11/3/88

No. C872551
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: ROBERT GORDON MIDDLETON PLAINTIFF AND: BRISTOL-MYERS CANADA INC. DEFENDANT	REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE LEGG

G. K. Steele, Esq.	Counsel for the Plaintiff
F. G. Potts, Esq. and R. Mottus, Esq.	Counsel for the Defendant
Dates of Hearing:	February 15, 16, and 17 1988 Vancouver, B. C.

The defendant hired the plaintiff as its western regional manager on February 27th, 1985 but terminated his employment, without cause, on January 5th, 1987. On the date of his termination, the plaintiff signed a letter agreement with the defendant which required him to cease his employment immediately, to accept 16 weeks severance pay and other benefits, and to release the defendant from all claims

he might have arising out of his employment. He now brings this action claiming damages for the defendant's breach of his contract of employment. He claims that he is not bound by the release on the grounds that it is voidable because he signed it under duress and because the agreement is unconscionable.

My review of the evidence is focussed on whether the plaintiff can succeed in avoiding the agreement and release which he signed.

The plaintiff is now 41 years of age. He had been employed for slightly in excess of ten years by a large pharmaceutical drug company, a competitor of the defendant, as its regional sales manager in British Columbia before he accepted a position with the defendant. In his former employment he had been responsible for 11 sales representatives and was in charge of selling infant and adult nutritional products. When he commenced working for the defendant as its western regional manager on March the 4th, 1985 he became responsible for the sale of similar products by the defendant and was in charge of the defendant's six sales representatives in British Columbia.

The terms of his employment were set out in a letter of February 27th, 1985 and required him to report to Mr. Harradine, the Director of National Sales of the defendant. His salary was $48,000 per annum. This was to be subject to review on February the 1st, 1986. He was to be eligible for a bonus under a regional manager incentive compensation plan of the defendant and was to be supplied a company motor-vehicle for a period of four years at a personal cost to himself of only $30.00

per month. He received certain other benefits, such as hospitalization and dental coverage, and a company pension plan, which were detailed in the letter.

His employment commenced on March the 4th, 1985. Mr. Harradine testified that within six months of his commencing his employment there was cause to complain about his performance and in particular his failure to arrange for sales representatives to report properly, his unsatisfactory drug sales, and his failure to motivate personnel in his sales territory. Despite these complaints however in February 1986 the plaintiff received a merit increase of 3% for his 1985 work.

The plaintiff's performance continued to be unsatisfactory in a number of areas and there were complaints from Harradine, both in writing and verbally, that he was not taking responsibility for training his staff, that sales had decreased and that there was poor performance with certain accounts. Harradine became particularly concerned over the loss of the Peace Arch Hospital account in April 1986. His complaints continued through to the latter part of 1986.

The plaintiff's record was not all unsatisfactory. He was responsible for obtaining the Grace Hospital account for the defendant, was complimented by the Shaughnessy Hospital for the services of his staff, congratulated by Harradine for reducing and monitoring the expense accounts of personnel under his control and for improving in certain types of sales. He received a telegram from the president of the defendant on December the 17th, 1986 congratulating him for his dedicated effort which had contributed to the overall sales achievements of the company.

I mention these matters because the defendant took the position at trial that by the end of 1986 the plaintiff was probably expecting the termination of his employment as a result of Harradine's complaints. The plaintiff denied this and testified that his termination came as a shock. In my opinion he was not expecting to be terminated although he was aware that his performance was not satisfactory in some areas. This is best illustrated by a telephone discussion which took place when the plaintiff telephoned Harradine on December 24th, 1986 and discussed his poor performance and sought Harradine's advice on precisely what he was doing wrong. Harradine advised him that he should check the sales representatives' performance more closely but Harradine did not indicate any intention to terminate the plaintiff's employment. He told the plaintiff that he would meet with him in Vancouver on January the 5th, 1987. The transcript of the telephone conversation, which the plaintiff recorded showed that Harradine wished the plaintiff a good Christmas holiday and, in speaking of the plaintiff's concerns generally, said "Nothing is that important."

