IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Annable v. Devencore Company Ltd.,* 2024 BCSC 1503

Date: 20240816
Docket: S188380
Registry: Vancouver

Between:

Mark Graham Annable

Plaintiff

And

Devencore Company Ltd.

Defendant

Before: The Honourable Justice Majawa

Reasons for Judgment

Counsel for the Plaintiff:	B. Carpenter
Counsel for the Defendant:	M. Korbin A. Render
Place and Dates of Trial:	Vancouver, B.C. January 15-19, 22-26, and 31, 2024
Place and Date of Judgment:	Vancouver, B.C. August 16, 2024

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OVERVIEW

[1] This is primarily a dispute between a real estate broker, Mark Annable, and the brokerage that employed him, Devencore Company Ltd. ("Devencore"), over a commission. As is industry standard, brokers at Devencore shared their commissions with the brokerage. Mr. Annable says that, based on his employment agreement, he was entitled to a 50/50 split with Devencore at the relevant time. The brokerage says that Mr. Annable was only entitled to a 25/75 split in Devencore's favour, and this is what they eventually paid him. Mr. Annable left Devencore shortly after the dispute arose.

[2] Mr. Annable claims that he was constructively dismissed and alleges breach of contract and trust. Devencore denies any wrongdoing and counter-claims against Mr. Annable for recoverable draws it provided to him during his time with the company. Devencore only relies on the counterclaim as a set-off should the plaintiff succeed, not as an independent debt action.

[3] For the following reasons, each claim must fail. Devencore did not constructively dismiss Mr. Annable, and Mr. Annable's claims in contract and trust must fail. The counter-claim must therefore also fail.

BACKGROUND

[4] Generally, these facts are undisputed, but I indicate relevant conflicts in the evidence.

[5] On June 3, 2014, Mr. Annable and Devencore entered into a written employment agreement ("Agreement"). Devencore employed Mr. Annable to conduct real estate transactions.

[6] Article 1.2 of the Agreement is titled "Position" and states:

> The Employee will commence employment with the Company as a Senior Advisor, Investment/Industrial Practice group, and will report directly to the Company's Vice President & Managing Principal (Jon Bishop). <u>The objective of both the Employee and the Company is that the Employee will successfully transition into his new position and that he will then become and autonomous</u>

> Real Estate Agent ("Agent") employed by the Company. If this occurs, this Employment Agreement will continue to apply to the Employee with the modified compensation structure as set forth below.
>
> [Emphasis Added.]

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[7] The Agreement contemplates two compensation structures. Under Article 2.1 of the Agreement, during his first year of employment, the compensation package includes:

a) a guaranteed commission of $30,000 per year, paid bi-monthly;

b) a recoverable draw of $30,000 per year, paid bi-monthly, as an advance against future commissions; and

c) 25% of commissions earned and received by Devencore for the transactions that the plaintiff realized, after reimbursing the company for all advances currently outstanding. The remainder of the commissions, if any, will be paid to Mr. Annable on demand, 10 days after payment is received by the company.

("Phase 1")

[8] The Agreement contemplates a second compensation structure under Article 2.2, which opens with:

> **Compensation following the transition period of one (1) year:** If the Employee completes successfully the transition period of one year, the compensation structure that was in place during that period will no longer be in effect, and instead the following compensation structure will take effect:
>
> ...

[9] Article 2.2 then goes on to define the specifics of compensation. The second compensation structure states that Phase 1 would no longer be in effect (i.e., Mr. Annable would no longer receive the guaranteed commissions or recoverable draws). Instead, Mr. Annable would be compensated as follows:

a) Mr. Annable would be entitled to 50% of the commissions earned and received by Devencore that he realized, after reimbursing the company for

all advances currently outstanding. The remainder of the commissions, if any, would be paid to Mr. Annable on demand, 10 days after payment is received by the company.

b) Mr. Annable would be entitled to a bonus commission of 10% of any net fees (5% of gross fees) earned by him if he earned in excess of $160,000 gross accounting revenue.

(“Phase 2”)

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[10] Phase 1 is intended to allow Mr. Annable, as a new broker, to build his book of business: it includes a lower commission split with the company but provides a guaranteed income. Phase 2 is the standard compensation structure for brokers at Devencore: it includes a higher commission split but no guaranteed income.

[11] On June 16, 2015, Devencore and Mr. Annable agreed in writing to amend the Agreement to extend the duration of Phase 1 by 12 months (“Phase 1 Extension”). The Phase 1 Extension stipulated that Devencore would continue paying Mr. Annable under Phase 1 until June 2, 2016. This is not in issue.

[12] The parties disagree about what happened in June 2016. Mr. Annable claims that the Phase 1 Extension elapsed on June 2, 2016, and he transitioned to Phase 2. Devencore claims that their executives met with Mr. Annable in June 2016 (and again in August 2016 and January 2017), and Mr. Annable informed them that he could not afford to transition to Phase 2 because he would lose the guaranteed commissions and recoverable draws, and he did not have sufficient commissions in the pipeline to support himself. Devencore claims that it continued to pay Mr. Annable under Phase 1 because of Mr. Annable’s request to further extend the Phase 1 Extension and, more importantly to Devencore, because Mr. Annable had not yet satisfied the contractual conditions of transitioning to Phase 2. Put differently, the parties disagree about whether Mr. Annable automatically transitioned to Phase 2 after the Phase 1 Extension elapsed simply by the effluxion of time.

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[13] From June 30, 2016, to May 31, 2017, Devencore paid Mr. Annable the guaranteed commissions, the recoverable draws and his commission statements showed that he was being credited with a 50% commission split against amounts he owed. Thus, during this period, the payments made to Mr. Annable and the commission statements provided to him during this time depict elements of the compensation structure from both Phase 1 and 2.

[14] In an email to Mr. Annable on June 9, 2017, Mr. Jon Bishop, Devencore's Managing Principal, explained that the 50% commission credits reflected in the statements provided to Mr. Annable were an internal accounting error, and Mr. Annable had actually been under Phase 1 throughout this time and was thus entitled to a 25% share. The mistake arose because 50% is the default rate use by Devencore's accounting department given that almost all of its agents are entitled to a 50% commission rate. Mr. Bishop did not recognize the error until the accounting department reconciled Mr. Annable's account.

