CITATION: Brant Securities Limited v. Goss, 2024 ONSC 915
COURT FILE NO.: CV-22-00676785-0000
DATE: 20240212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Brant Securities Limited Plaintiff (Defendant by counterclaim)	James Renihan for Brant Securities Limited
– and –	
Donald Goss Defendant (Plaintiff by counterclaim)	Kenneth A. Dekker and Ardita Sinojmeri for Donald Goss
	HEARD: January 11, 2024

ROBERT CENTA J.

[1] The plaintiff, Brant Securities Limited, moves for summary judgment to enforce a promissory note signed by the defendant, Donald Goss. Mr. Goss resists enforcement of the promissory note and seeks summary judgment in favour his own claims against Brant.

[2] I find that there are no genuine issues requiring a trial. I grant summary judgment in favour of Brant on its claim under the note for $461,000. I grant summary judgment in favour of Mr. Goss on his claim for $33,616.60 in unpaid *Employment Standards Act* benefits and set that amount off against the amount Mr. Goss owes under the note. I dismiss the remainder of Mr. Goss's claims.

The parties, key persons, and factual overview

[3] Many of the facts underpinning the claim and counterclaim are not in dispute. I will first set out the undisputed facts at a fairly high level and will then consider them in more detail as I address each issue raised on the motions for summary judgment.

[4] The defendant (and plaintiff by counterclaim) Donald Goss has worked as an investment advisor since 1992. In 2013, Mr. Goss joined Aston Hill Securities as a vice-president and investment advisor. AHS and Mr. Goss signed an employment agreement dated July 31, 2013. As part of that agreement, Mr. Goss received a "recruitment bonus" of $1.6 million. This amount was loaned to Mr. Goss at the commencement of his employment for the sole

purpose of Mr. Goss acquiring common shares of Aston Hill Financial Inc. through a private placement. AHF was the publicly traded parent company of AHS. Mr. Goss received 1,304,844 shares with a total market value of $1,748,490.96.

[5] If Mr. Goss met certain revenue benchmarks, AHS agreed to award Mr. Goss an annual bonus of $160,000, which would be applied to forgive the debt arising from the recruitment bonus. If Mr. Goss met his annual benchmarks each year, the interest-free loan would be repaid over ten years. If Mr. Goss defaulted on repayment of the loan, the entire principal amount outstanding would become due and payable.

[6] On September 16, 2013, Mr. Goss signed a promissory note in respect of the recruitment bonus. In the promissory note, Mr. Goss promised to pay to AHS, or to its order, the $1.6 million in ten equal annual instalments.

[7] Effective April 1, 2016, AHS amalgamated with the plaintiff (and defendant by counterclaim) Brant Securities Limited pursuant to the terms of a share purchase agreement dated March 11, 2016, and the issuance of articles of amalgamation.

[8] In anticipation of this merger, Mr. Goss, AHS, and AHF entered into an amended and restated promissory note dated March 30, 2016, which was effective as of September 16, 2013. There is a dispute about Mr. Goss's signature on the amended note that I will address below. The recitals to the amended note record that, "through inadvertence,"

a. the original promissory note was in the name of AHS when it should have been in the name of AHF; and

b. AHS did not award the annual bonuses to Mr. Goss in September 2014 and 2015; and

c. Mr. Goss did not make the repayment of the annual portion of the loan in those years.

[9] The amended note extended the time for repayment of the loan by two years and expressly permitted AHF to assign the note to an affiliate or to Brant without further consent of Mr. Goss. As part of the amalgamation transaction, AHF transferred the note to AHS, which amalgamated with Brant, which became the beneficiary of the note. Following the amalgamation, Brant also became the legal employer of Mr. Goss.

[10] In October and November 2016, Mr. Goss sold 1,268,000 of the 1,304,844 AHF shares that he had purchased with the proceeds of the $1.6 million recruitment bonus. This represented over 97% of the shares he received. He sold the shares on the open market for a total of $143,466.

[11] From 2017 to 2020, Mr. Goss signed an annual confirmation of the amount he continued to owe under the amended note. On October 8, 2020, he signed the final such acknowledgement, confirming that he owed $960,000 under the amended note.

[12] In February 2020, Brant began discussions with Worldsource Securities about the possible merger of the business.

[13] Mr. Goss was the subject of a regulatory investigation and prosecution under the Ontario *Securities Act*. A 36-day hearing took place before the Capital Markets Tribunal between October 2020 and February 2021.

[14] Eventually, Worldsource agreed to agreed to purchase Brant's business, but it would not agree to offer employment to Mr. Goss. There is a dispute between the parties regarding when Mr. Goss first knew that Worldsource would not be offering him a position. Mr. Goss's evidence is that he did not know that he would not be employed by Worldsource until September 30, 2021. On October 29, 2021, Mr. Goss sent an email to Brant stating: "Today will be my last day at Brant. Thank you [for] everything you have done for me over the years." Mr. Goss left to commence employment at Hampton Securities, which paid him a lump-sum signing bonus of $250,000.

[15] On November 9, 2021, Brant wrote to Mr. Goss and requested repayment of the amounts still owing under the amended note. Brant acknowledged that it owed Mr. Goss $78,000 in compensation for October 2021, and $101,000 in respect of referral fees. Setting those amounts off against what Mr. Goss owed under the amended note, Brant demanded repayment of $461,000. Mr. Goss declined to repay the amount owing.

[16] On February 11, 2022, Brant commenced an action to recover on the note. On March 22, 2022, Mr. Goss defended the action on the basis that the amended note was not enforceable. Mr. Goss also counterclaimed for amounts he claimed were owing to him and requested that those amounts be set off against any amounts he was found to owe to Brant.

[17] On May 26, 2022, the Capital Markets Tribunal concluded that Mr. Goss had breached the Securities Act by repeatedly engaging in "insider trading on a large scale." On January 20, 2023, the Capital Markets Tribunal imposed a 15-year market ban, a penalty of $1 million, and required Mr. Goss to disgorge $1,228,509. Mr. Goss notes that one member of the Capital Markets Tribunal dissented from these findings and that decision is currently under appeal.

Legal principles on summary judgment

[18] Summary judgment is an important tool for enhancing access to justice where it provides a fair process that results in a just adjudication of disputes.[1] Used properly, it can achieve proportionate, timely, and cost-effective adjudication.

[19] The Court of Appeal for Ontario described the correct approach on a motion for summary judgment. I am to:

[1] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 4-7.

a. determine if there is a genuine issue requiring a trial based only on the evidence before me, without using the enhanced fact-finding powers under rule 20.04(2.1);

b. if there appears to be a genuine issue requiring a trial, determine if the need for a trial could be avoided by using the enhanced powers under

   i. rule 20.04(2.1), which allow me to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence; and

   ii. under rule 20.04(2.2), which allows me to order that oral evidence be presented by one or more parties.[2]

[20] The Supreme Court of Canada emphasized that I must focus on whether the evidence before me permits a fair and just adjudication of the dispute and cautioned that judges should not use the enhanced powers where their use would be against the interests of justice:

> On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.[3] [emphasis in original]

[21] On a motion for summary judgment, each party is required to put their best foot forward. They are not permitted to sit back and suggest that they would call additional evidence at trial.[4] The court proceeds on the basis that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial.

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[2] *Royal Bank of Canada v. 1643937 Ontario Inc*., 2021 ONCA 98, 154 O.R. (3d) 561, at para. 24.
[3] *Hryniak*, at para. 66.
[4] *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d), at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691, at para. 17; *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, at para. 62, rev'd on other grounds, 2015 ONCA 758, 393 D.L.R. (4th) 237.