Harradine agreed on cross-examination that he did not indicate to the plaintiff that his job was in jeopardy.

But shortly after that telephone discussion, Harradine decided in consultation with his superiors in Ottawa, to terminate the plaintiff's employment. He arranged for a letter of agreement to be prepared under which the plaintiff was to resign and to receive 12 weeks severance pay and other benefits. He also arranged for another letter to be prepared, an alternative to the letter agreement, which informed the plaintiff that his employment was terminated immediately.

Harradine came to Vancouver and the two men met in Harradine's hotel room at the Pan Pacific Hotel in Vancouver on January 5th, 1987 at about 9:00 a.m. There is a conflict in the evidence over precisely what occurred.

The plaintiff testified that the meeting lasted approximately an hour and a half and that during the first part of the meeting, they reviewed his 1986 performance and were about to review the plaintiff's 1987 plans when Harradine told him that he would have to terminate his employment. He said Harradine pulled out a letter which set out the terms of the termination and told him that if he did not accept these terms, Harradine had another letter which he would give the plaintiff immediately which would terminate his employment "on the spot." He said that the provision in the letter agreement regarding the length of separation pay had been changed from 12 to 16 weeks before he saw the letter which Harradine proposed that he sign. He said that they discussed adding a provision for medical and dental coverage benefits and this was agreed to and added. But the plaintiff said he was shocked at the announcement that he was to be terminated. He asked Harradine if he could contact his lawyer but Harradine told him that if he did not sign the letter providing for his resignation Harradine would deliver the other letter. The plaintiff thereupon signed the letter agreement. Harradine discussed certain other matters which were not covered by the letter, including compensation for the value of an expense paid trip to Fiji, to which the plaintiff might have been entitled if he had continued in the defendant's employment, the payment of bonuses owing including one arising from orders obtained from St. Pauls Hospital, the reimbursement of expenses, and the continued use by the plaintiff of the company car until it was needed by his successor. The plaintiff said

that his entitlement to the trip to Fiji was contingent upon his achieving budget and that on the day of the meeting it was not known whether he had met this requirement. He said that Harradine promised that if he qualified for the trip to Fiji he would be paid a sum equivalent to its value, that Harradine agreed to the payment of any bonuses owing, the reimbursement of expenses and the continued use of the company vehicle until it was required by the plaintiff's successor.

As a result of being faced with either having to sign the letter of agreement or be fired with termination "on the spot", he signed the letter of agreement in the hotel room but he said that he was in shock at the time.

He said that he and Harradine then went to the lobby of the hotel and Harradine had the signatures witnessed by a clerk at the front desk while the plaintiff waited in the lobby within sight of the desk.

He then called his solicitor, Mr. Thorneycroft and left the hotel. He met his solicitor for lunch that day. He testified that his solicitor advised him that the letter of agreement which he had signed was unenforceable and that the amount of severance pay was unreasonably low. He said that his solicitor advised him to accept the 16 weeks severance pay. If the plaintiff found immediate employment at an equivalent salary he might not have to claim against the defendant, but if he did not, he would have a claim which was not restricted by the letter agreement.

Harradine's account of the meeting conflicts with the plaintiff's account. He testified that the meeting lasted approximately two and one-half hours and that

within the first one or two minutes of its commencement he advised the plaintiff that his employment was terminated. He denied that the plaintiff was in a state of shock. He said they discussed the terms set out in the letter agreement which he produced. The plaintiff asked for five or six months severance pay rather than 12 weeks and eventually Harradine agreed to 16 weeks severance pay and changed that provision in the letter. At the plaintiff's request, he added a provision regarding medical and dental benefits after telephoning his office in Ottawa and obtaining authorization. He denied that the plaintiff asked to contact his lawyer or make any telephone calls. He testified that after an approximately one and a half hour discussion in the hotel room the two men went to the coffee shop of the hotel and continued their discussions there. They agreed to some matters which were not set out in the letter including the use of the company vehicle, the payment of a bonus for the St. Pauls Hospital account, and the reimbursement of expenses.