[15] In February 2017, a large transaction closed that catalyzed this dispute. Devencore had assisted the BC Liquor Distribution Branch ("BCLDB") in finding a new space ("BCLDB Lease Deal"). Devencore received a net commission of $1,204,337.80 ("BCLDB Commission"), the largest single commission Devencore had ever received in BC. Mr. Annable assisted a senior agent, Graeme Bullus, with the transaction. Mr. Bullus was the Project Leader on the BCLDB Lease Deal. Mr. Bullus and Mr. Annable split the BCLDB Commission 80/20 in favour of Mr. Bullus ("Bullus Split").

[16] Mr. Annable disputed the Bullus Split and claimed a 50% share throughout the litigation. A considerable amount of time was spent by both parties on this issue, both in evidence and in argument. However, Mr. Annable abandoned his claim with respect to the Bullus Split during his reply submissions.

[17] The BCLDB Commission was deposited into Devencore's commission trust account, and $240,867.56 was initially credited to Mr. Annable on Devencore's internal accounting system. This represents the gross amount, before accounting for

the split with Devencore or deducting the amounts Mr. Annable was required to repay to Devencore on account of recoverable advances he had received. As I understand his position, Mr. Annable bases his breach of trust claim on the fact that these funds were held in the commission trust account and initially credited to him.

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[18] Given the brokerage's view of the Bullus Split and Mr. Annable being entitled to a 25/75 in favour of Devencore, the plaintiff was credited $60,216.89 for his work on the BCLDB Lease Deal.

[19] On April 27, 2017, Mr. Annable completed another transaction. Devencore received a net commission of $34,100 ("April Commission").

[20] By way of email May 25, 2017, Devencore advised Mr. Annable that they would move him to Phase 2, effective June 1, 2017, because, given the BCLDB Commission and the April Commission, Mr. Annable "had the sales activity necessary to repay all of the recoverable draws against future commissions that we have advanced to you." At that point in time, Devencore calculated that Mr. Annable owed it $65,924.78 for the recoverable draws provided – an amount that would be offset by the aforementioned commissions.

[21] On June 1, 2017, after disagreements about the commission split with Devencore, Mr. Annable emailed Mr. Bishop, claiming he was entitled to 50% of the BCLDB Commission. Mr. Bishop disagreed.

[22] In the previously mentioned email from Mr. Bishop to Mr. Annable on June 9, 2017, Mr. Bishop told Mr. Annable that he owed Devencore $89,788.46 (before factoring in the BCLDB or April Commissions). This is more than Devencore mentioned just two weeks earlier. This is because Devencore noticed that it had been over-crediting Mr. Annable at 50% when, according to Devencore, Mr. Annable was actually entitled to 25% from June 30, 2016, to May 31, 2017. Mr. Bishop wrote: "our accounting department had internally mistakenly treated you as being entitled to a 50% commission rate on certain transactions…"

[23] On June 11, 2017, after Devencore refused to credit Mr. Annable 50%, Mr. Annable decided to leave his employment and provided 30-day notice as required under the Agreement.

[24] The parties agree that 50% of Mr. Annable's share of the BCLDB Commission is $120,433.78 and that 25% of his share would be $60,216.89. The parties also agree that Mr. Annable received $89,788.46 in commission advances during his employment with Devencore and that those advances must be set-off against the commissions earned by Mr. Annable.

[25] Mr. Annable now claims that he is entitled to $62,019.83 for the unpaid portions for the BCLDB and April Commissions and $240,867.56 for breach of trust. He also initially claimed $32,135.92 for unpaid incentive payments and $41,999.41 in lieu of reasonable notice. Given Mr. Annable's late concession with respect to the Bullus Split, the amounts Mr. Annable originally claimed for the incentive payments and pay in lieu of reasonable notice have been significantly reduced. Indeed, the incentive payment may not even be triggered under the Agreement given that it required the agent to gross $160,000.

[26] Although not pleaded, Mr. Annable also claimed at trial that he was entitled to a 10% "override" on all transactions that stemmed from work he did on a specific project. He did not pursue this argument in submissions, and in any event, this claim must fail for reasons discussed later.

ISSUES

[27] Given this background, the issues are:

I. Was the plaintiff operating under the Phase 1 or Phase 2 compensation structure under his employment agreement from June 2, 2016, to May 31, 2017 (i.e., when Devencore closed the BCLDB Lease Deal)?

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II. Were the gross amounts of the BCLDB Commission held in the Devencore commission trust account and credited to the plaintiff impressed with a trust in favour of the plaintiff?

III. Was the plaintiff constructively dismissed?

IV. What amounts does the plaintiff owe to Devencore on account of the recoverable draws paid to him over the course of his employment?

CREDIBILITY

[28] While credibility is not particularly important in my interpretation of the words of the Agreement, credibility is important in determining whether there was a *further*, unwritten extension of the Phase 1 Extension. This was Devencore's alternate submission on why Mr. Annable remained in Phase 1: that the parties agreed, through their words and conduct, to further extend the Phase 1 Extension until June 1, 2017. Mr. Annable disagreed that there were further verbal amendments to the Agreement.

Mr. Annable

[29] Mr. Annable's evidence was not reliable, and he was not a credible witness.

[30] Reliability is about the accuracy of a witness's testimony and engages the ability of a witness to accurately recount, observe, and recall the relevant events. Credibility is about whether a witness is telling the truth: *United States v. Bennett,* 2014 BCCA 145 at para. 23. As stated by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides … The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally …

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> Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the Court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".
>
> [Citations omitted.]

[31] With respect to reliability, Mr. Annable had a poor memory of certain key events, including the content of meetings with Mr. Bishop that are fundamental to his position. As Devencore rightly points out, instead of candidly acknowledging this deficiency in his memory, Mr. Annable persistently gave unsubstantiated and unqualified evidence about what was or was not said at these meetings.

[32] With respect to credibility, Mr. Annable's evidence frequently contradicted common sense, his previous statements on examination for discovery, and his earlier testimony at trial. Moreover, significant portions of his story are simply, and inherently, unbelievable.