[22] I can fairly determine the motion on the record before me without resort to the enhanced powers under rules 20.04(2.1) or (2.2). I am satisfied that there are no genuine issues requiring a trial. However, if I were to weigh the evidence, evaluate the credibility of the deponents, and draw inferences from the evidence, exercising those powers would affirm my conclusions.

The original promissory note is valid and enforceable

[23] I find that there is no genuine issue requiring a trial regarding the issue of whether or not the original promissory note is valid. I find that the original note is valid and would be enforceable, subject to the effect of the amended note, which I address below.

[24] Mr. Goss submits that the original note was never enforceable against him because of a failure of consideration. Mr. Goss submits that the original note was a bill of exchange and relies on the decision of the Court of Appeal for Ontario in *Teixeira v. Markgraf Estate* for the proposition that the failure or absence of consideration is a complete defence to an action on a bill of exchange.[5] I am, of course, bound by the decision in *Teixeira*, but I conclude that it does not assist Mr. Goss.

[25] Mr. Teixeira was kind and helpful to his elderly neighbour, Mary Markgraf, for nearly 15 years. Shortly before her death, Ms. Markgraf made a will that included a bequest of $100,000 to Mr. Teixeira. She also wrote out a cheque to him in the amount of $100,000. He attempted to cash the cheque at Ms. Markgraf's bank the next day. The bank said that it would have to investigate and returned the cheque to Mr. Teixeira without advising him that Ms. Markgraf did not have enough funds in that account to cover the cheque. Ms. Markgraf died six days later, the bank froze her accounts, and Mr. Teixeira could not cash the cheque. Ms. Markgraf's estate advised Mr. Teixeira that he would receive the bequest under the will, but that the cheque was an imperfect gift that was not legally enforceable. Mr. Teixeira sued the estate for the value of the cheque. The application judge dismissed the claim, finding that the cheque was a gift that failed for lack of delivery.

[26] The Court of Appeal dismissed the appeal. It upheld the application judge's findings that there was no contract between Ms. Markgraf and Mr. Teixeira, that the cheque was a gift, that the law of gifts applied to the facts of the case, and that the purported gift failed because it was not delivered before the bank received notice of Ms. Markgraf's death.

[27] With respect to Mr. Teixeira's claim under the *Bills of Exchange Act*, the Court of Appeal noted the settled law that "as between the immediate parties, the failure or absence of consideration is a complete defence to an action on a bill of exchange."[6] The Court of Appeal cited a leading text that described the effect of the defence as follows:

> Both total failure of consideration and complete absence of consideration (*as, for example, where a gift is made by cheque of the*

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[5] *Teixera v. Markgraf Estate*, 2017 ONCA 819, 137 O.R. (3d) 641.
[6] *Teixeira*, at para. 26.

> *donor but not completed by payment upon presentment*) are defences to actions upon the engagements of immediate parties to a bill, cheque or note. A gratuitous promise of payment does not become binding at the suit of the immediate promisee merely because it is expressed formally in a negotiable instrument.[7]

[28] Mr. Goss submits that the original note was not enforceable by AHS because it advanced nothing to Mr. Goss, therefore Mr. Goss owed nothing to AHS, and the promissory note was unenforceable. The parties agree that AHF, not AHS, advanced the $1.6 million that was used by Mr. Goss to purchase the AHF shares by way of private placement. Mr. Goss submits that AHS, therefore, stands in the same position as Mr. Teixeira and cannot enforce the promissory note. I disagree.

[29] I find that the promissory note is inextricably linked to the recruitment bonus, which was part of the consideration contained in the employment contract between AHS and Mr. Goss. The employment contract between Mr. Goss and AHS, which was dated July 31, 2023, contained the recruitment bonus. The section of the contract provided as follows:

> RECRUITMENT BONUS: Subject to this entire section, the amount of the recruitment bonus will be $1,600,000 which amount will be loaned to you at the commencement of your employment with AHS. The proceeds of the loan shall be used by you to acquire common shares of Aston Hill Financial Inc. by way of, subject to any required approvals of the TSX, a private placement priced at the commencement of your employment based on a five day VWAP immediately prior to your Start Date. The loan will be evidenced by the delivery by you of a promissory note (the "Note"), in substantially the form attached hereto. The principal of the Note will be $1,600,000, which shall be interest free until maturity or default, after which interest will accrue at the annual rate of prime plus one percent (1%). The Note will have a ten (10) year term and shall provide for ten (10) equal consecutive annual principal payments of $160,000 the first payment being due on the first anniversary of the Start Date on page 1. Interest amounts, which would be otherwise payable by you, may constitute a taxable benefit in your hands, and a tax advisor should be consulted.
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> The recruitment bonus is conditional on your current Assets under Administration ("AUM") being successfully transferred to AHS and revenues from your book of business being consistent with previous years.

[7] *Teixeira*, at para. 27 (emphasis added by the Court of Appeal).

> AHS shall pay to you an annual bonus in the amount of $160,000, by way of debt forgiveness, during the first ten (10) years of your employment provided that, at the end of the year immediately prior to the payment of each annual bonus, you shall have $150,000,000 of AUM and you shall have generated minimum revenue of $1,000,000. In the event that, in any year, your AUM is less than $150,000,000 or the amount of revenue generated is less than $1,000,000, the amount of the annual bonus shall be pro-rated based on the amount of such deficiency; however, this pro-ration shall not apply if, in previous years, the aggregate excess revenue generated in such years exceeds the amount of such deficiency. There will be a cumulative carry forward of annual revenues so that if total annual revenues during the existence of the Note total $10,000,000 prior to the due date of the last annual payment under the Note, then you shall have the option of receiving the amount of all unpaid annual bonuses at that time,
>
> You will only be paid the annual bonuses provided that your employment with AHS remains in good standing on each such payment date. By signing below, you will be authorizing and directing AHS and its affiliates to apply the amount of the annual bonus payment (after deducting applicable employee withholdings for minimum revenue and AUM thresholds) against the Note.

[30] The parties agree that Mr. Goss received $1.6 million from AHF, that money was used to purchase 1,304,844 shares AHF shares through a private placement, and that Mr. Goss received shares with a total market value of $1,748,490.96.

[31] The employment agreement also contained a provision regarding debt repayment:

> DEBT REPAYMENT: Upon termination of your employment for any reason, any type of outstanding draws, loans, debits, or unpaid expenses, not otherwise recovered, which are owing to AHS by you are considered a debt to AHS that survives the termination of the agreement and your employment with AHS, subject to, in the case of the Note, the terms of the Note.

[32] I agree with Mr. Goss that the original promissory note is clearly a promise to pay AHS. The first paragraph of the promissory note obliges Mr. Goss, “for value received” to pay $1.6 million to AHS:

> FOR VALUE RECEIVED, I promise to pay to ASTON HILL SECURITIES INC. ("AHS"), or to its order, at its offices in Toronto, Ontario the sum of $1,600,000.00 in lawful money of Canada, without interest, except as provided herein. The sum of $1,600,000.00 shall be due and paid in ten (10) equal consecutive

> instalments of $160,000.00 (each, an "Instalment Payment") beginning on the first anniversary of the date of this Note and thereafter annually on the next nine (9) anniversaries (each, a "Payment Date") until the Maturity Date (as defined below).

[33] The original note expressly states that Mr. Goss is signing the note as a condition of the offer of employment:

> This Note is entered into contemporaneously with, and as a condition of, an offer of employment by AHS to me dated July 31, 2013 (the "Offer") and, in the event of any inconsistency between this Note and the Offer, the Offer shall prevail.

[34] I find that it is clear that Mr. Goss received significant consideration in his employment agreement with AHS in exchange for the promissory note in favour of AHS.