Harradine said that he did not agree that the plaintiff would be reimbursed for the value of the Fiji trip but agreed to request his superiors to consider authorizing payment of compensation for this trip if he qualified. He said the plaintiff then made a telephone call from the lobby of the hotel.

Harradine said that they both signed the agreement in the hotel lobby. Harradine then went to the concierge's desk where a clerk witnessed their signatures with the plaintiff standing approximately one metre away from where Harradine was standing. Harradine agreed that he told the plaintiff that if he did not sign the letter agreement he would give him the other letter. He said that the plaintiff was not outraged, showed no outward sign of shock, and did not ask to speak to a lawyer.

The letter agreement was worded as follows:

January 5, 1987

Mr. Robert Middleton
846 Cornell Avenue
Coquitlam, B.C.
V3J 2Z5

Dear Mr. Middleton:

This letter is to confirm the discussions held with V. Harradine, Director, National Sales on January 5, 1987 and your decision to tender your resignation, severing your employment relationship with the Bristol-Myers Pharmaceutical Group.

Therefore, it has been decided that the following terms will apply to the termination of your employment and this letter, once signed by you will constitute a binding agreement between yourself and Bristol-Myers Pharmaceutical Group.

- You will cease to be employed by Bristol-Myers Pharmaceutical Group effective January 5, 1987.

- The Company agrees to remit to you a severance payment equivalent to ~~12~~ weeks salary, the method and timing of said payment shall be by mutual agreement.

*(16 weeks)

- The Company agrees to remit to you all outstanding vacation pay and bonus payments earned but not received up to and including January 5, 1987.

- The Company agrees to provide you with relocation counselling services to a maximum of $3,000.

*- Medical and dental coverage not to exceed 16 weeks or to cease upon obtaining alternate employment.

The payments described above are subject to income tax and other deductions required by Federal and Provincial law and shall be properly made therefrom, and you hereby authorize us to make said deductions.

Following the termination of your employment with us and in consideration of the above, you hereby agree:

(a) to hereby remise and forever discharge Bristol-Myers Pharmaceutical Group, its parent company and affiliated companies of all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, claims and demands whatsoever which you ever had, now have or hereafter can, shall or may have for or by reason of or in any way arising out of your employment with Bristol-Myers Pharmaceutical Group or out of any cause, matter of thing whatsoever existing up to the date of the termination except any payments to which you may be entitled to under our pension plan; and

(b) not to disclose to anyone confidential information with regard to our business which you may have; and

(c) to return to us any keys which Bristol-Myers Pharmaceutical Group provided you; and

(d) to return to us any files, objects, books or records which are the property of Bristol-Myers Pharmaceutical Group; and

(e) to deduct from your final pay any monies advanced to you during your employment relationship which have not been reimbursed or otherwise properly accounted for prior to your date of termination.

The agreement set out above shall endure (sic) the benefit of our successors and assigns and shall be binding on your heirs, executors, administrators and assigns.

Dated this 5th day of January 1987, at Vancouver in the Province of British Columbia.

Accepted and agreed to on

January 5, 1987

"Robert Middleton"

BRISTOL-MYERS PHARMACEUTICAL GROUP

a division of BRISTOL-MYERS CANADA INC.

per: "V. Harradine"
Director National Sales

Witness: (Indecipherable)

* Added and initialled "V.H.".

On the conflicting evidence of what occurred at the meeting, I accept the evidence of Harradine. I find it improbable that Harradine would discuss the plaintiff's performance for approximately an hour before the letter agreement was produced as described by the plaintiff. Harradine had come to Vancouver armed with the letter agreement and a letter of dismissal for the express purpose of terminating the plaintiff's employment. There would have been no point in him discussing the plaintiff's past performance for an hour and a half or going on to discuss the plaintiff's future plans. I accept Harradine's evidence that he produced the letter agreement a minute or two after the meeting commenced. I further accept Harradine's evidence that he and the plaintiff discussed the amount of severance pay and that they agreed to 16 weeks severance and that Harradine then altered the letter dealing with that provision during the course of the discussion. It is more probable that this term in the letter was changed after the meeting commenced rather than before the letter was presented to the plaintiff.