[33] Mr. Annable's credibility suffered from the very outset of his cross-examination when he denied that in the 20-25 years before joining Devencore most of his experience, by far, was in residential real estate. He eventually admitted that this was true but only after being taken to, and ultimately adopting, his discovery evidence.

[34] During cross-examination, it was put to Mr. Annable that he must have been surprised to receive his regular pay on June 15, 2016, (i.e. the guaranteed commissions and recoverable advances under Phase 1) after he claimed he believed he had successfully transitioned to Phase 2 such that he would no longer be paid that regular pay. He denied that he was surprised by this. Mr. Annable was

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again impeached with his discovery transcript where he clearly provided evidence that he was surprised by the payments. When faced with this inconsistency, Mr. Annable adopted his discovery evidence and admitted that his answer at trial was not truthful.

[35] In an effort to explain why he did not raise what he now admitted to be the surprising remuneration situation with Mr. Bishop, Mr. Annable provided the simply unbelievable evidence that he assumed that Devencore was continuing to pay him those amounts because it wanted him to continue working on a project that he was already being remunerated for on an hourly basis. This particular issue will be discussed in more detail later in these Reasons.

[36] Mr. Annable was impeached again, this time in respect of his denial that he needed to continue to receive his regular pay post-June 2, 2016, in order to meet his monthly living expenses. His denial at trial was entirely inconsistent with his discovery evidence. Rather than acknowledge this immediately, Mr. Annable suggested that he had additional bank accounts that could have funded his monthly expenses. Troublingly, the bank accounts he mentioned at trial were not referenced by him at his discovery, where he testified that he had provided all of his banking information. Mr. Annable eventually adopted his discovery evidence that he did need to continue to receive the payments to fund his monthly expenses.

[37] As referenced earlier, Mr. Annable's memory of certain events was poor, leading me to conclude he was an unreliable witness. However, the evidence provided at trial about a particular meeting also contributes to my credibility concerns with Mr. Annable. At trial, Mr. Annable attempted to provide detailed evidence about what occurred at a meeting on January 25, 2017. Yet again, Mr. Annable was impeached by the evidence he provided at discovery. At discovery, he testified that he did not recall that meeting and, because he could not remember the meeting from four years earlier, he could not actually say what happened at that meeting. No satisfactory explanation was given for Mr. Annable's willingness to provide detailed

evidence at trial about a meeting that he had previously testified he could not remember. I find this very troubling.

[38] Finally, I will discuss Mr. Annable's problematic evidence regarding his work in responding to a 2015 provincial Request for Qualifications ("2015 RFQ"). The 2015 RFQ was an opportunity to have Devencore placed on the province's list of pre-qualified contractors. Being placed on this list is typically the initial stage in bidding on certain government contracts. To submit the 2015 RFQ, Mr. Annable gathered and organized representative transactions of other brokers at Devencore. The plaintiff conceded this was essentially an administrative role. Devencore eventually qualified on the province's list.

[39] Mr. Annable gave inconsistent evidence as to whether the 2015 RFQ was necessary for Devencore to win the BCLDB Lease Deal. But the 2015 RFQ and the BCLDB contract were unrelated. Andy Schimmel is a former senior employee with the province. I found him to be credible and reliable. He has no stake in this dispute. Mr. Schimmel stated that Devencore did not need to be on the province's qualified list to bid for the BCLDB contract. Mr. Annable's attempts to suggest otherwise undermine his credibility.

[40] Also damaging to the plaintiff's credibility is that Mr. Annable claimed that Mr. Bishop promised him a 10% override related to *any* and *all* of Devencore's work earned by it being on the province's list of qualified suppliers. Mr. Bishop denied this on cross-examination. There is no reference to the 10% override in contemporaneous documents. The plaintiff conceded that he was bringing up the 10% override for the first time during his testimony at trial. It was not mentioned on discovery nor was it pleaded. Indeed, Mr. Annable stated on cross-examination: "the 10% number is a new number, I agree". Therefore, if one is to accept Mr. Annable's evidence at trial, the 10% override must have been an oral amendment to the Agreement. However, Mr. Annable testified on numerous occasions that there were no oral amendments to the Agreement in support of his position that Phase 1 ended

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on June 2, 2016: these positions are mutually exclusive and further undermine his credibility.

[41] Further, it is simply not believable that Mr. Bishop would have promised Mr. Annable, a relatively new broker who was still on the Phase 1 compensation structure (i.e., not fully autonomous), a commission override. Mr. Bishop, Devencore's Managing principal, is the only person in the office with an override. Why would Mr. Bishop have promised Mr. Annable a 10% override because of administrative work he did in compiling the 2015 RFQ? Mr. Annable's attempts to convince the Court of this seriously undermined his credibility.

[42] There are more examples that serve to illustrate Mr. Annable's lack of credibility, but it is not necessary to detail them all. In summary, Mr. Annable's evidence was internally inconsistent and oftentimes inherently unbelievable. In no way was his evidence consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Bradshaw* at para. 187. Where Mr. Annable's evidence contradicts the evidence of Devencore's witnesses, I prefer the evidence of Devencore's witnesses.

Devencore's Witnesses

[43] I found Devencore's witnesses to generally be credible and reliable; they provided evidence in a candid and forthright manner. They made reasonable concessions when appropriate. To the extent that there were any inconsistencies between Mr. Bishop's evidence at trial and his evidence at discovery, I find that those inconsistencies arose from the often times unclear way in which the questions were posed to him on cross-examination. Ultimately, and unlike Mr. Annable's evidence, the Devencore witnesses provided evidence that was consistent with the preponderance of probabilities.

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THE PLAINTIFF REMAINED UNDER THE PHASE 1 COMPENSATION STRUCTURE

[44] The Agreement did not provide for the plaintiff to automatically transition from Phase 1 to Phase 2 simply by the passage of time. To successfully transition to Phase 2, Mr. Annable also needed to become an autonomous real estate agent. This is the inevitable result of interpreting the Agreement holistically and objectively.