[35] Courts ensure that there is consideration for a contract, but the court is not concerned with the adequacy of the consideration.[8] As long as there is some consideration for the contract, the court leaves it to the parties to form their own judgment over its adequacy and to make their own bargain.[9] The law does not require that the new benefits be in the form of money, or that the economic value of the benefits provided equal or exceed the economic cost of the agreement.[10]

[36] Here, consideration passed to Mr. Goss from AHS through the commission-based compensation, sales support, transfer costs, licence costs, and the recruitment bonus contained in the employment agreement. That was the “value received” referred to in the promissory note, which Mr. Goss signed as a condition of his employment agreement. Mr. Goss admits that he received the value of the recruitment bonus and the $1.7 million worth of AHF shares that he purchased with the proceeds of that bonus. In my view, there is no failure of consideration for the original promissory note.

[37] Mr. Goss did not provide any caselaw to suggest that the *Bills of Exchange Act* permits an enforceable bill of exchange to name only the exact party that advanced the funds as the beneficiary of the bill of exchange. I do not read the Act as imposing that requirement.

[38] AHS did not stand in the same position as Mr. Teixeira when he tried to enforce Ms. Markgraf’s gift. Here, there was consideration for and performance of a contract between AHS and Mr. Goss.

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[8] *Richardson v. Tiffin*, [1940] S.C.R. 635 at 656.
[9] *Loranger v. Haines*, [1921] 64 D.L.R. 364 (Ont. C.A.).
[10] *Lancia v. Park Dentistry*, 2018 ONSC 751, at para. 54; *Riskie v. Sony of Canada Ltd*., 2015 ONSC 5859, at paras. 31 to 36; *Techform Products Ltd. v. Wolda* (2001), 206 D.L.R. (4th) 171 (Ont. C.A.), at paras. 26, 28; *Clarke v. Insight Components (Canada) Inc*., 2008 ONCA 837, at paras. 7 to 11; *United Rentals of Canada Inc. v. Brooks*, 2016 ONSC 6854, at para. 51.

[39] There is no genuine issue requiring a trial regarding the status of the original promissory note. I find that the original promissory note was a bill of exchange and it was enforceable against Mr. Goss. There was no failure of consideration.

The amended promissory note is valid and enforceable

[40] I find that there is no genuine issue requiring a trial regarding the issue of whether or not the amended promissory note is valid. I find that the amended note is valid and enforceable. I will first describe the amended note and then address Mr. Goss's submissions regarding its enforceability.

The amended note's terms

[41] The amended note is dated March 30, 2016, and is in favour of AHF, not AHS. The recitals to the amended state that Mr. Goss borrowed $1.6 million from AHF (not AHS) and that, through inadvertence, the original note was made in favour of AHS when it should have been made in favour of AHF. The recitals provide the rationale for the amended note being made in the name of AHF as follows:

> WHEREAS [Mr. Goss] borrowed the sum of $1,600,000 from Aston Hill Financial Inc. ("AHF") effective September 16, 2013, in conjunction with the undersigned commencing employment with Aston Hill Securities Inc. ("AHS") on such date and as contemplated in the offer of employment given to [Mr. Goss] by AHS on July 31, 2013 (the "Offer of Employment"); and
>
> WHEREAS [Mr. Goss] executed a promissory note with an effective date of September 16, 2013 in respect of the loan received from AHF (the "Original Promissory Note"); and
>
> WHEREAS through inadvertence the Original Promissory Note was in the name of AHS when it should have been in the name of AHF;

[42] The recitals to the amended note state that, through inadvertence, AHS had not paid Mr. Goss the $160,000 annual bonus payments in 2014 and 2015, Mr. Goss had not made the required principal repayments of $160,000 in those years, and the parties agreed that the amended note would deal with this situation:

> WHEREAS the Original Promissory Note had a term of 10 years and required among other things the undersigned to make repayments of principal in the amount of $160,000 on September 16, 2014 and $160,000 on September 16, 2015 (the "Required Principal Repayments""), with the Offer of Employment requiring AHS to pay to the undersigned a bonus in the amount of $160,000 effective September 16, 2014 and $160,000 effective September 16, 2015 (the "Required Bonus Payments"), it being acknowledged by

> AHS and AHF that the undersigned met the criteria in the Offer of Employment for payment of the Required Bonus Payments; and
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> WHEREAS through inadvertence neither of the Required Bonus Payments were made and, accordingly, neither of the Required Principal Repayments were made; and
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> WHEREAS the undersigned, AHS and AHF have agreed that the undersigned shall provide to AHF this amended and restated promissory note (the "Note"), which shall supersede the Original Promissory Note in its entirety, so as to deal with the foregoing;

[43] The amended note was effective as of September 13, 2013, and would run for 12 years (instead of ten years). Mr. Goss would not be required to make principal repayments for the periods ending September 16, 2014, and September 16, 2015, and ten annual repayment instalments would be due starting September 16, 2016. The operative provision of the amended promissory note provided as follows:

> FOR VALUE RECEIVED, I promise to pay to ASTON HILL FINANCIAL INC., or its successors or permitted assigns, or to its order, at its offices in Toronto, Ontario the sum of $1,600,000.00 in lawful money of Canada, without interest, except as provided herein. The sum of $1,600,000.00 shall be due and paid in 10 equal consecutive instalments of $160,000.00 (each as "Instalment Payment") beginning on September 16, 2016 and thereafter annually on the next nine anniversaries thereof (each, a "Payment Date") until the Maturity Date (as defined below). The parties agree that no repayments of principal shall be required for the periods ending September 16, 2014 and September 16, 2015.

[44] Mr. Goss submits that this amended note is unenforceable against him. I disagree.

No genuine issue for trial regarding whether or not Mr. Goss signed the amended note

[45] Mr. Goss suggested in argument that he may not have actually signed the amended note. In my view, that was not Mr. Goss's evidence. Based on my review of the transcript of Mr. Goss's cross-examination, his evidence is that he does not recall signing the amended promissory note or discussing it with anyone. Counsel for Brant directly asked Mr. Goss if he was suggesting that his signature on the amended note was forged and Mr. Goss stated that no, he was not making that suggestion:

> Q. Now, when we look at the fourth page with the signatures, your evidence is that the signature does look like yours; right, sir?
>
> A. Yeah. But I would say that Goss is questionable.

Q. Well, your affidavit says it looks like yours. What I want to know is, are you suggesting that it's a forgery?

A. I'm not suggesting anything.

Q. You just don't have any memory of signing it?

A. I do not.

[46] The submission that Mr. Goss did not sign the amended note is not supported by Mr. Goss's own evidence.

[47] In addition, Mr Goss did not tender an expert report to cast any doubt on the authenticity of his signature. If Mr. Goss wanted to dispute the authenticity of his signature on this motion for summary judgment, he was required to put his best foot forward. I find that there is no genuine issue requiring a trial over the authenticity of his signature on the amended note and I am satisfied that he signed it.

No genuine issue requiring a trial regarding whether or not Mr. Goss received consideration for the amended note

[48] Second, Mr. Goss submits that he received no consideration for agreeing to the amended note. Mr. Goss submits that the amended agreement was to his detriment because it required him to "let AHS off the hook for $320,000 in missed bonus payments" and that he would be required to meet his targets for two additional years to discharge the loan. In my view, Mr. Goss takes a too narrow view of how the amended note reset the relationship among the parties to their mutual benefit.

