for 2008, the first full year after Mr. Williams received the email, he received just under \$16,000, with Mr. Williams using him "only when required" and giving him small projects. He said that 2009 was not as bad as 2008 but that as of the time of trial his overall earnings were down about \$45,000 from what they had been before this incident arose, at least some of which was attributable to receiving less work from Ablaze.
- [51] Mr. Van Gaalen described the circumstances under which he sent the email. Shortly before sending it, he had learned that slightly less than \$8,000 had been withdrawn from the partnership's bank account. He assumed, correctly as it turned out, that this withdrawal had been done by Mr. Wright. In fact on October 23, 2007 at 3:55 am, a little more than an hour after sending the email to Mr. Williams, Mr. Van Gaalen sent an email to Mr. Wright, demanding that he confirm or deny taking the money.
- [52] Mr. Van Gaalen admitted that he had sent the email to Mr. Williams but said that it was not deliberate. Because the email was about Mr. Williams, he had typed that name in the address line.
- [53] In cross-examination, Mr. Van Gaalen was asked to elaborate on the process by which he ended up sending the email. He said that the email program pulls up names from his "contacts list", which includes people who have sent him previous emails. Mr. Williams was in that category. He said he must have mistaken the first letter of Mr. Williams' address for that of Mr. Brown's as a result of his "hunt and peck" style of typing. At that point in the questioning, he denied the suggestion that he had intentionally sent the email to Mr. Williams.
- [54] Later in cross-examination, he appeared to abandon this position, instead explaining that it was 3:00 am and he was very upset about Mr. Wright having interfered with his relationship with Mr. Brown and then having withdrawn funds from the business account without authorization. As a result, he did actually intend to send the email to Mr. Williams, in order to inform him of what Mr. Wright was doing in relation to that account. He said that he then decided not to destroy that relationship, even though he felt that Mr. Wright had tried to do that to him. He tried to send the email to Mr. Brown instead, but apparently sent it to Mr. Williams, as he had first intended, by mistake. He agreed that he has not been able to find any indication that the email was ever actually sent to Mr. Brown, to whom it was ostensibly addressed.

D. The Withdrawal from the Partnership Account

- [55] As described previously, on September 28, 2007, Mr. Wright withdrew \$7,950 from the partnership's bank account. He did so without Mr. Van Gaalen's authorization. This self-help remedy was in furtherance of Mr. Wright's claim that the retainer with TG was not sufficient to cover all of the design work done for it by their business.

- [56] This withdrawal caused a shortfall in the funds that the business required to meet its outstanding obligations, such as to its accountants. Mr. Van Gaalen had to put \$5,170.31 of his own money into the account to prevent cheques that had been written by the business from being returned for lack of sufficient funds.

E. Work for the Partnership by Beth Van Gaalen

- [57] Mrs. Van Gaalen works full-time as a legal assistant. However, she testified that, during the time that Mr. Wright and her husband were in business together, she spent approximately 326 hours performing administrative work for the business.
- [58] This was akin to work that she had done for her husband before he started working with Mr. Wright. It included incorporating the company through which the business operated, preparing the business's invoices by means of an Excel program, entering invoices into the accounting software program (Simply Accounting) and doing the business's banking.
- [59] She acknowledged that because she is not a bookkeeper by trade, it took her some "additional time" to carry out her duties with respect to the invoices. I infer that this would be over and above the time that would be needed by a trained bookkeeper to perform the same tasks.
- [60] Her evidence was that trained bookkeepers command a rate in the range of \$25 to \$35 per hour. Given her lack of formal training, she valued her time at \$20 per hour, resulting in a total claim of \$6,520.
- [61] In his evidence, Mr. Wright said that he had not specifically requested Mrs. Van Gaalen to perform these duties on behalf of the business, but this position was not pursued by his counsel. He said that he believed that the going rate for the services she provided was \$12 per hour, but did not dispute that \$20 per hour was "reasonable". His main concern was that the invoice for her services appeared only after the company dissolved and the parties were at odds.

III. DISCUSSION

A. The Business Relationship & the Bonus

- [62] Counsel for Mr. Van Gaalen characterized the comments in advance of the 2006 bonus to the effect that Mr. Wright would receive a share as gratuitous promises by Mr. Van Gaalen, made without consideration and not grounded in any entitlement based on Mr. Wright's work for their business.
- [63] Counsel for Mr. Wright submitted that, in essence, fairness requires an equal division of the bonus for the months in 2006 before the partnership dissolved, because it was part of the "revenue stream" of their joint business.