[45] The parties do not dispute the principles of contractual interpretation. These principles stem from the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]. Justice Armstrong articulated the salient principles of *Sattva* in *Abstract Projects Inc. v. The Owners, Strata Plan EPS6069*, 2023 BCSC 42:

> [144] The legal principles to be applied when interpreting contracts are discussed in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 [*Sattva*]. In *Sattva*, the Supreme Court clarified and affirmed principles to be used in interpreting contracts, emphasizing that the interpretation of contracts engages common sense principles and is "not dominated by technical rules of construction"(at para. 47). The goal of contractual interpretation is "to ascertain the objective intention of the parties": *Sattva* at para. 49.
>
> [145] Contracts must be interpreted as a whole rather than interpreting individual parts: *Sattva* at para. 47. The factual matrix extant at the time of contract formation can be considered without any precondition that the terms of the agreement are ambiguous; rather, considering the factual matrix surrounding the making of a contract is one part of the interpretive exercise: *Sattva* at paras. 46-50.
>
> [146] It is not appropriate to consider the parties' subjective intentions: Sattva at paras. 58-60. Rather, contractual interpretation relies on an objective assessment of the facts known (or that reasonably ought to have been known) to the parties when they made their agreement: Sattva at para. 58. A court may consider anything that could affect the way a reasonable person would have understood the language of a document: *Sattva* at para. 58.
>
> [147] Surrounding circumstances or consideration of the factual matrix cannot overwhelm the words of the agreement itself: *Sandhu v. Sidhu,* 2019 BCCA 465 at para. 24, citing *Sattva* at para. 57. Contract interpretation should be centered on the core meaning of the entire contract, and consideration of background facts should only come from objective evidence extant at the time of the execution of the contract: *Sattva* at para. 58.
>
> [148] The Supreme Court has also confirmed that surrounding circumstances cannot be used to "deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57, citing *Glaswegian*

> *Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 at para. 20, 1997 CanLII 4085 (C.A.).

[46] Put simply, contractual interpretation is an objective exercise. The overriding concern is to determine "the intent of the parties and the scope of their understanding": *Sattva* at para. 47. The Court must read the "contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.

[47] The language of the Agreement ought to be given full effect. To do so, Article 1.2 must be read in conjunction with Article 2.1 and 2.2.

[48] Article 1.2 states that the parties' mutual intention is that Mr. Annable will "successfully transition into his new position and that he will then become an autonomous Real Estate Agent". Immediately following this, Article 1.2 states:

> If this occurs, this Employment Agreement will continue to apply to the Employee with the modified compensation structure as set forth below.

[49] Reproducing for convenience, Article 2.2. states:

> If the Employee completes successfully the transition period of one (1) year, the compensation structure that was in place during that period will no longer be in effect

[50] Reading these two sections in harmony leads to one outcome: to transition to Phase 2, Mr. Annable needed to complete the one-year transition period and successfully become an autonomous real estate agent. And it is clear that Mr. Annable was not an autonomous real estate agent by June 2016 or by February 2017. Mr. Annable became an autonomous real estate agent starting, at the earliest, after the April Commission.

[51] While "autonomous real estate agent" is not defined in the Agreement, I agree with Devencore that the factual matrix and contract as a whole clarify its meaning. Based on the Agreement, the plaintiff could only retain commissions earned once the recoverable draws were paid off. This is the plain reading of both Articles 2.1 and

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2.2. To become autonomous, the plaintiff needed to have been at Devencore for a year and repaid the company such that he could earn revenue for himself and the company.

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[52] The background facts known to both parties at the time of contracting support this interpretation. The plaintiff was a residential real estate agent with little experience in the commercial marketplace, and no material experience in the industrial market, and he needed to the guaranteed payments to support himself while he established his footing. Both parties knew that Devencore's standard compensation structure was 'high risk high reward'. Both parties knew that an autonomous agent would need to have sufficient commissions in the pipeline to survive on a commission only compensation model. Sufficient, in this instance, means that an agent is *at least* in the 'green': that they no longer owe the company recoverable draws and can keep their commissions.

[53] The necessary conclusion is that transitioning from Phase 1 to Phase 2 required *more* than just remaining employed for a year. The animating objective of the contract, per Article 1.2, was to make Mr. Annable an autonomous real estate agent. If this occurs, and Mr. Annable completed the one-year transition period, Mr. Annable would then transition to Phase 2.

[54] During the Phase 1 Extension period (June 3, 2015, to June 2, 2016), Mr. Annable had zero commissions. On June 2, 2016, Mr. Annable owed Devencore about $60,000 in recoverable draws. Once the Phase 1 Extension elapsed, I interpret the contract to mean that Devencore would transition Mr. Annable to Phase 2 once Mr. Annable had sufficient sales activity to become an autonomous agent; this could be any time – not necessarily tied to completing *another* year cycle. Mr. Annable admitted on cross-examination that he had no deals in the pipeline as of June 2016. Mr. Annable did not become an autonomous agent and complete Phase 1 until the end of May 2017, when he had enough sales from the BCLDB Commission and April Commission to pay off his debts to Devencore and begin retaining his commissions. Although Devencore's internal accounting error actually

meant that Mr. Annable had not fully repaid his debts, once Devencore transitioned Mr. Annable to Phase 2 by way of their email on May 25, 2017, any commissions from that point on ought to have been credited at 50%. The slightly earlier transition would have, in theory, benefited Mr. Annable by making it easier to repay his advances.

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[55] To the extent that there is any ambiguity in the Agreement after considering its words and the factual matrix, I find the subsequent conduct discussed later in these Reasons (beginning at para. 65) supports the interpretation that autonomous means the agent had repaid the advances: *Wade v. Duck*, 2018 BCCA 176 at paras. 28-31.

[56] The plaintiff's argument is predicated on reading certain words of the Agreement in isolation, divorced from other clauses. The plaintiff summarized his position at the outset of his submissions:

> The written employment agreement and the written extension are clear and unambiguous with regards to the criteria for Annable to transition to the second phase of his compensation structure, where he would be entitled to 50%. That criterion includes only for Annable to continue working with Devencore for 1 year. There are no other pre-conditions in the Agreement.

[57] In light of the agreement as a whole, and specifically Article 1.2, the plaintiff's position is contrary to the principles of contractual interpretation.