The two men are in agreement that the provison regarding medical and dental benefits was added as a result of their discussion in the hotel room. I think it more probable that Harradine telephoned his office from his hotel room before agreeing to this term. I accept his evidence on that point.

I further accept Harradine's evidence that he and the plaintiff went to the coffee shop and continued their discussions of matters which were not contained in the letter agreement. That these terms were discussed is consistent with a letter which the plaintiff wrote to Harradine the next day, January 6th. That letter set out the matters discussed which were not in the letter agreement. It read:

Jan. 6th/87

Dear Vic:

As I promised, I am sending the file for Susie.

I have made arrangements with Randy to put everything in his locker.

To clarify points not contained in the letter but what (sic) we discussed at the January 5th, 1987 meeting we agreed to the following:

(1) If I qualify for the trip to Fiji, I will be paid an equivalent sum to the value of the trip.

(2) Any bonus' owing will be paid including St. Pauls birth bonus.

(3) I will be re-imbursed for all expenses incurred prior to Jan. 5th.

(4) I will have use of the company vehicle until it is needed for a replacement.

I am enclosing the company credit cards with this letter.

Yours truly,

Bob

I also concluded that the plaintiff and Harradine signed the letter agreement in the hotel lobby or coffee shop and that the plaintiff was present when Harradine arranged for a clerk at the concierge's desk to witness his signature. The clerk may not have witnessed the plaintiff's signature but I find that the plaintiff was aware that the clerk witnessed Harradine's signature.

Counsel for the plaintiff submitted that Harradine's evidence that the agreement was signed in the lobby or coffee shop should not be accepted - that it was unlikely that a private agreement would be signed in a public place. I am unable to

accept that submission. Harradine testified that he had been advised at his head office before he left for Vancouver that while he should discuss the agreement in private he should complete the discussion and signing of the agreement in a public place to avoid any problems. I found Harradine to be a careful witness. I think he came to Vancouver with a carefully planned strategy to terminate the plaintiff's employment. If the plaintiff did not agree to the terms of the letter agreement he was resolved to terminate his employment and accept any consequences that might follow. I think he appreciated that the plaintiff might become difficult and that this was less likely if final discussion or completion of the agreement took place in a public area.

Whether the Agreement was Voidable on the grounds of Duress

Plaintiff's counsel submitted that the plaintiff was in a state of shock when the plaintiff signed the letter agreement, that there was an inequality in the bargaining position of the plaintiff compared with the defendant due to this state of shock and that Harradine's conduct amounted to an ultimatum to the plaintiff that he should sign the agreement or be fired on the spot. He submitted that the plaintiff was subject to duress and coercion. The bargain between the parties was unfair because the termination pay was unreasonable. The agreement was unenforceable because it was unconscionable.

Although I find that the plaintiff was probably shocked on learning that Harradine had decided to terminate his employment, I do not find that he was coerced

into signing the letter agreement. His state of shock did not prevent him from negotiating more favourable terms than those that were offered. He negotiated the 12 week term of his severance pay to a 16 week term. He negotiated a provision for medical and dental benefits in the hotel room and had the presence of mind to negotiate and confirm the next day by letter that he was to receive certain bonuses and expenses and the continued use of the company car until the vehicle was needed by his replacement. He also sought to negotiate as a term that he receive compensation for the trip to Fiji. This evidence indicates that notwithstanding his shock the plaintiff was mentally alert and prepared to negotiate better terms if possible.