- [64] Both counsel used the term "joint venture" to describe the relationship between the parties. That is a particular type of partnership arrangement, one often directed to the accomplishment of a specific event: see, for example, *Canlan Investment Corp. v. Gettling*, 1997 CanLII 4126 at para. 31, 37 B.C.L.R. (3d) 140 (C.A.). I have not found it to be a helpful term in understanding the business relationship in the present case.
- [65] In order to decide whether Mr. Wright is entitled to a share of the 2006 bonus, it is first necessary to determine the nature of the business relationship between him and Mr. Van Gaalen and in particular whether it constituted a partnership within the meaning of the Partnership Act, R.S.B.C. 1996, c. 348.
- [66] Although Mr. Wright did not raise the applicability of partnership principles explicitly in his pleadings, and indeed the parties did not frame their submissions with reference to these principles, his counsel amended his Statement of Claim at the conclusion of submissions, with the consent of Mr. Van Gaalen's counsel, to include an allegation that Mr. Van Gaalen had failed to account for the bonus. I am satisfied that he has pleaded sufficient facts giving rise to such a relationship that it is appropriate for me to consider it.
- [67] Partnership is defined in s. 2 of the Partnership Act as "the relation which subsists between persons carrying on business in common with a view of profit".
- [68] A partnership is a business relationship arising from contract. Accordingly, there must be a completed agreement, oral or written, before it can be found to exist, including, most importantly, certainty as to its terms: *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27 at paras. 38-42, 40 B.L.R. (4th) 83, aff'd 2009 BCCA 34, 89 B.C.L.R. (4th) 120.
- [69] I am satisfied that there was an oral contract between the parties in this case that expressed with sufficient certainty their agreement about the essential terms under which their business would operate, specifically the pooling of gross revenues of their respective design operations, payment of partnership expenses from those revenues and equal division of any resulting profits.
- [70] Further, it is clear that although they maintained separate offices in their respective homes, the business was carried out in common, in that income they each produced was brought together within the business, applied to the expenses of that business and the balance shared.
- [71] A view of profit was of course the entire reason for this enterprise to come into existence - each of the parties thought he stood to increase his earnings by sharing in the fruits of their increased capacity. Mr. Wright wanted to work less while maintaining his earnings. Mr. Van Gaalen's objective was to be able to receive half of the profit of TG projects that were otherwise being assigned elsewhere because they exceeded his own capacity.

- [72] Accordingly, I find that the business operated by the parties was a partnership within the meaning of section 2 of the Partnership Act. I do not think it matters to this finding that a company was incorporated to carry out the business - that company appears simply to have been the mechanism by which the pooled earnings were brought together. The contractual relationship between the parties was external to its corporate structure.
- [73] I have found, however, that the oral agreement creating the partnership failed to provide a means of dealing with the bonuses received by Mr. Van Gaalen from TG.
- [74] I do not think that an agreement with respect to the bonuses can be inferred from the actions of the parties, who treated them inconsistently over the life of the partnership.
- [75] Trevor Brown's evidence convinces me that his retainer agreement with Mr. Van Gaalen was intended to cover all of the work for TG that Mr. Van Gaalen was able to take on, including design work. It appears that Mr. Van Gaalen was content to string Mr. Wright along somewhat in the belief that this arrangement would be changed. I find it unlikely that Mr. Wright would have continued to pursue this issue so adamantly, as his correspondence demonstrates, unless he had been given cause by Mr. Van Gaalen to believe that more money would be charged above the retainer.
- [76] However, as I will explain, Mr. Wright's entitlement to a share of the bonus does not depend on whether it represented payment for specific jobs done for TG by the partnership. Rather, the question will be whether it was a payment of a kind that the rules governing partnerships required the partners to share.
- [77] In the absence of an express or implied agreement about the disposition of the bonus, Mr. Wright's potential entitlement is potentially governed by s. 27 of the Partnership Act, which provides in part:

Subject to any agreement express or implied between the partners, the interests of partners in the partnership property and their rights and duties in relation to the partnership must be determined by the following rules:

- (a) all the partners are entitled to share equally in the capital and profits of the business...
- [78] However, an immediate application of s. 27 here begs the question somewhat, because it first has to be determined whether the bonus became part of the "profits" of the business, which means the gross receipts of the business minus its expenses, calculated on an annual basis: see *Hayes v. British Columbia Television Broadcasting System Ltd.* [1993] 2 W.W.R. 749; 74 B.C.L.R. (2d) 120 (B.C.C.A.), leave to appeal refused [1993] 2 S.C.R. viii, at para.15. To answer that question, I must first consider whether the bonus earnings were sufficiently connected to the work of the partnership that Mr. Van Gaalen has a duty to account to Mr. Wright for receiving them.
- [79] There are some additional provisions of the Act that have relevance to that question:

Fairness and good faith

22 (1) A partner must act with the utmost fairness and good faith towards the other members of the firm in the business of the firm.

- (2) The duties imposed by this section are in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of partners.

Application of partnership property

23 (1) Subject to subsection (2) [which does not apply to the present case], all partnership property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

...

Partners must render accounts

31 Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representatives.

Partner must account for benefits

32 (1) A partner must account to the firm for any benefit derived by the partner without the consent of the other partners from any transaction concerning the partnership, or from any use by the partner of the partnership property, name or business connection.

...

Profits of partner carrying on similar business

33 If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits made by him or her in that business.

...

Authority of partners after dissolution

41 (1) Subject to subsections (2) and (3), after the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue despite the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

...