[58] I also reject the plaintiff's suggestion that by crediting Mr. Annable 50% commission from June 30, 2016, to March 30, 2017 (on trade record sheets and agent commission statements), Mr. Annable was actually under Phase 2 and Devencore should be estopped from claiming otherwise. First, promissory estoppel was not pleaded in the further amended notice of civil claim.

[59] Second, Mr. Annable continued to receive the recoverable draws and guaranteed commissions. His evidence that he assumed this amount – the exact amount he had been receiving monthly for two years – was compensation for his consulting work on the BCLDB project before it became a commission-based project

was entirely unconvincing. Mr. Annable acknowledged that he made this assumption even though no one at Devencore told him this was the case and he never sought to confirm it.

[60] Moreover, it is clear that Mr. Annable was credited with consulting revenue earned by Devencore on the consulting project arising from Mr. Annable's work on it; Mr. Annable recorded his time, and that time was billed to the client, and 50% was credited to him. If Mr. Annable was being paid the $5,000 per month for his work on the consulting project, he would have been compensated twice for his ongoing work on the BCLDB project after June 2016 – once in connection with his time recording and the invoices sent to the client with the revenue attributable to him being credited to him; and once through the ongoing payments of $5,000 per month for the guaranteed commissions and advances.

[61] The untenable nature of this argument is further illustrated by the number of hours that Mr. Annable actually recorded as having worked on the BCLDB consulting project during the time which he says he was being compensated in this manner. To accept Mr. Annable's position, I would have to accept that he really believed he was being paid, and that Devencore willingly provided him with, $2,500 a month in salary plus $2,500 per month in advances for him to work 3.5 hours in July, 1.5 hours in October, and 6 hours in November. After January 2017, there was no work done on the BCLDB file for the duration of Mr. Annable's employment, and yet he continued to receive the $5,000 per month in February, March, April, and May. This simply does not accord with common sense, is inherently unbelievable, and I reject it in its entirety.

[62] Third, I accept the evidence of Mr. Bishop and Ms. Janet Patricelli, Devencore's managing broker, on this point: 50% is the default amount credited to agents, and the adjustment is not made until the agent requests payment from the commission trust account. However, this never occurred because the plaintiff was always in a deficit position (his commission earnings were used to pay back the

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recoverable draws). Therefore, this was simply an error, and Devencore was over-crediting Mr. Annable for his repayments during this period.

[63] Fourth, although the 50% commission credits are subsequent conduct that may be considered as an interpretive tool in light of any ambiguities in the Agreement, I find them irrelevant. This is because of the explanation for this conduct discussed above. To the extent that there are ambiguities in interpreting the Agreement, as mentioned earlier, the relevant subsequent conduct, which may assist as an interpretive tool, is discussed below.

[64] Mr. Annable was properly under Phase 1 during the relevant period. He was entitled to a 25% commission split.

IN ANY EVENT, THE AGREEMENT WAS AMENDED TO EXTEND THE TRANSITION PERIOD AND THE PHASE 1 COMPENSATION STRUCTURE

[65] Regardless of the success of Devencore's primary position, I also find that the parties agreed to amend the Agreement in June 2016, further extending Phase 1. First, by its conduct, Devencore offered to amend the Agreement and extend Phase 1, and Mr. Annable accepted that offer through his conduct: Devencore continued to pay Mr. Annable under Phase 1, and Mr. Annable continued to work and accept the recoverable draws and guaranteed commissions under Phase 1 after allegedly transitioning to Phase 2.

[66] Second, the parties subsequently confirmed the amendment to the Agreement and a further extension of the Phase 1 Extension at the August 19, 2016, January 25, 2017, and February 22, 2017, meetings. As stated earlier, given the credibility findings in this case, where Mr. Annable's evidence conflicts with the documentary evidence or Devencore's witnesses' evidence, I prefer the Devencore witnesses' evidence and do not accept Mr. Annable's evidence.

[67] Conduct may constitute acceptance of an offer: *Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614, 1964 CanLII 88 (S.C.C.) [*Saint John*]; *Prins Greenhouses Ltd. v. Garden Back to Eden Organic Ltd.*, 2010 BCCA 601 at

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paras. 13, 18. If a reasonable person in Mr. Annable's shoes would have interpreted Devencore's actions of continuing to pay Mr. Annable his Phase 1 compensation as an offer, and, conversely, if a reasonable person in the position of Devencore would have interpreted Mr. Annable's conduct in continuing to work as constituting his acceptance of its offer, there was an objective agreement: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp*., 2020 SCC 29 [*Crystal Square Parking*] at paras. 33, 37.

[68] Devencore has satisfied me that, when considered objectively, the parties both demonstrated, through their conduct, a clear intention to further extend Phase 1 in June 2016. In *Saint John,* the Supreme Court of Canada concluded that, based on an objective approach, an oil refinery operator accepted an offer through its conduct by acquiescing to the continued service of a tug boat after the express agreement had expired. This was the case "crucially, notwithstanding the operator's subjective opinion that it had not agreed to pay for the continued service": *Crystal Square Parking* at para. 30. Indeed, a "person may be bound by contractual obligations that she did not intend (subjectively) to assume". I must examine how each party's conduct would appear to a reasonable person in the position of the other party: *Crystal Square Parking* at para. 33.

[69] The evidence demonstrates that in June 2016, the plaintiff still owed Devencore about $60,000. He did not have sufficient commissions at that point (or in the pipeline) to repay his advances and convert to the full commission model. Despite the one-year period in the Phase 1 Extension elapsing, Devencore continued to pay Mr. Annable his guaranteed commissions and recoverable draws (like it had been doing throughout Mr. Annable's employment). A reasonable person in Mr. Annable's shoes would have interpreted this as Devencore offering to continue under Phase 1 until Mr. Annable completed Phase 1 and transitioned to an autonomous real estate agent. Mr. Annable continued to work and accepted these payments, demonstrating objective agreement to Devencore's offer through his conduct.

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[70] For the reasons outlined above in paras. 34-36 and paras. 59-61, I disagree with Mr. Annable's position that the company was offering him the recoverable draws, guaranteed commissions, and the 50% commission split or that the $5,000 payments represented additional payment for consulting work he was doing. This is entirely unbelievable and unreasonable. Both of these are assumptions that Mr. Annable admitted to never confirming with Devencore. Mr. Annable's consulting work was already being credited against his advances, which he admitted to knowing on cross-examination. He surely knew he would not be compensated twice for this work. He never mentioned any issues with receiving the recoverable draws and guaranteed commissions to Devencore. By accepting the continued payments, Mr. Annable accepted Devencore's offer of continuing under Phase 1.