[49] The parties agree that Mr. Goss met his performance targets in 2014 and 2015 and was entitled to a bonus in each of those years. It is conceded that AHS did not pay those bonuses in those years, which breached the employment agreement. In consequence, Mr. Goss did not make his annual instalments in either 2014 or 2015, which was a payment default under the promissory note. It is conceded that AHS did not notify Mr. Goss in writing of the payment default as required by the promissory note. All of this came to light at the time when AHF was on the cusp of selling its business to Brant. The entire situation was a bit of a mess.

[50] The parties had a number of options available to them. Each could have insisted on performance of the other's obligations, attempted to enforce their legal rights through litigation, or accepted a purported repudiation of the agreement. Mr. Goss could have insisted that he receive an immediate lump sum payment of the two missed bonuses with those amounts credited to the amount outstanding on the loan. Mr. Goss could have insisted that he receive a retroactive payment of the outstanding amounts. However, the payment of lump sum or retroactive bonus payments could have had immediate and very significant adverse tax consequences for Mr. Goss. It is important to recall that Mr. Goss did not receive a cash payment in respect of his bonus, he only received a reduction in the principal

amount owed under the promissory note. If he faced an unexpected tax bill in respect of a retroactive bonus, he had to pay that tax bill out of his own after tax income.

[51] Instead, the parties negotiated and signed an amended and restated promissory note. The amended note clarified the relationship among the parties, dealt with the misnomer issue, and dealt with the complicated situation created by the missed bonuses. Obtaining this clarity, certainty, and avoiding a future costly dispute was a benefit to both sides. The Court of Appeal for Ontario has recognized that it is to the benefit of both parties to avoid costly disputes and that is something of value that flows from and to each party:

> Clarifying an unclear term in a long-term contract, in order to create certainty and to avoid future costly disputes, enures to the parties' mutual benefit, and is something of value that flows from and to each contracting party. It thus serves as a functional form of consideration.[11]

[52] In my view, the resolution of the issues in dispute is sufficient consideration for the amended note.

[53] Moreover, there were other benefits that accrued to Mr. Goss in the amended note. Mr. Goss received an additional two years before any interest would accrue on the amount he borrowed. As mentioned above, Mr. Goss also avoided the cash flow implications of paying taxes on the missed bonuses and obtained a further tax deferral on the value of his bonuses. Even if the tax deferral benefit did not match a detriment suffered by AHF, it is evidence of benefits he obtained under the amended note. Indeed, this benefit was available only because AHF agreed to extend the time it would be required to wait for repayment for an additional two years.

[54] The parties could have resolved this situation in many different ways. It is not for the court to second guess the bargain made by the parties, assess the adequacy of the consideration offered by AHF, or to assess whether the economic benefits obtained by Mr. Goss outweigh what he gave up. I find that Mr. Goss did receive some benefit under the amended note.

[55] For this reason, it does not matter that Mr. Goss now characterizes the other changes in the note as imposing new burdens on him. Indeed, while I think the addition of the express permission of the ability of AHF to assign the note was legally unnecessary, and did not in fact impose new burdens on Mr. Goss, even if it did that would not be fatal.[12]

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[11] *Richcraft Homes Ltd. v. Urbandale Corporation*, 2016 ONCA 622, at paras. 45 to 47.

[12] The holder of a bill of exchange may transfer it to another person unless the bill expressly prohibits such a transfer. The original promissory note, which Mr. Goss concedes was a bill of exchange, contained no prohibitions on transfer and was an unconditional promise to pay. See *Bills of Exchange Act*, ss. 16, 20(1), 21(1) and 60; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53; *Clark v. Werden*, 2011 ONCA 619, at para. 16;

[56] While Mr. Goss may not remember signing the amended note or discussing the amended note with Mr. Killeen, I accept Mr. Killeen's evidence that there were negotiations over the terms of the amended note.

[57] I find that there is no genuine issue requiring a trial regarding whether or not the amended note is enforceable.[13] I find that it is enforceable.

Brant has standing to enforce the amended note

[58] Mr. Goss submits that Brant does not have standing to sue on the amended note. I disagree.

[59] First, Mr. Goss submits that Brant is not a corporate successor to AHF, the entity to which he owed the $1.6 million, and therefore has no standing to enforce the note. As I have explained above, the fact that AHF was the source of the $1.6 million that funded the purchase of the shares does not mean the original note was not enforceable by AHS.

[60] Moreover, the evidence is clear (and uncontradicted) that AHF assigned the amended note to AHS, which was then amalgamated into Brant. In my view, Brant has standing to enforce the amended note.

[61] Second, Mr. Goss submits that AHS "paid little or nothing" for the assignment of the amended note from AHF. Even if that is true, it is irrelevant. The amended note was a bill of exchange, AHF was free to give the note to AHS with or without consideration. Even if the note was transferred without consideration, that would not affect the right of AHS (and later Brant), as a matter of law, to enforce the amended note.

[62] Third, whether or not Brant paid cash to AHF for its shares in AHS, or whether Brant made payments under the promissory note it gave to AHF, is legally irrelevant to Brant's ability to sue on the amended promissory note, which is a bill of exchange. Mr. Goss cannot avoid his obligations under the promissory note by challenging the *bona fides* or the performance of obligations under the subsequent transactions among AHS, AHF, and Brant.

[63] In my view, there is no genuine issue requiring a trial over Brant's standing to enforce the amended note. I find that Brant has standing to enforce the amended note.

Is Mr. Goss entitled to set off any amounts against the amount he owes under the amended note?

[64] Mr. Goss advances a number of claims against Brant and asks that the amounts owing to him be set off against any amounts that he is found to owe under the amended note. It is

[13] In his notice of motion, Mr. Goss asserted that the amended promissory note was unconscionable, but he did not advance that argument in his factum. In any event, I see neither an inequality of bargaining power nor a resulting improvident bargain, which are the elements of an unconscionable agreement: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 118.

convenient to first address whether or not any of Mr. Goss's claims raise a genuine issue requiring a trial and then address whether he is entitled to set any of those amounts off.

No genuine issue requiring a trial regarding a credit for the unpaid bonuses in 2014 and 2015

[65] Mr. Goss claims an entitlement to "$320,000 in credits for his 2014 and 2015" bonuses and that those amounts should be set off against any amounts owed to Brant. This claim does not raise a genuine issue requiring a trial. I find that Mr. Goss is not owed anything on account of his 2014 and 2015 bonuses.

[66] First, as set out above, Mr. Goss entered into the amending note, which I have found to be enforceable and binding. The amended note resolved the issue of his 2014 and 2015 bonuses and he has no further entitlement to them.

[67] Second, each year between 2017 to 2020, Mr. Goss acknowledged to Brant the amount that he continued to owe under the amended note. On October 23, 2017, for example, Mr. Goss signed below the sentence "I confirm the balance of $1,440,000 owing to Brant Securities Limited as of August 31, 2017." This balance reflects the original $1.6 million debt, minus the first payment of $160,000 made on September 16, 2016. This balance did not include the additional credits for 2014 and 2015 that Mr. Goss now claims.

[68] Mr. Goss signed similar letters on October 12, 2018, October 15, 2019, and October 8, 2020. The final letter listed the balance owing as $960,000 in relation to the amended note. It is clear that Mr. Goss knew that he was not entitled to credits in relation to the 2014 and 2015 bonus years and never asserted any entitlement to any credit. Instead, he routinely acknowledged the full amount he still owed to Brant Securities.

[69] In my view, there is no genuine issue requiring a trial regarding Mr. Goss's claims regarding the 2014 and 2015 bonuses and I dismiss those claims whether framed as defences to Brant's claims or independent claims to be set off against and amounts Mr. Goss is found to owe to Brant.