Moreover, after speaking to his lawyer at lunch within an hour and a half of signing the agreement, he confirmed his acceptance of the agreement by writing to Harradine on January 6th, "to clarify points not contained in the letter. . .but what we discussed. . .(and) agreed to the following". If the letter agreement had been signed under duress or had set out a completely unconscionable bargain, I would have expected the plaintiff to have rejected the agreement out of hand. Instead, he acted as though he accepted its terms by writing the letter of January 6th. He then wrote a further letter dated January 18th, 1987 in which he asked Harradine to arrange to have a cheque for ". . .$3,000 for the relocation counselling service sent to me as we had agreed upon". This conduct shows that he accepted the provisions of the letter agreement. Although he testified that he wrote the letter of January 6th after he had received legal advice that the letter agreement was unenforceable, I am unable to accept that explanation. The writing of the letter of January 6th was inconsistent with his regarding the letter agreement as being unenforceable

In an affidavit sworn October 2nd, 1987 in proceedings prior to the trial the plaintiff deposed that he was under some financial duress when he signed the letter. He deposed that he was married, living with his wife and three children that his wife did not have any employment outside of the home, that the home was subject to a mortgage which required monthly payments and there was an additional loan outstanding on his wife's automobile. He deposed that at the time he signed the agreement his circumstances were such that he had no choice but to sign the agreement and that he was not given any opportunity to consider his position or to obtain proper advice before signing the agreement.

The plaintiff's evidence did not establish that he was suffering any particular economic pressure at the time he signed the letter. He had $12,000 in a savings account, owned shares worth $30,000, owned $6,000 in an R.R.S.P. and owned a house with an equity worth $75,000. On examination for discovery he agreed that there was no financial reason that prevented him from telling Mr. Harradine that he would not accept the offer.

Although the plaintiff testified that he was refused permission to call a lawyer I do not accept his evidence on that point. In any event he did see his lawyer at a luncheon meeting within an hour or so of signing the agreement. He says he was advised that he could accept the benefits under the letter agreement without being bound by its terms. I doubt that his solicitor would have given this advice but his evidence is that he chose on counsel's advice to accept benefits under the agreement. I do not regard that as the conduct of the man who was acting under coercion or who was intimidated.

Nor am I able to find on the evidence that the terms of the agreement which were offered by the defendant were so unreasonable as to be unconscionable. Under the letter agreement he received almost four months severance pay, the use of an automobile until the end of February, 1987 and $3,000 cash for counselling services. The terms of the letter agreement permitted him to accept the benefits without any obligation to refund them if he obtained employment immediately following his termination. That option would not have been open to him if he had rejected the terms of the letter agreement and had decided to rely upon an action for damages for wrongful dismissal. If he had decided to take that alternative, but succeeded in obtaining another equivalent job promptly, the amount of damages which he might have recovered would have been minimal.

But the most important indication of whether the agreement was reasonable depends upon whether the length of the term of severance pay was reasonable. The length of notice to which an employee is entitled on termination of his employment has been reviewed in numerous cases. I referred to the leading authorities in Mutch v. Norman Wade Company Ltd, 17 B.C.L.R. (2d) 185, at p. 190, particularly the decision of our Court of Appeal in Gillespie v. Bulkley Valley Forest Industries Ltd. (1975) 1 W.W.R. 607, 50 D.L.R. (3d) 316, the decision in Bordal v. Globe and Mail Ltd. (1960) O.W.N. 253, 24 D.L.R. (2d) 140 at 145 (H.C.), and the discussion by McEachern C.J., S.B.C. in Ansari v. B. C. Hydro & Power Authority, 2 B.C.L.R. (2d) 33, (1986) 4 W.W.R. 123, 13 C.C.E.L. 238 (S.C.).

From these authorities I consider the following circumstances of the plaintiff to be of importance in determining the length of notice to which he was

entitled. He was the western regional manager of the defendant, a middle management position. He was aged 41 at the time of his termination. He had been employed for less than two years by the defendant but I think it reasonable to infer that at the time he commenced his employment with the defendant both he and the defendant expected the employment to be permanent. The plaintiff had left his previous employment with a competitor of the defendant to join the defendant. The plaintiff and the previous employer were the largest companies active in the pharmaceutical industry in British Columbia. His prospects for further similar employment in the same industry in British Columbia were therefore not good.