[71] Moreover, the parties explicitly discussed the plaintiff's compensation at various meetings. I accept Mr. Bishop's evidence about the August 19, 2016, meeting: Mr. Bishop says the plaintiff told him that he needed to continue receiving the guaranteed commissions and advances. This is supported by Mr. Bishop's contemporaneous notes and the objective facts at this time: Mr. Annable had achieved minimal sales and had minimal upcoming sales activity but needed to meet his normal monthly living expenses. Even accepting Mr. Annable's evidence that he had transitioned to Phase 2 at this time, this meeting would have been an opportunity for Mr. Annable to raise any concerns about his subjective belief that he had transitioned to Phase 2, and his assumption that he was continuing to be paid the recoverable draws and advances for his work on the consulting project. He did not raise either of these matters with Mr. Bishop and provided no cogent explanation as to why he did not.

[72] I also do not accept that Mr. Annable actually believed, in August 2016, that the BCLDB Commission was coming down the pipeline. There is no reasonable basis upon which to draw this conclusion. The evidence is clear that the BCLDB Lease Deal did not become a commission-based project until much later and that, in August 2016, no one at Devencore contemplated it becoming a commission-based deal.

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[73] I further accept Mr. Bishop's evidence that the parties met on January 25, 2017, and Mr. Bishop reminded Mr. Annable that he was being paid under Phase 1. In this meeting, Mr. Bishop's evidence is that Mr. Annable again said he needed to be paid the recoverable draws and guaranteed commissions.

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[74] Finally, in the February 22, 2017, meeting, Mr. Bishop and Mr. Annable's evidence is consistent and demonstrates that Mr. Annable knew he was being compensated under Phase 1 at the relevant time. Mr. Annable admitted in cross-examination that he told Mr. Bishop in this meeting that if he only received a 15% split with Mr. Bullus, he would net out at zero because all of his commission would go towards repaying Devencore. Mr. Annable admitted to owing Devencore about $60,000 in advances at this time. The BCLDB Commission grossed $1,267,724 for Devencore. If Mr. Annable received a 15% split with Mr. Bullus, he would be entitled to roughly $190,000. Then, a 50% split with Devencore, or $95,000, would have meant that Mr. Annable received $35,000 in his pocket. But Mr. Annable knew that he would net out at zero because he was only entitled to 25%, or $47,500 – all of which would go to Devencore.

[75] Mr. Annable's evidence therefore, supported by Mr. Bishop's contemporaneous notes, is that the plaintiff knew at the February 22, 2017, meeting that he was properly being compensated under the Phase 1 structure. Devencore continued to pay Mr. Annable under Phase 1 because he was not an autonomous real estate agent, and Mr. Annable accepted the payments by continuing to work and this extension was subsequently confirmed at various meetings.

<u>THE FUNDS WERE NOT IMPRESSED WITH A TRUST</u>

[76] Mr. Annable's trust argument is somewhat perplexing. $240,867.56 was put into the commission trust account and credited to Mr. Annable on account of the BCLDB Commission. This was the gross amount before Devencore paid itself its 75% share of the commission and other amounts owing. As I understand his submission, Mr. Annable argues that the *Real Estate Services Act,* S.B.C. 2004, c. 42 ("*Act*") creates a statutory trust and, by handling the money in the commission

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trust account as it did, Devencore breached its trust obligations. Regardless of his entitlement under contract, Mr. Annable argues that once the money, credited to him in Devencore's ledgers, was put into the commission trust account and removed without his consent, Devencore breached their trust obligations. As a remedy, Mr. Annable claims the *entire* $240,867.56 – despite the fact that, even under his own interpretation of the Agreement, Mr. Annable is, at best, entitled to half of that (Mr. Annable was credited 25% of $240,867.56 but claims 50% based on his interpretation of the Agreement).

[77] This argument must fail. Section 31 of the *Act* does not create a statutory trust. And if I am wrong, Devencore acted in accordance with its obligations.

[78] Devencore operates a brokerage trust account and a commission trust account. Section 70 of the Real Estate Services Rules states that a brokerage *may* operate a commission trust account, and s. 70 governs their operation.

[79] Payment of licensee remuneration is governed by s. 31 of the *Act*:

> **Payment of licensee remuneration**
>
> **31** (1) Money in a brokerage trust account that is intended as remuneration for a licensee may be withdrawn from the account when it has been earned as determined in accordance with the rules.
>
> (2) Money withdrawn from a brokerage trust account under subsection (1) must be paid by the brokerage as follows:
>
> (a) any share of the remuneration that is payable by the brokerage to another brokerage must be paid to the other brokerage directly out of the brokerage trust account;
>
> (b) any net share of the remuneration that is payable by the brokerage to a licensee engaged by the brokerage must be paid, at the brokerage's option,
>
> (i) to that licensee directly out of the brokerage trust account, or
>
> (ii) into a commission trust account maintained by the brokerage in accordance with the rules and, from that account, to or on behalf of the licensee.

[Emphasis added.]

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[80] The crux of the plaintiff's submission is that there was a statutory trust at play, such that once the gross funds moved from the brokerage trust account to the commission trust account, even if they were not meant to be fully credited to Mr. Annable per their contractual agreement, the company held the funds in trust for Mr. Annable. The plaintiff's position is that, because of s. 31, the <u>only</u> money that a brokerage can pay into the commission trust account is money that is intended as <u>net</u> remuneration for the brokerage or a licensee engaged by the brokerage. On the plaintiff's theory, the wording of the statute means that *any amount* credited to an agent that goes into the commission trust account is deemed to be the net amount and held in trust for the credited licensee. Or, put differently, by putting an amount in the commission trust account and noting it as being credited to a particular licensee, that itself <u>makes</u> it the *net amount*. That amount is then held on trust for the benefit of the credited licensee.