<u>Mr. Goss's claim to a credit for the unpaid bonuses is statute barred</u>

[70] In the alternative, Brant advances a defence under the *Limitations Act* against Mr. Goss's claims regarding the 2014 and 2015 bonus amounts.[14] Brant submits that its limitations defence raises no genuine issue requiring a trial and that this part of the claim should be dismissed. While it is not necessary for my decision, I will address this argument for completeness.

[71] Under ss. 4 and 5 of the *Limitations Act*, a party must normally sue within two years of the discovery of their claim. This basic limitation clock starts running when the plaintiff has actual knowledge of the material facts that give rise to a claim, or when the plaintiff ought

[14] *Limitations Act, 2002*, S.O. 2002, c 24, Sch B.

to have known of those facts through the exercise of reasonable due diligence.[15] Working backwards, Mr. Goss's claim is statute barred if he discovered it before March 22, 2020.

[72] Section 5 of the *Limitations Act* explains when a claim is discovered. Speaking broadly, a claim is discovered when the plaintiff has actual or constructive knowledge of the material facts upon which the plaintiff can draw a plausible inference of the defendant's liability. The statute provides as follows:

> 5(1) A claim is discovered on the earlier of,
>
> > (a) the day on which the person with the claim first knew,
> >
> > > (i) that the injury, loss or damage had occurred,
> > >
> > > (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> > >
> > > (iii) that the act or omission was that of the person against whom the claim is made, and
> > >
> > > (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
> >
> > (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[73] In this case, pursuant to s. 5(1), Mr. Goss discovered his claim on the earlier of the date that:

a. he knew of the matters referred to in s. 5(1)(a)(i) to (iv), and he is presumed to have known of these matters on the day the wrongful act took place unless the contrary is proved; or

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[15] *Espartel Investments Limited v. Metropolitan Toronto Condominium Corporation No. 993*, 2024 ONCA 18, at para. 14; *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613, at para. 29.

b. a reasonable person with the abilities and in the circumstances of Mr. Goss ought to have known of the matters referred to in s. 5(1)(a)(i) to (iv).

[74] In assessing the plaintiff's state of knowledge, I can rely on both direct and circumstantial evidence.[16] The level of actual or constructive knowledge needed is more than mere suspicion or speculation, but less than perfect knowledge of liability. The level of knowledge is reached when they have knowledge, either actual or constructive, of the material facts upon which the plaintiff can draw a plausible inference of the defendant's liability.[17] The plaintiff does not have to be certain that the known facts will give rise to legal liability, but the plaintiff must have knowledge of the material facts that form the basis for the plausible inference of the defendant's legal liability.[18]

[75] I find that Mr. Goss had actual knowledge of the claim no later than October 23, 2017. By that time, he knew the material facts upon which he could draw a plausible inference of the Brant's liability.[19] By that date, Mr. Goss had not only signed the amending note (even accepting his evidence that he does not remember doing so), he had also signed an acknowledgment that he still owed Brant $1.44 million, not $1,080,000, which would have been the amount he owed if he had received credit for 2014 and 2015.

[76] I find that on October 23, 2017, Mr. Goss had subjective knowledge that:

a. the loss or damage had occurred, fulfilling the criterion in s. 5(1)(a)(i);

b. that the loss or damage was caused or contributed to by an act of his employer, namely not reducing the amount owing under the amended note (or the original note) for the bonuses to have been paid in respect of the 2014 and 2015 years, fulfilling the criterion in s. 5(1)(a)(ii); and

c. the act or omission that caused the loss was that of Brant or its predecessor AHS, fulfilling the criterion in s. 5(1)(a)(iii).

[77] I would also find that Mr. Goss had constructive knowledge of the claim on October 23, 2017. In my view, it is obvious that a reasonable person with Mr. Goss's abilities and in his circumstances, ought to have known the facts that form the basis of the claim. I would find that Mr. Goss, therefore, had constructive knowledge that he had a claim under s. 5(1)(b) no later than October 23, 2017.

[78] That leaves only the question of on what day Mr. Goss knew that having regard to the nature of the loss or damage, a proceeding would be an appropriate means to seek to

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[16] *Grant Thornton*, at para. 44.
[17] *Grant Thornton*, at para. 46; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd*., 2019 ONCA 47, 144 O.R. (3d) 385, at para. 41, leave to appeal refused, [2019] S.C.C.A. No. 91.
[18] *Di Filippo v. Bank of Nova Scotia*, 2024 ONCA 33, at para. 38.
[19] *Di Filippo*, at para. 59.

remedy it. A proceeding would only be appropriate if the circumstances give rise to one or more legally recognized causes of action on which to base the proceeding.[20]

[79] Mr. Goss submits that because he was an employee, it would not have been appropriate to bring a claim until he left his employment on October 29, 2021, and, therefore, the limitation period did not begin to run until that date. Mr. Goss relies on *Benson v. Bird Mechanical Ltd*. in support this proposition.[21] In my view, *Benson* does not assist Mr. Goss.

[80] *Benson* was a motion by the defendant for partial summary judgment to dismiss Mr. Benson's claim for bonuses that he allegedly earned in the years prior to the termination of his employment in 2010. Justice Moore held that Bird Mechanical, the defendant employer, had not demonstrated that there was no genuine issue requiring a trial. In particular, Justice Moore held that Bird Mechanical had not put its best foot forward and had not demonstrated that Mr. Benson knew or ought to have known that he had a claim:

> Bird has established that it applied the bonus provisions in the employment agreement in an arbitrary and unilateral fashion and that it failed to explain its decision making process to Benson or to arm him with sufficient information upon which he could come to an informed, reasonable understanding of his bonus entitlement for any of the years during which he was employed at Bird. Bird has not demonstrated that Benson knew or ought to have known that he had a claim for unpaid bonus that Bird would not honour and that he needed to sue to recover upon that claim at any time sooner than he did in fact sue.[22]

[81] Mr. Benson had testified that there was a power imbalance between Bird Mechanical and himself, and that it would not have been "workable" for him to have brought a claim while he was an employee:

> Benson further testified and I accept that, although his bonuses were not what he expected them to be, given the power imbalance between him and his employer, it would not have been workable for him to have brought a claim for bonuses unpaid or short paid while employed by Bird and it was not until he had been terminated that he realized that no further bonus payments would be forthcoming.[23]

[82] In this case, however, Mr. Goss did not provide any evidence that he believed there was a power imbalance with Brant or that it would not have been workable for him to bring a

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[20] *Di Filippo*, at para. 37.
[21] 2013 ONSC 5375.
[22] *Benson*, at para. 22.
[23] *Benson*, at para. 14.

claim. Indeed, he provided no evidence at all on this issue. The absence of evidence on this point is a problem for two related reasons.

[83] First, Mr. Goss was required to put his best foot forward on the motion for summary judgment. The court assumes that the parties have each advanced their best case and that the record contains all the evidence that would be led at trial. The parties are not permitted to sit back and suggest that they would call additional evidence at trial.[24]

[84] Second, Mr. Goss must overcome the statutory presumption that he knew that a proceeding would be an appropriate means to seek to remedy his loss on the day the act or omission took place. The evidence of a plaintiff is crucial on a defendant's motion for summary judgment on a limitation period. Absent direct evidence from the plaintiff, it is extremely difficult to rebut the statutory presumption.[25]

[85] I do not read *Benson* as articulating a bright line legal test that a limitation period will never begin to run for a potential claim against their employer as long as they remain an employee. Indeed, the Court of Appeal for Ontario has held that an employee's fear of the employer's reprisal alone is not a basis to suspend a limitations period.[26]

[86] The decision in *Benson* turned on Mr. Benson's evidence regarding why he believed that it was not appropriate to bring an action against his employer before his employment ended and on the employer's failure to put its best evidentiary foot forward.