[Emphases added]

- [80] Rather than being additional payment in respect of specific design work, it is clear from the evidence of Trevor Brown that the bonus was a discretionary recognition on his part of the value of Mr. Van Gaalen's contribution to TG's success over that year. There was no entitlement to receive it and specifically, as Mr. Van Gaalen's overestimate for 2006 demonstrates, no entitlement to a particular amount.
- [81] I find that the discretionary aspect of the bonus does not change its fundamental nature as part of the potential income of the partnership. If Mr. Van Gaalen received any bonus at all from TG for 2006, the portion of it that was attributable to the months before the dissolution was earned by him, as one of the constituent members of the partnership, in thanks and recognition for what was unquestionably partnership work. To that extent, I think that the 2006 bonus was part of a "transaction concerning the partnership" as contemplated by s. 32(1).
- [82] Quite aside from being evidence of a fleeting intention to share the bonus, Mr. Van Gaalen's attribution of 8/12 of the expected 2006 bonus to the earnings of the partnership at the time of its breakup in August 2006 demonstrates the integral relationship between the receipt of the bonus and the billable work that had been done by Mr. Van Gaalen for TG, as Mr. Wright's partner.
- [83] A helpful authority on this point is the decision of the Ontario Court of Appeal in *Rochweg v. Truster* (2002), 212 D.L.R. (4th) 498, [2002] O.J. No. 1230 (QL) (C.A.) [Rochweg cited to QL]. In that case, members of a dissolved partnership of chartered accountants sought to have Mr. Rochweg, one of their former partners, account for certain shares and stock options that he had received as a director of a company called Techlogix, which had been a client of the firm. He had disclosed his director's fees to his partners and paid them into the partnership. He had not disclosed the investment opportunities that became available to him as a director. As in the present case, there was no written partnership agreement.
- [84] The trial judge declined to order an accounting, focusing on whether Mr. Rochweg's activities as a director had come within "the scope of the partnership", a term that originated in the English authorities to help decide whether a partner was engaged in a business of the same nature as the business of the partnership. (That inquiry is reflected in s. 33 of the British Columbia Act).
- [85] On appeal, Madam Justice Cronk found that the applicable legislation, Ontario's Partnerships Act, R.S.O 1990 c. P.5., imposed broader duties. Section 29(1) of that Act (which is equivalent to s. 32(1) of the British Columbia Act) was of particular importance:

56 In my view, to trigger an obligation to account under the first branch of s. 29(1) of the Act, transactions "concerning the partnership" need not, although they may, relate to transactions or dealings falling within the scope of the partnership's activities or services. Rather, so long as the transaction at issue "concern[s]" the partnership, liability to account under the first branch of s. 29(1) can relate to benefits derived from dealings outside the "scope of the partnership"

58 [T]he word "concerning", as used in s. 29(1), means "relating to", "in respect of", "referring to" or "connected to" in the sense of a transaction affecting the interest of, or important to, the partnership. Such words, in their ordinary and legal usage, enjoy a wide connotation and have been interpreted by the courts as having the "widest possible scope of any expression intended to convey such connection between two related subject matters [citations omitted]. Accordingly, while a transaction "concerning the partnership" requires a link between the transaction and the partnership, that link can include, but is not limited to, activities or services within the "scope of the [partnership] business".

[original insertions; emphases added]

[86] In the present case, I have found an even more direct link between the partnership activity and the payments than was found to be sufficient to require an accounting in *Rochweg*. Here, I have found that, while the bonus was at Mr. Brown's discretion, it nonetheless arose directly from Mr. Van Gaalen's work for TG, as a member of the partnership.

[87] This "transaction concerning the partnership" that produced the 2006 bonus was ongoing at the time of its dissolution, and thus is dealt with by s. 41 of the Act. Madam Justice Wedge discussed the effect of s. 41 in *Blue Line*, *supra*, at para. 116 of 2008 BCSC 27:

Former partners can continue to owe fiduciary duties to one another but those duties are of a particular and limited kind. They consist essentially of the duty to ensure that ongoing transactions are completed and the assets of the partnership are realized for the benefit of all the partners. A partner who takes partnership property for his or her own benefit following dissolution is liable to account to his or her partners. That is because the assets of the partnership belong to all of the partners. [emphasis added]

[88] Thus, Mr. Van Gaalen's duty to account for the bonus and to share in any profit to which it contributed, pursuant to s. 27, was ongoing at the time the 2006 bonus was received, because it was the completion by TG, in the form of additional payment, of the transactions that Mr. Van Gaalen had carried out with it when he was still a member of the partnership.

[89] While it is always open to partners to agree to something other than the effect of s. 27, I am unable to find that there was any such express or implied contrary agreement by the parties here that would prevent its application and an equal division of the 2006 bonus.

[90] The actions of the parties with respect to the 2005 bonus are ambiguous in that regard - half of it was shared at Mr. Van Gaalen's insistence, following an initial refusal by Mr. Wright. With respect to the 2006 bonus, Mr. Van Gaalen certainly made representations that it would be shared. Even if they were gratuitous representations, as he now argues, they certainly preclude a finding that the parties had agreed that Mr. Van Gaalen could keep it.