After reviewing a number of decisions by judges of this Court I have concluded that a reasonable length of notice for this plaintiff would have been between and four and six months. When the letter agreement is examined against that standard I am unable to find that its terms were unreasonable, especially when the plaintiff was entitled to accept all the benefits under the agreement without being under any obligation to repay any amounts if he found further equivalent employment promptly following his dismissal.

It is my conclusion on the evidence here that there was no duress or coercion going so far as to vitiate consent. There was pressure brought to bear by Harradine making it plain that the plaintiff would be terminated if he did not agree to the terms of the letter agreement. But I do not find that that pressure amounted to coercion so as to vitiate consent. I refer to the decision of the Privy Council in Pao On and Others v. Lau Yiu Lon and Others. At page 635, Lord Scarman said:

> "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J. in Occidental Worldwide Investment Corporation v. Skibs A/S Avanti (1976) 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent." This conception is in line with what was said in this Board's decison in Barton v. Armstrong (1976) A.C. 104, 121 by Lord Wilberforce and Lord Simon of Glaisdale--observations with which the majority judgment appears to be in agreement. In determing whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in Maskell v. Horner (1950) 3 K.B. 106, relevant in determining whether he acted voluntarily or not."

I apply these principles in that decision and find that the plaintiff did not protest against signing the agreement. He did have an alternative course open to him of rejecting the letter agreement but chose not to adopt that course. Moreover he was independently advised although I doubt that he received the advice to which he testified. Further after entering into the letter agreement and after being advised that it was not enforceable he did not take any steps to avoid it until after he had received all benefits under the letter agreement as well as the additional benefits mentioned in his letter of January 6th, 1985 (with the exception of the trip to Fiji of which I shall say more later).

The plaintiff is a man of good education. He had graduated from high school, had completed two years pre-medical education at university and had had in

excess of 10 years experience in a managerial capacity. He himself had hired and fired employees on occasion. I am unable to find that he was coerced into signing the letter agreement.

Was the Agreement Unconscionable?

The leading judgment of the Court of Appeal on unconscionable bargains is Morrison v. Coast Finance Ltd. (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710; and was so described by Lambert J.A., in Harry v. Kreutzijer, 9 B.C.L.R. 166 at 176, who quoted the following passage from the judgment of Davey J.A., at p. 259:

> ". . . a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable. . . ."

Lambert J.A. went on at p. 177 to state that the question of whether the use of power was unconscionable, or whether an advantage was unfair or very unfair, or whether bargaining power was grievously impaired were really aspects of one single question.

> "That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded"

This was not the judgment of the majority of the court but I have considered that question in determining whether the agreement here was unconscionable.

The decision of Harradine made prior to the meeting to dismiss the plaintiff either on the terms set out in the letter agreement or on the basis that plaintiff cease his employment forthwith showed that the defendant had determined to follow a hard line. But the plaintiff was not weak or ignorant. He was a man of some education and he himself had hired employees and on occasion had fired them. He responded to Harradine's hard approach by negotiating some significant advantages for himself. Harradine did not use his superior bargaining power to the exclusion of all considerations of fairness to the plaintiff. He agreed to the majority of the terms requested by the plaintiff which were not set out in the letter agreement. The final result under the agreement was not such a marked departure from the result which the plaintiff could have expected to obtain if he had not signed the agreement. I have already referred to the amount of severance pay which he would have been awarded based upon my review of the authorities decided by this Court. The plaintiff obtained independent legal advice and presumably could have taken the position that the agreement was voidable. But he decided not to take that position until after he had received all of the benefits which the defendant had agreed to pay him. In my opinion the agreement was a fair result and was not obtained by the defendant taking an unfair advantage of the plaintiff. When the transaction is looked at as a whole it cannot be said to be an unconscionable agreement.