[87] In this case, Mr. Goss provided no evidence to rebut the statutory presumption that a proceeding would be an appropriate means to seek to remedy long before March 22, 2020. He was required to put his best foot forward. I find that Mr. Goss has not rebutted the statutory presumption.

[88] Brant has satisfied me that there is no genuine issue requiring a trial regarding its defence under the *Limitations Act, 2002*, to Mr. Goss's claim for credits from the 2014 and 2015 bonus cycles. I would dismiss that portion of Mr. Goss's claim on this basis.

No genuine issue requiring a trial regarding Mr. Goss's claim for the loss on the sale of his shares

[89] Mr. Goss purchased 1,304,844 AHF shares with a market value of $1,748,490.96, with the proceeds of his $1.6 million recruitment bonus. In October and November 2016, Mr. Goss sold 1,268,000 of those shares, representing over 97% of his original purchase, for a total of $143,466. Mr. Goss claims $1,403,494 in damages from the capital losses he incurred

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[24] *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 326, 162 O.R. (3d), at para. 4; *Ntakos Estate v. Ntakos*, 2022 ONCA 301, at para. 38; *Salvatore v. Tommasini*, 2021 ONCA 691, at para. 17; *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, at para. 62, rev'd on other grounds, 2015 ONCA 758, 393 D.L.R. (4th) 237.

[25] *Rowe v. 1225064 Ontario Limited*, 2022 ONSC 5036, at para. 21.

[26] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, 160 O.R. (3d) 173, at paras. 99 to 101; *Singh v. RBC Insurance Agency Ltd*., 2023 ONSC 1439, at paras. 101 to 127.

when he sold his AHF shares in October and November 2016. Mr. Goss frames his claim two ways. He asserts that in September 2013:

a. he had been promised that he could re-sell his shares to AHF at their original cost, but that no such agreement was ever put in writing.

b. he was told that he "would be expected to refrain from selling his shares" while he was an AHS employee.

[90] In my view, neither of these claims raise a genuine issue requiring a trial.

Considering only Mr. Goss's evidence, the alleged misrepresentation about the put right does not raise a genuine issue for trial

[91] In his affidavit, Mr. Goss states that in September 2013, Michael Killeen, the then Chief Operating Officer of AHS, promised him that he would have right to sell, or put, his AHF shares back to AHF at the original purchase price. Mr. Goss describes the conversation this way:

> In any event, at or about the time I began working at AHS in September 2013, I had a discussion with the Chief Operating Officer of AHS, Mike Killeen, who told me that I while I remained employed at AHS I would be expected to refrain from selling my AHF Shares. I was led to believe that there would be adverse consequences for my employment if I were to sell the AHF Shares. When I expressed concerns about protecting myself if the value of the AHF Shares dropped below the amount of the debt I incurred to purchase them, Mr. Killeen promised me that I would be given a Put for the AHF Shares, or a right to sell them back to AHF at the price I paid for them. Unfortunately, this promise was - like the promissory note - never put in writing.

[92] In my view, even on Mr. Goss's evidence, there is no genuine issue requiring a trial regarding Mr. Goss's claim that he suffered damages as a result of misrepresentation regarding a put right. As I explain below, on Mr. Goss's own evidence, he did not rely on the alleged representation about the put right, he never attempted to exercise the put right, and any claim regarding the alleged put right is statute barred.

Mr. Goss did not rely on the alleged representation about the put right

[93] Mr. Goss signed his employment contract on July 31, 2013. The employment agreement set out the terms of the recruitment bonus and required Mr. Goss to use the proceeds of the $1.6 million to purchase shares in AHF by way of private placement. The employment agreement did not confer any right on Mr. Goss to sell the shares back at the price he paid for them. The employment agreement also contained an entire agreement clause that stated:

> ENTIRE AGREEMENT: This Agreement and the other documents referenced herein, supersede and replace any prior agreements entered into between the parties, and contain the entire agreement between the parties.

[94] Mr. Goss has not identified a single document that gives him a put right, including the employment agreement, the promissory note, or any of the transaction documents associated with the private placement.

[95] Mr. Goss frames his claim in misrepresentation. Whether the claim is framed in fraudulent misrepresentation or negligent misrepresentation, Mr. Goss must establish that he relied on that alleged misrepresentation in order to succeed.[27]

[96] Mr. Goss has not provided any evidence that he relied on the alleged representation about the put right at the time he agreed to purchase the AHF shares using the proceeds of the recruitment bonus. Indeed, on Mr. Goss's own evidence, it would have been impossible for him to rely on the alleged put right when he entered into his contract.

[97] Mr. Goss signed his employment contract (with its entire agreement clause) on July 31, 2013. As discussed above, neither the employment agreement nor any of its related documents gave Mr. Goss a put right. Mr. Goss's evidence is that that promise of the put right was not made until sometime in September 2013. Mr. Goss had signed the employment agreement and obliged himself to purchase the shares long before he received the alleged promise of the put right. He cannot demonstrate that he relied on a promise that, on his own evidence, post-dates the signing of the contract.

[98] The absence of evidence on a motion for summary judgment of a necessary element of the pleaded tort means that there is no genuine issue requiring a trial of that claim.

<u>Mr. Goss never attempted to exercise the put right</u>

[99] In addition, there is no evidence that Mr. Goss ever attempted to exercise the put right before he sold his shares on the open market and at a significant loss.

[100] In his affidavit, Mr. Goss does not say that he ever asked AHS, AHF, or Brant to fulfill the put right that he claimed existed or that they refused to honour that promise. All Mr. Goss says is that in the fall of 2016, "I realized that Brant was not going to live up to the promise that AHS had made to me in 2013 that I would be able to sell my AHF shares for their cost [and] I began the process of selling my shares on the open market."

[101] In my view, if Mr. Goss believed he held a put right, it was incumbent on him to demand that AHF or Brant perform the bargain before selling his shares on the open market. Assuming for the moment that Mr. Goss had the right to sell his shares back to AHF, on his own evidence he never tried to exercise that right and, as a corollary, AHF or Brant

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[27] *Mariani v. Lemstra*, (2004), 246 D.L.R. (4th) 489 (Ont. C.A.), at paras. 12 and 19.

never breached any obligation they allegedly owed to Mr. Goss. Absent a breach of the put right, Mr. Goss cannot plausibly recover any damages and there is no genuine issue requiring a trial.

Any claim arising from the put right would be barred by the *Limitations Act*

[102] Any claim that Mr. Goss had for Brant's failure to fulfill the put right must have been known to him when he sold his shares at a tremendous loss in October and November 2016.

[103] I am satisfied that he discovered his claim no later than November 2016. I will not repeat the analysis in paragraphs [71] to [87] but it applies with equal force to this claim. Brant has satisfied me that there is no genuine issue requiring a trial regarding its defence under the *Limitations Act, 2002*, to Mr. Goss's claim for damages arising from the sale of his shares.

The exercise of the rule 20.04(2.1) powers demonstrates that there is no genuine issue requiring a trial

[104] If it were necessary to exercise the enhanced powers under rule 20.04(2.1), I would be satisfied that there is no genuine issue for trial. Rule 20.04 (2.1) provides that I may weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence, unless it is in the interests of justice that those powers only be exercised at a trial.

[105] Mr. Killeen provided an affidavit for use in the proceeding. It does not appear that Mr. Goss chose to cross-examine Mr. Killeen on his evidence.

[106] In his affidavit, Mr. Killeen stated that he is no longer with AHF and has never been employed by Brant. He has no interest in the outcome of this litigation. Mr. Killeen flatly denied ever promising Mr. Goss that he had a put right. Mr. Killeen points out that he had no authority to make such a promise. He also stated that he was not aware of any employees at AHF, including himself, having a put right.