- [91] Similarly, although Mr. Wright's belief that design work was outside the retainer with TG turns out to have been mistaken, his apparent willingness to relinquish his share of the 2006 bonus if the partnership was properly compensated for that design work does not amount to an agreement that the bonus in question need not be shared.
- [92] Aside from the matters in issue at this trial, my understanding is that the expenses of the partnership have now been addressed and whatever is awarded amounts to profit for the purposes of s. 27. Accordingly, I find that Mr. Wright is entitled to an equal share of 8/12 of the 2006 bonus, or \$10,000, representing the eight months of that year in which the partnership operated.

B. Work for the Partnership by Dave Ryan

- [93] I am unable to accept Mr. Van Gaalen's position that Mr. Wright should be solely responsible for the cost of the support work done by Dave Ryan during the life of the partnership.
- [94] While it is clear that Mr. Wright benefitted most directly from Mr. Ryan's assistance, in that Mr. Ryan worked out of his residence and did basic level work on his design projects, the structure of the partnership was that Mr. Van Gaalen shared equally in the profits earned by Mr. Wright, once the partnership's expenses had been paid. Thus, whatever Mr. Ryan did to assist Mr. Wright that enhanced the earnings of the partnership benefitted Mr. Van Gaalen as much as Mr. Wright.
- [95] Mr. Van Gaalen is really arguing that the partnership agreement did not provide for Mr. Wright to subcontract his design work in this manner and that therefore the cost of doing so should have been borne solely by Mr. Wright, rather than reducing the total potential profits available for sharing between them.
- [96] While it might have been useful for the parties to have addressed this point with greater clarity when forming their partnership, I am satisfied that Mr. Ryan's work fell within the general category of reasonable partnership expenses that they contemplated sharing at its formation. I am also satisfied that, however reluctant it may have been, there was specific agreement by Mr. Van Gaalen that a Ryan invoice should be paid each time one was submitted.
- [97] On the evidence, it is certainly possible that Mr. Van Gaalen began to have some misgivings about allocating responsibility for Mr. Ryan's work as the partnership progressed. The tally sheet that he prepared in August 2006, which he obviously intended to illustrate the parties' respective contributions to the partnership, does break down Mr. Ryan's invoices to that point as a separate expense, although he did not explicitly seek to attribute their cost to Mr. Wright in the document.
- [98] On the other hand, the email communications between the parties in evidence, which otherwise define very clearly the growing fault lines in the partnership, are silent on this point. In addition, the invoices for Mr. Ryan's work were paid regularly without overt protest

by Mr. Van Gaalen, who was responsible for the partnership's finances, which suggests that, while the partnership was operating, these costs were mutually considered to fall within the overhead. On this last point, it is also significant that, while his evidence was that he was surprised upon learning that he was expected to pay for Mr. Ryan's contribution, Mr. Van Gaalen made other comments while giving evidence that are more suggestive of a common understanding that this would be a partnership expense. In particular he said that he "rationalized" that this assistance was necessary if Mr. Wright was to be able to get his work done on time and that he expressed to Mr. Wright that Mr. Ryan's rate was high in view of his limited "skill set" but that he had no problem with the number of hours.

[99] What I consider most likely is that, upon reflection and in light of all of Mr. Wright's other behaviour as their dispute unfolded, including commencing the present action, Mr. Van Gaalen has concluded that this division of responsibility for Mr. Ryan's invoices was unfair to him. Whatever the merits of this position, it is not one that can be imposed on the parties retroactively, when their conduct during the relevant period demonstrates a different understanding. This part of the counterclaim is dismissed.

C. The Email of October 23, 2007

1. Defamation

[100] A successful claim in defamation requires proof on a balance of probabilities that the defendant published (that is, communicated to a third party) comments about the plaintiff that have the tendency to lower the reputation of the plaintiff in the estimation of other members of society. Those comments are to be considered according to their natural and ordinary meaning - the meaning that an ordinary person, based on general knowledge, would give to them: *WeGo Kayaking Ltd. v. Sewid*, 2007 BCSC 49 at paras. 66-69, [2007] B.C.J. No. 56 (QL) [WeGo Kayaking].

[101] Mr. Van Gaalen has pleaded that the words he used were not defamatory in their ordinary sense and that he did not intentionally publish them.

[102] In analyzing the potentially defamatory nature of the words uttered, it is important to identify what has been described in the authorities as "the sting of the libel" - the essential claim or accusation that arises from the words used, in their ordinary meaning.

[103] I have no difficulty in finding that the natural and ordinary meaning of the words used by Mr. Van Gaalen in the October 23, 2007 email was defamatory, in that they would certainly lower Mr. Wright's reputation, in Mr. William's estimation, in the fire suppression business community and in society generally.