[81] On March 17, 2017, when Devencore received the BCLDB Commission, it deposited the entire amount in the commission trust account, and $240,867.56 was credited to Mr. Annable in Devencore's records. The plaintiff suggests that to comply with s. 31 of the Act, any funds credited to Mr. Annable in the commission trust account *must* be Mr. Annable's net remuneration. The plaintiff goes further to suggest that there is no option to pay monies out of the commission trust account that were credited to a licensee by mistake; he says the funds ought to have been paid into Court in accordance with s. 33 of the *Act*.

[82] The defendant argues that the *Act* does not create a statutory trust; instead, the *Act* creates procedural rules that governs the handlings of funds which may be subject to a common law trust. I agree.

No Statutory Trust

[83] It is not clear to me that s. 31 of the *Act* deems a trust into existence by constituting certain property as trust property and a certain person as the trustee of that property: *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 at para. 18.

[84] Justice Sharpe outlined statutory trusts, or deemed trusts, in *Guarantee Company*:

> [18] As a preliminary matter, it will be helpful to define the terminology involving statutory trusts. In Henfrey, McLachlin J. referred to a "deemed statutory trust": p. 34 S.C.R. A "deemed statutory trust" is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property. The legislation purports to deem the trust into existence independently of the subjective intentions of or actions taken by the trustee. For example, the [page233] legislation at issue in Henfrey, s. 18 of the Social Service Tax Act,R.S.B.C. 1979, c. 388, established that a merchant who collected sales tax was [at p. 38 S.C.R.] "deemed to hold it in trust" for the provincial Crown. Deemed statutory trusts may be in favour of either the Crown or private parties: GMAC, para. 14. The subject matter of deemed statutory trusts also varies. Some statutes establish a trust over specific sums of property owing to or received by the trustee. In contrast, other statutes purport to establish a general floating charge over the assets of the trustee for the sum of the trust moneys.
>
> [Emphasis added.]

[85] The Supreme Court of Canada discussed statutory trusts in *Canada v. Canada North Group Inc.,* 2021 SCC 30. The Court discussed how statutory trusts are unique and must not abide by the normal requirements of trust law:

> [118] A statutory deemed trust is a unique legal vehicle. Unlike an express trust, which can be created by contract, will, or oral and written declarations, and unlike a trust that arises by operation of law, a statutory deemed trust "is a trust that legislation brings into existence by constituting certain property as trust property and a certain person as the trustee of that property" (*Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, at para. 18; see also A. Grenon, "Common Law and Statutory Trusts: In Search of Missing Links" (1995), 15 *Est. & Tr. J.* 109, at p. 110).
>
> [119] Being a creature of statute, a statutory deemed trust does not have to fulfill the ordinary requirements of trust law, namely, certainty of intention, certainty of subject matter, and certainty of object.
>
> [Emphasis added.]

[86] *Principal Savings & Trust Co. v. British Columbia*, [1994] 8 W.W.R. 549, 1994 CanLII 8980 at paras. 32-33, establishes that a statutory trust requires clear, explicit wording creating the trust and the rights of the beneficiaries. *Kingsett Mortgage Corp et al v. Stateview Homes et al.*, 2023 ONSC 2636 at para. 33, establishes that a statute does not itself create a statutory trust by requiring the parties to agree to

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create a trust; the language of the statute must create the trust for a statutory trust to arise. *PriceWaterhouseCoopers v. Bank of Montreal*, 2017 NLTD(G) 43, 2017 CanLII 11229 (S.C.) relies on the same reasoning. In that case, the Newfoundland Supreme Court found that their *Real Estate Trading Act* did not create a statutory trust or independent trust interest: “[the Act] is merely a requirement to designate an account as a trust account and to keep proper books”: para. 55.

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[87] The Ontario Court of Appeal came to a similar conclusion in *Ontario (Real Estate & Business Brokers Act, Director) v. NRS Mississauga Inc.*, [2003] O.J. No. 1164, 2003 CanLII 36551 (C.A.) [*NRS*]. The Court found that the Ontario *Real Estate and Business Brokers Act* did not establish a statutory trust. In that case, a brokerage became insolvent and there were competing claims to its assets. One group, trust claimants, had deposited funds in trust with the brokerage in connection with pending real estate transactions (which fell through). Another claimant was the bank who had a perfected security interest over all the assets of the brokerage, including accounts receivable. The Court stated that there was no statutory trust in place:

> [21] It is agreed that the deposits were subject to a trust and that NRS breached that trust and its fiduciary duty to the trust claimants when it misappropriated the deposits. The Director also argues that the deposits were subject to a statutory trust created by s. 19(2) and s. 20(1) of REBBA. I disagree. These provisions provide:
>
>> 19(2) Every broker shall maintain a trust account for every person from whom trust money is received in which shall be entered full details of all trust money so received and disbursements therefrom.
>>
>> 20(1) Every broker shall maintain an account designated as a trust account in a bank listed in Schedule I or II to the Bank Act (Canada), loan or trust corporation, credit union, as defined in the Credit Unions and Caisses Populaires Act, or Province of Ontario Savings Office in which shall be deposited all money that come into the broker's hands in trust for other persons in connection with the broker's business, and shall at all times keep the money separate and apart from money belonging to the broker or to the partnership, in the case of a partnership, and shall disburse the money only in accordance with the terms of the trust.

> [22] Neither section creates a trust. Instead, both assume the existence of a trust and require that the broker maintain appropriate books and records and a separate account designated as a trust account.
>
> [Emphasis added.]

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[88] In *NRS*, the Court found that the statute only created procedural rules and assumed the existence of a trust.

[89] The *Builders' Lien Act*, S.B.C. 1997, c. 45 is an example of a statute that does create a statutory trust. This Court discussed s. 10 of the *Builders' Lien Act* in *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.,* 2010 BCSC 1248. The statute itself creates a trust relationship and defines the beneficiaries – and even establishes the trustee:

> [61] Section 10 of the *Builders Lien Act* impresses a trust on the funds that were paid by Columere to Enviro BC and Enviro AB. The important portion of that section reads as follows:
>
>> (1) Money received by a contractor or subcontractor on account of the price of the contract or subcontract constitutes a trust fund for the benefit of persons engaged in connection with the improvement by that contractor or subcontractor and the contractor or subcontractor is the trustee of the fund.
>
> [Emphasis added.]