[107] There is no evidence to corroborate Mr. Goss's claim that either AHS or AHF granted Mr. Goss a put right at the time Mr. Goss entered into the employment contract.

[108] In my view, Mr. Killeen's evidence is far more plausible than Mr. Goss's version of events. It seems highly unlikely that AHF, a publicly traded company, would give Mr. Goss an indefinite put right, which would appear to create a $1.6 million potential liability of indefinite term, without writing that down. I find it implausible that AHS or AHF gave Mr. Goss a put right that it did not offer to its COO or any other employee.

[109] If I were to consider and weigh Mr. Goss's evidence with Mr. Killeen's evidence, I would give much more weight and credence to Mr. Killeen's evidence, which is much more credible because it is entirely consistent with the contemporaneous documents and common sense. I would accept Mr. Killeen's evidence on this point without hesitation.

[110] If I were required to exercise the powers under rule 20.04(2.1), I would find that there is no genuine issue requiring a trial of Mr. Goss's claim for damages arising out of the sale of his AHF shares.

No genuine issue requiring a trial regarding Mr. Goss's claim that he was required to hold his shares

[111] Mr. Goss asserts that he was told that he "would be expected to refrain from selling his shares" while he was an AHS employee. To the extent that Mr. Goss submits that this gives rise to a cause of action or the ability to claim damages, I find that there is no genuine issue requiring a trial.

[112] In his affidavit, Mr. Goss provides the following evidence related to the supposed requirement that he not sell his shares:

> In any event, at or about the time I began working at AHS in September 2013, I had a discussion with the Chief Operating Officer of AHS, Mike Killeen, who told me that I while I remained employed at AHS I would be expected to refrain from selling my AHF Shares. I was led to believe that there would be adverse consequences for my employment if I were to sell the AHF Shares.

[113] On cross-examination, however, Mr. Goss readily conceded that the shares were freely trading and that his employment agreement did not contain any prohibitions on him selling the shares:

> Q. Mr. Goss, what words did Mike Killeen use?
>
> A. Mike Killeen, as well as David Tawaststjerna and Ben Cheng, said that it would be frowned upon if I received these shares and immediately sold them. That they did not want me to sell them.
>
> Q. You understand that there was no prohibition on selling those shares contained in your employment agreement; right?
>
> A. They were free trading shares, yes.

[114] In his affidavit, Mr. Goss stated that he was "led to believe here would be adverse consequences" for his employment if he sold the shares. On cross-examination, Mr. Goss explained what he meant:

> Q. Well, what were you referring to when you said you thought there'd be adverse consequences?

> A. I'm referring to the fact that if they give you the shares, they don't want you dumping them the day after you get them. They want you to stick around; they want to build up the firm; they obviously promote the securities business and maybe give shares to other people. And you know, it would be frowned upon significantly if I sold them the day after I got them.
>
> Q. Understood. But your affidavit refers to a concern about adverse consequences. I want to understand what those adverse consequences were.
>
> A. It may be that I get fired, yes.

[115] On Mr. Goss's own evidence, he understood that he could sell his shares any time he wanted to sell them, that his employer would "frown upon" him selling his shares, and that the employer could terminate his employment if he sold his shares. This does not amount to AHS or AHF prohibiting Mr. Goss from selling his shares. Mr. Goss's evidence, even taken at its highest, does not establish that he had any legal rights that AHS or AHF could possibly have infringed. I am satisfied that considering Mr. Goss's evidence alone, he has not raised a genuine issue requiring a trial with respect to this claim.

The exercise of the rule 20.04(2.1) powers demonstrates that there is no genuine issue requiring a trial

[116] Mr. Killeen flatly denied telling Mr. Goss that he could not sell his shares. Mr. Goss explained his recollection this way:

> At para. 8 of his affidavit, Mr. Goss asserts that I told him he was "expected to refrain from selling [his] AHF shares" while he remained employed at AHS. Mr. Goss alleges that I made this representation in or around September 2013.
>
> To my recollection, I never made this statement to Mr. Goss. Nor did I ever tell him that there was any sort of restriction on him selling his AHF shares. During my time as COO of AHF, there was never any prohibition on any employees selling their AHF shares, save perhaps for certain blackout periods in order to comply with securities laws and TSX rules.

[117] If I were to consider and weigh Mr. Goss's evidence with Mr. Killeen's evidence, I would give much more weight and credence to Mr. Killeen's evidence, because it is entirely consistent with the contemporaneous documents and common sense. I would accept Mr. Killeen's evidence on this point without hesitation.

[118] If I were to exercise the powers under rule 20.04(2.1), I would find that is no genuine issue requiring a trial of Mr. Goss's claim for damages arising out of the sale of his AHF shares.

Mr. Goss is not entitled to common law damages for wrongful dismissal

[119] Mr. Goss asserts a claim for common law damages for wrongful dismissal. For the reasons that follow, I conclude that there is no genuine issue requiring a trial of this claim. Mr. Goss suffered no damages because Mr. Goss was better off financially after he found new employment.

[120] Mr. Goss's evidence is that Brant terminated his employment on September 30, 2021, when Worldsource advised him that it would not be taking him on as an investment advisor. He further submits that the last day he could have continued to work at Brant was November 15, 2021. Brant submits that Mr. Goss, in fact, knew much earlier than September 30, 2021, that Worldsource would not be offering him a job. As I will explain, nothing turns on this dispute. I will assume the scenario most favourable to Mr. Goss: that he was only told he would not be hired by Worldsource on September 30, 2021.

[121] Brant submits that Mr. Goss is not entitled to any damages for wrongful dismissal because he resigned during the notice period to take up employment at Hampton Securities. I disagree. I find that Brant gave Mr. Goss working notice of termination from September 30, 2021, to November 15, 2021. In my view, that amount of notice was plainly insufficient and less than his common law entitlement.[28]

[122] I find that it was open to Mr. Goss to accept Brant's repudiation of the employment contract and to mitigate his damages by obtaining other employment. The income that Mr. Goss earned at Hampton Securities is deducted from the damages for wrongful dismissal, but Brant is not completely insulated from the consequences of terminating Mr. Goss's contract without offering him reasonable notice or pay in lieu of notice.

[123] Mr. Goss's lawyer stipulated that that, at common law, Mr. Goss was entitled to four to six months notice of termination of employment.[29] I will accept the high end of the range of Mr. Goss's stipulation and I find that Mr. Goss was entitled to six months notice of the termination of his employment or pay in lieu. That amount seems reasonable to me given the length and character of his employment, his age, and the availability of similar employment having regard to the experience, training and qualifications of the employee.[30]

[124] The notice period, therefore, should run from the date Mr. Goss received notice of termination, September 30, 2021, for six months, to March 30, 2022.

[125] Calculating Mr. Goss's income from Brant is a challenge given the evidentiary record placed before the court. Mr. Goss refused to provide his tax returns, which would have assisted me in determining his income from Brant. Instead, Mr. Goss produced redacted copies of his bank statements from October 30, 2020, to February 28, 2022. The redacted

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[28] Mr. Goss's employment contract did not contain a termination provision that addressed terminations of his employment other than for just cause.
[29] Cross-examination of Mr. Goss, July 11, 2023, Q. 211 to Q. 213.
[30] *Bardal v. Globe & Mail Ltd*. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

records show the direct deposits made by Brant into Mr. Goss's account. This amount would necessarily be net of any source deductions withheld by Brant.