[104] The potential sting of the libel here was twofold. First, the email explicitly stated that he was "unreliable", because of his efforts to invoice TG for work done in addition to the retainer and the actions of his "buddy" Dave Ryan in his dealings with Trevor Brown, and should not be used for any further work. Second, the clear implication was that Mr. Wright had overcharged his client Chris Williams - it is described as "those crazy fees". Others

reading this email could not reasonably come to any other conclusion from the meaning of these words and their further conclusion, if they accepted the statements, would be that he is a person to be avoided in a business context.

- [105] I am also satisfied that Mr. Van Gaalen intentionally published these defamatory statements by sending the email to Mr. Williams.
- [106] I find that his evolving explanations in his evidence (from accidentally sending it to Mr. Williams because of an error in typing the email address line to having intended to send it to inform Mr. Williams of what was going on, thought the better of it then accidentally sent it anyway) defied common sense.
- [107] What I find to be a much more likely set of facts on the evidence is that he was incensed at having discovered the withdrawal of funds from the partnership account, which he rightly attributed to Mr. Wright, and that this withdrawal, which he considered a theft, built on his existing embarrassment at Mr. Wright's attempts to "collect" from TG and frustration at the acrimonious winding-up of the partnership. In the throes of those emotions, he made the unwise decision to take a measure of revenge by revealing Mr. Wright's somewhat boastful attitude towards billing a particular file to the client involved.
- [108] Of course, even if he had only intended to send the comments to Mr. Brown the result would be the same. If they were defamatory, as I have found they were, it does not matter (in terms of liability) to which third party they were communicated.

2. Defences

- [109] In his pleadings, Mr. Van Gaalen advanced the defence of justification. He asserted that his statement that Mr. Wright was unreliable was true, having regard to a lengthy list of factors said to arise from Mr. Wright's performance and conduct during the partnership, such as being unavailable for calls from clients or delaying in submitting invoices for completed work. Some of these examples - employing Dave Ryan for partnership work and withdrawing partnership funds from the bank - were included as free-standing aspects of Mr. Van Gaalen's counterclaim.
- [110] Justification by reference to these other actions by Mr. Wright was not raised in submissions. If it was nevertheless intended that I consider them, I have no difficulty in concluding that none of these actions, individually or collectively, could have justified the statement. Taking them at their highest and assuming Mr. Van Gaalen's versions of each of them to be true, which is far from obvious on the evidence, they amount to no more than itemization of areas of his dispute or frustration with Mr. Wright within the context of their business relationship. They would not support the characterization of Mr. Wright as unreliable as a person to be hired as a sprinkler system designer, which is what Mr. Van Gaalen stated.

- [111] Instead, counsel put forward the argument that Mr. Van Gaalen's statements in the email do not amount to defamation because it was Mr. Wright's own statements, in the body of the original email that was attached to it, that actually prompted Mr. Williams to take his business elsewhere.
- [112] Obviously, merely forwarding someone's own comments in an email cannot in itself amount to defamation - it must be found in something actually written by the person who forwarded it. However it is not helpful, in deciding whether the portions written by Mr. Van Gaalen were defamatory, to focus on what part of the email affected Mr. Williams.
- [113] As I will discuss further below, the question of what harm actually flowed from the email, in terms of Mr. Williams' withdrawal of his business, goes to the issue of damages, not whether what was written by Mr. Van Gaalen was defamatory. If, as I have found, the words he wrote are defamatory to an ordinary reader, it does not matter on the issue of liability what Mr. Williams, the specific intended recipient, made of the entire email.
- [114] I have also considered whether this argument can be seen as an assertion that the statements about Mr. Wright's hourly rate were true, specifically, that the initial statement by Mr. Van Gaalen about what Mr. Wright's hourly rate amounts to is supported by Mr. Wright's own statement in the earlier email.
- [115] However, the subsequent references to it in his message ("nice work if you can get it" and "those crazy fees") are clearly statements of opinion. The defence of fair comment - that there were statements of opinion reasonably based on fact - was not pleaded by Mr. Van Gaalen. It would be unavailable to him in any event, because that defence requires that the issue commented on be one of "public interest", at least within the community affected by it and excludes comments that result from an improper motive, which certainly describes Mr. Van Gaalen's actions: *Creative Salmon Company v. Staniford*, 2009 BCCA 61 at paras. 25 and 34, 90 B.C.L.R. (4th) 328, leave to appeal ref'd [2009] S.C.C.A. No. 154 (QL).
- [116] As a result, I am unable to give effect to this argument.

3. Damages

- [117] In *WeGo Kayaking*, Mr. Justice Macaulay helpfully summarized the approach to awarding damages in defamation cases:

86 Once libel [a defamatory statement published in a permanent, as opposed to a transient, form: *Gatley on Libel and Slander*, 11th ed. (London: Sweet & Maxwell, 2008), at p. 92] is proved, harm to the plaintiff's reputation is presumed. The plaintiff need not prove general damages... The appropriate amount of general damages depends on the precise circumstances of the case. The court usually considers factors such as the nature and circumstances of the publication of the libel; the nature and position of the victim of the libel; the possible effects of the libel statement upon the life of the plaintiff; and the actions and motivations of the defendants. As each libel case is unique, there is little to be gained from a detailed comparison of libel awards...