I find support for that conclusion in the decision in Sapieha v. Intercontinental Packers Ltd., 10 C.C.E.L. 87 at p. 94 per Hrabinsky J (Sask. Q.B.). That case was concerned with a wrongful dismissal in which the plaintiff had signed a release in favour of his employer. The Court did not think that the agreement was

unconscionable. That was a stronger case for the plaintiff than is the case at bar because the plaintiff in Sapieha did not obtain independent legal advice. That decision applied the reasoning of our Court of Appeal in Harry v. Kreutzijer (supra).

I therefore find that the agreement was not voidable on the grounds that it was unconscionable or inequitable.

Accord and Satisfaction

The plaintiff cannot succeed on the further ground that there was accord and satisfaction for his agreement to resign and to release the defendant from all claims arising out of the plaintiff's employment. The defendant promised to provide in settlement what the plaintiff was prepared to accept in return for his resignation and release. The principles discussed in Goddard v. Blackwood Hodge Equipment Ltd. (1983) 2 C.C.E.L. 299 (Sask. Q.B.) by Geatros J (at p. 303-304) apply in the case at bar.

Estoppel

Further the plaintiff is estopped from taking the position that the agreement was voidable by accepting the benefits under the agreement, by accepting the counselling allowance and by continuing to accept other benefits under the agreement paid in accordance with the request made in his letter of January 6th, 1987 (see Halsbury's Laws of England, 3rd Edition, Volume 15, p. 169).

Approbation and Reprobation

Further the plaintiff is estopped on the principle that a person may not approbate and reprobate. The plaintiff had a choice of accepting benefits under the letter agreement and pursuant to his letter of September 6th, he chose to accept the benefits under the letter agreement and the other benefits. He is treated in law as having made an election from which he cannot resile. This is most clearly illustrated by his election to accept the payment of $3,000 for relocation counselling services offered under the letter agreement which the plaintiff elected to accept by his letter to the defendant of January 18th, 1987 (see on this point Halsbury's Laws of England, 3rd Edition, Volume 15, p. 171).

Compensation for the Fiji Trip

During argument counsel for the plaintiff sought to amend paragraph 8 of the statement of claim out of an abundance of caution to guard against the event that I held that the letter agreement was a bar to the plaintiff's claim on the ground that the claim for compensation for the Fiji trip was not covered by the letter agreement. Although this was opposed by counsel for the defendant, I exercise my jurisdiction in favour of allowing the amendment to conform with the evidence. I do not consider that the amendment, even at that late stage, will prejudice the defendant. Harradine testified that he discussed this matter with the plaintiff on the understanding that it was not part of the plaintiff's right to compensation upon his termination. He testified that he agreed to request his superiors to consider authorizing payment of

compensation for this trip if the plaintiff qualified as a result of his previous year's performance.

The letter of January 6th which the plaintiff wrote to Harradine confirmed the understanding that if the plaintiff qualified for the trip to Fiji he would be paid an equivalent sum to the value of the trip.

Plaintiff's counsel argued that this meant that if the plaintiff succeeded in reaching his 1986 budget figure (which he did) he was entitled to receive the value of this trip. But Harradine testified that the plaintiff did not qualify for this trip notwithstanding his having succeeded in reaching his budget for 1986 because the trip to Fiji was a matter in the discretion of the defendant and unless a person was an employee and entitled to go on the trip, that person did not qualify for this compensation. Harradine explained that the trip was designed for employees and their spouses so that employees, either with or without their spouses, could go on the excursion to Fiji. An employee who did not himself go on the trip or who did not take his spouse on the trip was not entitled to compensation for not going himself or for his spouse not going if he went without his spouse. I accept Mr. Harradine's evidence that this trip was only available to persons who were employed at the time the trip was available and who elected to go on it. As the plaintiff was not in that category he is not entitled to compensation for this item.

Summary

For the foregoing reasons the action must be dismissed with costs.

A.P. Legg J.

March 11, 1988
Vancouver, B. C.