[126] Based on the bank account statements produced by Mr. Goss, it appears that Brant made a direct deposit into his account on or about the 10th day of each month. Mr. Goss received 12 monthly deposits from Brant starting November 10, 2020, and ending October 8, 2021, which totalled $359,002.72. If I divided that total by 12, I would obtain a fair estimate of Mr. Goss's monthly income from Brant. In addition, Brant acknowledges that it owed Mr. Goss $78,000 for his work between October 8, 2021, and the date of his resignation. Because that amount is larger than the typical monthly deposit Mr. Goss received, I will include it as I determine the average monthly deposit he received from Brant. I calculate that Mr. Goss received an average of $33,615.59 per month from Brant in the last year of his employment. Based on his average monthly deposit, and a six month notice period, Mr. Goss's maximum damages are $201,693.54.

[127] An employee who is dismissed without reasonable notice is entitled to damages for breach of contract based on the employment income the employee would have earned during the reasonable notice period, less any amounts received in mitigation of loss during the notice period.[31] To determine whether or not Mr. Goss suffered any damages from the termination of his employment, I must deduct the income he earned during the notice period from his maximum damages entitlement.[32]

[128] As noted above, Brant acknowledges that it owes Mr. Goss $78,000 for the work he performed during the notice period. I find that this amount should be deducted from the maximum damages claim, leaving $123,693.56.

[129] Mr. Goss secured employment with Hampton Securities and resigned from his employment with Brant on October 29, 2021. Although he was asked to produce a copy of his employment agreement with Hampton Securities, he declined to do so. This was not an appropriate refusal for a litigant advancing a claim for common law damages for wrongful dismissal. Mr. Goss testified that his compensation formula at Hampton Securities was similar to his compensation formula at Brant, between 50 to 55% of gross commissions earned, less clearing fee costs.

[130] According to his bank records, Hampton deposited a total of $41,313.63 to Mr. Goss's bank account comprising the following deposits:

a. December 10, 2021: $6,738.51

b. January 10, 2022: $12,451.35

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[31] *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at paras. 14-17.
[32] *Mifsud v. MacMillan Bathurst Inc*. (1989), 70 O.R. (2d) 701 (C.A.), leave to appeal to S.C.C. refused (1990), 73 O.R. (2d); *Kieran v. Ingram Micro Inc*., 2004 CanLII 4852 (Ont. C.A.), at para. 43.

c. February 10, 2022: $22,123.77

[131] I find that those amounts must be deducted from Mr. Goss's maximum damages claim, leaving $82,379.93.

[132] As the six-month notice period would expire on March 30, 2022. There would be at least one more payment from Hampton to Mr. Goss during the notice period. Giving Mr. Goss the benefit of the doubt, I will include only one more monthly payment, which Hampton would have made on March 10, 2021. This excludes, at a minimum, the amount earned by Mr. Goss at Hampton between March 10, 2021, and March 30, 2021.

[133] Because Mr. Goss did not produce that deposit among the bank records he provided, I must impute income to Mr. Goss that was paid to him on March 10, 2022. Although the deposit made on December 10, 2021, is atypically low, I will include it in my calculation of the average monthly deposit he received from Hampton. I find that Hampton paid Mr. Goss an average of $13,771.21 per month, and impute that figure as the deposit on March 10, 2022. That amount must be deducted from the maximum damages, leaving $68,608.72.

[134] As set out below, I would award judgment to Mr. Goss in the amount of $33,616.60 as a termination payment under the *Employment Standards Act*. This amount would be deducted from any award of damages for wrongful dismissal.[33] After the deduction for the statutory benefits, Mr. Goss's maximum common law damages for the termination of his employment would be $34,992.12.

[135] Mr. Goss, however, also admits that he also received a lump-sum, up-front signing bonus of $250,000 from Hampton Securities. Even assuming that the signing bonus is a pre-tax amount, and that it was subject to withholdings as employment income, the signing bonus vastly exceeds the remaining amount of Mr. Goss's maximum damages claim of $34,992.12.

[136] In short, Mr. Goss improved his financial position by resigning from Brant and moving to Hampton. He has no damages from the termination of his employment.

[137] I am satisfied that there is no genuine issue for trial regarding Mr. Goss's claim for wrongful dismissal damages.

Mr. Goss is entitled to receive his statutory benefits

[138] In his reply factum on his own motion for summary judgment, Mr. Goss raises for the first time his entitlement to a payment in accordance with s. 61 of the *Employment Standards Act*.[34] This claim does not appear in Mr. Goss's defence and counterclaim, nor in his notice

[33] *Stevens v. The Globe and Mail* (1996), 28 O.R. (3d) 481 (C.A.).
[34] *Employment Standards Act, 2000*, S.O. 2000, c 41.

of motion for summary judgment. Having raised the issue in his reply factum, Mr. Goss still did not bring a written motion for leave to amend his statement of claim.

[139] Nevertheless, counsel for Mr. Goss asked me to grant leave to amend the statement of defence and counterclaim to advance this claim. Rule 26 provides that at any stage of an action, the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. Brant did not request an adjournment or identify any significant prejudice.

[140] In my view, it is appropriate to grant leave to amend the statement of defence and counterclaim. Mr. Goss is asserting a statutory entitlement. As the employer, Brant should have recognized this obligation at the time Mr. Goss left the company. In my view, there is no prejudice to Brant in granting leave to amend. I will, however, consider this late amendment when I determine the costs of this proceeding.

[141] In my view, Mr. Goss must succeed on his claim for his entitlements under the *Employment Standards Act*. Mr. Goss was employed for more than eight years by Brant and its predecessors.[35] Pursuant to the *Employment Standards Act*, Brant was required to provide Mr. Goss with eight weeks notice of termination or pay in lieu thereof.[36] Statutory entitlements are not damages. Entitlements under the *Employment Standards Act* are not subject to mitigation.[37]

[142] Mr. Goss seeks $33,616.60 in unpaid *Employment Standards Act* benefits. Brant did not dispute Mr. Goss's calculation or suggest that it had in fact paid these benefits. I see no genuine issue requiring a trial over this claim and award judgment to Mr. Goss in the amount of $33,616.60.

[143] In my view, this amount should be deducted from the amount that Mr. Goss owes under the note. Just as Brant agrees that it is appropriate to deduct the amounts it owed to Mr. Goss as unpaid wages and referral fees from the balance owing under the note, it is appropriate to deduct this amount from the amounts owing.

Conclusion and costs

[144] I conclude that there are no genuine issues requiring a trial. I grant summary judgment in favour of Brant on its claim for $461,000 under the note. I grant summary judgment in favour of Mr. Goss in respect of the claim for $33,616.60 in unpaid *ESA* entitlements only and dismiss the balance of his counterclaim.

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[35] *Debenham v. CSI-Maximus*, 2003 CanLII 10846 (Ont. C.A.).
[36] *Employment Standards Act, 2000*, ss. 54 to 61.
[37] *Brake v. PJ-M2R Restaurant Inc*., 2017 ONCA 402, at para. 111; *Theberge-Lindsay v. 3395022 Canada Inc. (Kutcher Dentistry Professional Corporation)*, 2019 ONCA 469, at para. 12.

[145] In the result, I declare that Mr. Goss owes Brant $427,383.40 and order him to pay that amount to Brant as damages.

[146] If the parties are not able to resolve costs of this action, Brant may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before February 19, 2024. Mr. Goss may deliver his responding submission of no more than three double-spaced pages on or before February 26, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Released: February 12, 2024

CITATION: Brant Securities Limited v. Goss, 2024 ONSC 915
COURT FILE NO.: CV-22-00676785-0000
DATE: 20240212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Brant Securities Limited

Plaintiff (Defendant by counterclaim)

– and –

Donald Goss

Defendant (Plaintiff by counterclaim)

REASONS FOR JUDGMENT

Robert Centa J.

Released: February 12, 2024