87 General damages are intended to provide comfort for personal distress and to vindicate one's reputation, including one's business reputation...

...

89 Proof of general economic loss may demonstrate injury to a business's reputation....

...

93 ...Special damages, unlike general damages, are not presumed. The plaintiff must allege and prove special damages at trial. Such losses must be the "natural and proximate result" of the defamatory publication, and capable of monetary measurement. Such losses must also be established with "reasonable certainty" and must be more than mere "speculation and surmise"...

[118] Mr. Wright did not plead special damages in this action. This is unfortunate, because there was evidence in the trial that was capable of demonstrating specific losses arising from Chris Williams' decision to stop referring meaningful design work to him.

[119] I am mindful of the need to avoid an excessively punctilious scrutiny of the pleadings and to focus instead on the substance of what has been alleged, but even aside from the omission of an explicit reference special damages in the claim, there are no facts pleaded from which an entitlement to them can be inferred, as was possible, for example in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, [1995] S.C.J. No. 69 (QL) at paras. 109-110. In the absence of even minimal supporting facts, I cannot give effect to this head of damages. I will consider the evidence of lost business only as it relates to the extent of the damage that has been done to Mr. Wright's reputation.

[120] I turn then to an appropriate award of general damages. In submissions, counsel for Mr. Wright sought damages in the range of \$20,000 - \$50,000. Although the nature of such damages was not specified, I will treat his submissions as relating to general damages. Considering first the nature and circumstances of these defamatory statements, I note that, although they were "published" sufficiently to ground liability, they were sent only to a specific individual. There was an obvious risk of further dissemination by that recipient within the sprinkler design business, but this is to be contrasted with defamatory statements that are conveyed through broadcast media, on the Internet or at public gatherings, in which a broader effect on a person's reputation is immediate and inevitable. It was also sent on a single occasion only, as opposed to being part of an ongoing series of defamatory statements. This factor favours a lower award.

[121] It is difficult to assess the effect of the statements on Mr. Wright, beyond the specific evidence of his economic loss that was relevant to special damages, but I am prepared to infer, as a matter of common sense, that Mr. Williams's reaction is indicative of an ongoing effect on his reputation as a designer, in what appears from the evidence to be a relatively small and fairly closely-knit industry. This factor would tend to increase the size of any award.

- [122] As to the actions and motivations of Mr. Van Gaalen, I have already found that he wrote and sent this email in a fit of pique over Mr. Wright's provocative actions during the disintegration of the partnership and that his intention was to harm Mr. Wright's relationship with a client. This sets him apart from defendants who, while not able to establish a defence to their statements, were nonetheless pursuing altruistic goals. It favours a higher award, but I should make it clear that I am distinguishing the relevance of this factor to an award of general damages from the analysis that would take place when considering an award of aggravated or punitive damages, which, like special damages, are not before me.
- [123] Overall, I characterize this as a relatively harmful communication, one that was intended to damage Mr. Wright's reputation and that succeeded in doing so. Its seriousness is moderated only by its narrow target and the absence of any repetition. Cases involving defamation by email that have resulted in awards of general damages in the range sought by Mr. Wright have tended to involve multiple emails and wider dissemination, or a combination of emails and Internet postings: see for example: *Smith v. Cross*, 2007 BCSC 1757, *aff'd* on other grounds 2009 BCCA 529 and *Cragg v. Stephens*, 2010 BCSC 1177.
- [124] In all the circumstances, I consider an award of general damages of \$15,000 to be appropriate here.
- [125] Mr. Van Gaalen pleaded, but did not pursue in argument, the assertion that Mr. Wright had rejected, through his counsel, an offer to deliver a retraction of the email to Chris Williams. If this is a point that he actually wished to have considered, s. 10 of the Libel and Slander Act, R.S.B.C. 1996, c. 263 provides:

Proving offer of written apology in mitigation of damage

10 In an action for defamation if the defendant has pleaded not guilty, if judgment has been given against the defendant with damages to be assessed, or the defendant admits the defamation, the defendant may give in evidence in mitigation of damages, that the defendant made or offered a written or printed apology to the plaintiff for the defamation before the commencement of the action, or if the action was commenced before there was an opportunity of making or offering the apology, that the defendant did so as soon afterwards as the defendant had opportunity.
[emphasis added]

- [126] I will assume that Mr. Van Gaalen's offer of a "retraction" is intended to amount to an offer on an apology for the purposes of this section.
- [127] In *Manno v. Henry*, 2008 BCSC 738 at para. 204, [2008] B.C.J. No. 1057 (QL), Mr. Justice Grauer interpreted this section as also being available to a defendant who denies liability in the course of the trial.

[128] No evidence was led in this case about the form of retraction that Mr. Van Gaalen offered, or of the basis on which it was said to have been rejected. While I am prepared to infer that a retraction of any sort would have had some beneficial effect, it would be speculative for me to reduce the damages awarded by any meaningful amount without knowing what was being offered. I also find the observations of Madam Justice Newbury in *Carter v. Gair*, 1999 BCCA 132 at para. 18, 64 B.C.L.R. (3d) 272, to be applicable in this regard:

But whether or not Mr. Carter's insistence on a particular form of apology was unreasonable, the onus lay on the defendants to mitigate his damages. It will be recalled that s. 10 of the Libel and Slander Act permits a defendant to give in evidence in mitigation of damages that he "made or offered a written or printed apology to the plaintiff" prior to the commencement of the action or if the action was commenced before there was an opportunity of doing so, that he did so "as soon afterwards as possible." Any apology so offered or made must amount to a full and frank withdrawal of the charges conveyed and should be worded so that "an impartial person would consider it reasonably satisfactory in all the circumstances". ... [citations omitted] The old British Columbia case of *Hoste v. Victoria Times Publishing Co.* (1889) 1 B.C.R. 365 (B.C.S.C.) contains a ringing passage from the judgment of Begbie C.J. that is apposite:

The most proper apology cannot undo the irretrievable publication and dissemination of the slander, nor be regarded as a complete restitution, though it may properly be considered in damages. And that is what Lord Campbell's Act permits. You should not offer to make, but actually make and publish at once, and unconditionally, such an apology, expressing sorrow, withdrawing the imputation, rehabilitating the plaintiff's character as well as you can; not stipulating that the plaintiff is to accept it; not making any terms but publishing it in the interest of truth, and because you are anxious to undo whatever harm which may have accrued from a wrong which you find you have been the unconscious instrument of inflicting. [at 366; emphasis added [by Newbury J.A.]]

Unfortunately, the defendants in the case at bar "stipulated" that the plaintiff was to accept their apology before they would publish it despite their lawyer's statement to the contrary. Thus whilst the offer may be considered in mitigation of Mr. Carter's damages, the effect of that mitigation is minor in light of the defendants' failure to carry through with a published apology. I would reduce Mr. Carter's general damages by \$500 in recognition of the defendants' efforts to mitigate by offering to publish an apology.

[129] Accordingly, I reduce the damages by the nominal amount of \$250 in light of the unspecified offer of a retraction.

D. The Withdrawal from the Partnership Account

- [130] As I have indicated, this aspect of Mr. Van Gaalen's claim was not really contested by Mr. Wright. This was wise, because obviously the same fiduciary duties to a fellow partner that prevented Mr. Van Gaalen from retaining all of the 2006 bonus also prevented Mr. Wright from unilaterally helping himself to partnership property - in this case, funds in its bank account.
- [131] Partnership debts which were to have been paid out of the bank account had to be covered solely by Mr. Van Gaalen. He is entitled to be compensated by Mr. Wright for that amount, which is \$5,170.31. This leaves a balance from the \$7,950 improperly withdrawn of \$2,779.69.
- [132] However, Mr. Van Gaalen also stopped payment of a cheque to Mr. Wright of his share of remaining partnership profits of \$2,428.50. Mr. Wright is entitled to retain this amount. The parties will share the remaining balance of \$351.19 equally in accordance with the partnership agreement.

E. Work for the Partnership by Beth Van Gaalen

- [133] No authority was provided to support Mrs. Van Gaalen's entitlement to compensation. I think that her claim, although not explicitly framed in this manner, should be dealt with as one of quantum meruit.
- [134] The principles underlying a quantum meruit claim were helpfully summarized by Madam Justice Fisher in *Rafal v. Legaspi*, 2007 BCSC 1944 at paras. 29 and 30, [2007] B.C.J. No. 2925 (QL):

29 Where one party "confers a benefit on another party by part performance of services under a contract and that other party accepts such services", the party conferring the benefit may "recover reasonable remuneration for services rendered under a contract, despite the fact that a contract may not exist or has been abandoned"... Obtaining quantum meruit relief is "not dependent on the existence of a valid contract. Rather, it is a discreet cause of action separate and apart from claims granted in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit"... [citations omitted; emphases added]

30 Quantum meruit will be available if the services in question were furnished at the request or with the encouragement or acquiescence of the opposing party in circumstances that render it unjust for the opposing party to retain the benefit conferred by the provision of the services... [citations omitted; emphasis added]

- [135] As I have indicated, counsel for Mr. Wright did not take issue with Mrs. Van Gaalen's entitlement to compensation, which is clearly borne out by an application of these principles. Rather he argued that hourly rate underlying her claim is excessive in light of her actual qualifications and that the number of hours she has claimed have been inflated by about 2/3 beyond what would be reasonable.
- [136] The only evidence on this point was sparse and conflicting. Mrs. Van Gaalen's evidence was to the effect that trained bookkeepers make \$25 to \$35 per hour and Mr. Wright's was that he understood it to be \$12 per hour, while not suggesting that her requested amount was unreasonable. There was no evidence about how either of them acquired their knowledge that would permit me to assess its accuracy.
- [137] Making the best of the evidence available, I think that, given that there were no complaints by Mr. Wright about the quality of the services performed by Mrs. Van Gaalen, it is reasonable to conclude that the partnership received services from her that approximated those for which it would otherwise have had to pay an administrative assistant and a bookkeeper. If there was a shortfall in the value of what she provided, it was in the additional length of time that the bookkeeping tasks took, which Mrs. Van Gaalen freely admitted. I think that her claimed rate of \$20 per hour reflects a fair and appropriate discount from the lower end of what she considers to be the going rate for bookkeeping services. The alternative would be to reduce the number of compensated hours by an equivalent percentage to allow for the additional time required. This would produce the same result and there is no particular reason to prefer it.
- [138] The argument that the number of hours claimed has in itself been inflated is partly dealt with by Mrs. Van Gaalen's admission that the bookkeeping function took her longer because of her skill level. As to the accuracy of the number of hours in general, while Mrs. Van Gaalen also admitted to having estimated this figure rather than having recorded her time contemporaneously, she was nonetheless able to list the approximate time that she spent on specific tasks, none of which seems unreasonable or unnecessary, in a fair amount of detail. In the absence of some reason to doubt the veracity of these totals or of a competing analysis of what a reasonable amount of time would be to do the work, I accept the amounts she has claimed.
- [139] Accordingly, I am satisfied that Mrs. Van Gaalen provided services of a value of \$6,520 to the partnership, for which she should be compensated.
- [140] However, it is vital to realize that Mrs. Van Gaalen's claim is her own personal one against Mr. Wright and his sole proprietorship, one that has been joined with the trial of the main claim and counterclaim by consent. Hers is not an action for an accounting of partnership expenses and as a result it is not appropriate to deduct it from whatever amounts may be owing to Mr. Wright. (Mr. Van Gaalen advanced a claim for compensation for her services in his pleadings but did not pursue it in argument.) Rather, I think that the correct approach is to consider that Mr. Wright received one-half of the value of the services that

Mrs. Van Gaalen provided to the partnership, or \$3,260, and order that Mr. Wright pay her that amount.

- [141] Although this situation was not reflected in the submissions by Mrs. Van Gaalen's counsel, who appeared to seek the full value of her services solely from Mr. Wright, her statement of claim sought only half of that amount, as I have awarded it.

IV. SUMMARY OF ORDERS

- [142] Mr. Wright is entitled to an accounting with respect to 8/12 of the \$30,000 bonus paid to Mr. Van Gaalen by TG and to receive 50% of that 8/12, or \$10,000, from Mr. Van Gaalen.
- [143] Mr. Van Gaalen will pay Mr. Wright \$14,750 in general damages for defamation.
- [144] Mr. Van Gaalen's claim to have Mr. Wright compensate him for Mr. Van Gaalen's share of the cost of work done for the partnership by Dave Ryan is dismissed.
- [145] Mr. Wright will pay Mr. Van Gaalen \$5,170.31 for funds that he had to deposit in the partnership account to cover its obligations, after funds had been improperly withdrawn by Mr. Wright. Mr. Wright will also pay Mr. Van Gaalen the amount of \$351.19, which is the difference between the cheque to Mr. Wright for partnership profits on which Mr. Van Gaalen stopped payment and the balance of the partnership funds withdrawn by Mr. Wright.
- [146] Mr. Wright will pay Mrs. Van Gaalen \$3,260 for administrative and bookkeeping services provided to the partnership.

V. COSTS

- [147] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, [2001] B.C.J. No. 2083 (QL), leave to appeal ref'd 2002 BCCA 454, 172 B.C.A.C. 179, Mr. Justice Bouck described the inquiry to be undertaken to determine whether a party has had substantial success and is entitled to receive his or her costs:

[A] decision to award or not award costs after a trial might follow a four step inquiry.

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those "matters" to the parties.
3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

- [148] At para. 45, Mr. Justice Bouck indicated that, while courts should not engage in "a meticulous mathematical examination" a rough rule of thumb for "substantial success" would be 75%.
- [149] The matters of critical importance to both parties in the litigation were the entitlement to the bonus and the defamatory nature of the email. Mr. Wright prevailed on both of these issues, although his failure to plead special damages for defamation resulted in a reduction of what his total damages could otherwise have been.
- [150] A critical aspect of Mr. Van Gaalen's counterclaim, the cost of Mr. Ryan's work, was dismissed and his right to recover the funds he expended to cover the improper withdrawal by Mr. Wright was never contested.
- [151] Mrs. Van Gaalen succeeded in her claim for compensation, but only the hourly rate she sought was contested and she recovered only the amount sought in her original pleadings, which was half of the amount that had been sought in submissions.
- [152] Considering these matters as a whole in light of the Fotheringham factors, I conclude that Mr. Wright has had substantial success, even in light of his failure on the question of special damages, and should be entitled to receive his costs at Scale B. This action was commenced pursuant to Rule 66 of the former Supreme Court Rules but given that the trial ultimately took six days to complete, I will order of my own motion that the rule no longer applies to it.

"The Honourable Mr. Justice Schultes"

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