[90] The *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 also creates a statutory trust: see *Markin v. Fasken Martineau DuMoulin LLP*, 2019 BCCA 275 at para. 63 and *Bison Properties Ltd. (Re)*, 2016 BCSC 507 at paras. 17-18. In relevant part, the statute states:

> Handling deposits
>
> **18** (1) A developer who receives a deposit from a purchaser in relation to a development unit must promptly place the deposit with a brokerage, lawyer, notary public or prescribed person who must hold the deposit as trustee in a trust account in a savings institution in British Columbia.
>
> (2) A trustee under subsection (1) holds the deposit for the developer and the purchaser and not as an agent for either of them and must not release the deposit from trust except as follows: …
>
> [Emphasis added.]

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[91] For further examples, see s. 184 of the *Provincial Sales Tax Act,* S.B.C. 2012, c. 35; and s. 58 of the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30.

[92] Section 31 of the *Act* does not contain similarly clear language deeming a trust into existence. Instead, s. 31 is analogous to the line of cases whereby the statute itself does not create an independent trust interest; rather, it creates a requirement to designate an account as a trust account and keep proper records. Nowhere does the *Act* employ the necessary clear language to create an obligation. Rather, the *Act* creates procedural steps, which like those outlined in *NRS* and in *Midland* below, may facilitate the creation of a trust. Moreover, the other statutory trusts had very clear public policy goals attached to them: alleviating the risks of no privity of contract to protect sub-contractors, protecting public money, protecting consumers, etc. But the *Act* does not. The plaintiff points to no such public policy goals consistent with his interpretation of the *Act*.

[93] Just because an agent earned a commission, it does not mean that money is held in statutory trust. The Court of Appeal for Ontario did not contest the parties' position on this point in *Firepower Debt GP v. TheRedPin, Inc.*, 2019 ONCA 903. A motions judge held that secured creditors could access the insolvent brokerage's yet to be paid commissions for agents – i.e., these funds were not held on trust. At the hearing and before Court of Appeal, the parties agreed that: "there is no statutory or regulatory requirement to hold the Agents' commissions in trust": at para. 7.

[94] In *Ogden v. Award Realty Inc.*, [1999] B.C.J. No. 422, 1999 CanLII 5569 (S.C.), the Court held that real estate commissions were held in trust, but that case was based on there being an express trust, whereby the brokerage held the funds in trust for the agents – much like in *Midland Pacific Properties Corporation (Bankruptcy of)*, [1999] B.C.J. No. 1902, 1999 CanLII 5833 (S.C.). In *Midland*, the parties intended a brokerage to hold the commissions in trust for the agents. No statutory trust was at play in either case. While the case turned on a slightly different point, *Midland* clarified that setting up a commission trust account does not create a trust. Analogizing, for the *Act* to create a statutory trust, it is not enough that money

be held in a commission trust account; the statute must create a trust or the parties must intend to create a trust. At para. 45, the Court in *Midland* stated:

> [45] … Whether the commissions went through a commission trust account or not is not determinative of the issue of whether a trust can be implied. It is not the setting up of the account which creates the trust - it is simply a vehicle for dealing with trust property.
>
> [Emphasis added.]

Even if there is a Statutory Trust, Devencore Complied with the Statute

[95] If I am wrong and s. 31 does create a statutory trust, Devencore acted in accordance with the statute and committed no breach of trust.

[96] Section 31(2), outlined above, states that any net share of remuneration payable by a brokerage to a licensee engaged by the brokerage must be paid to them directly or into the commission trust account, and then to the licensee. Section 31(2) does not say that *only* money intended as remuneration for a licensee can be removed from the brokerage trust account. The statute itself does not turn a gross amount into a net amount simply by moving money from the brokerage trust account to the commission trust account. In terms of defining what the net share is, one must refer to the words *intended* in s. 31(1): what would better define the parties' intentions than their contractual agreement?

[97] In other words, Devencore acted in line with the statute because (1) the statute does not prevent an agent's gross payment amount being moved from the brokerage trust account to the commission trust account; (2) in moving this money, nowhere in the statute is there a suggestion that only money intended as the net share of licensee remuneration can be moved into the commission trust account or that money moved into the commission trust account solely belongs to agents; (3) the contract logically delineates what is intended as remuneration; (4) the gross share has, imbedded within it, any net share of remuneration that is intended as remuneration for the agent.

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[98] Finally, it must be said that gross amount deposited into the commission trust account did not belong to Mr. Annable in equity. In *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350, the Court of Appeal referred to a passage where there was an intersection of equitable rights and rights under statutory trust. The Court discussed an English judgment, where equitable principles meant that a payment never formed part of a statutory trust, and I find this reasoning applicable here:

> [39] … He rejected the argument that all the defendant's assets had been held on a *statutory* trust since the winding-up petition had been filed in accordance with the *Companies Act*. He found that the mistaken payment **had never belonged to the defendant beneficially**. In his analysis:
>
>> The answer, in my judgment, is short and simple. <u>It is common ground that if (as I have decided) there is a right in English law to trace money paid by mistake, it rests on a persistent equitable proprietary interest</u>. Moreover, as I have already indicated, the right to trace given by New York law is, in my judgment, on the evidence, likewise founded on such a proprietary interest... If I am right, therefore, under whichever law the plaintiff's title ought to be founded, <u>the assets (if any) in the defendant's hands properly representing the plaintiff's money at the commencement of the winding up, did not belong to the defendant beneficially and never formed part of its property subject to the statutory trust</u>. ... There may be, of course, the special cases where the conduct or inaction of a party who has paid money by mistake similarly makes it inequitable for him to recover it to the prejudice of third parties, but nothing in the facts pleaded and proved in the present case discloses any such situation. [At 1033-4; emphasis added.]
>
> [Bold emphasis added; underline emphasis in original].

[99] Equity does not presume a gift. Under this theory, any money which may have been credited to Mr. Annable was never beneficially his. The money that Mr. Annable seeks to deem a statutory trust over *never formed part* of the statutory trust because that money did not belong to Mr. Annable beneficially. This goes back to s. 31(1) which circumscribes the rest of the statute: "money that is intended as remuneration for a licensee". The plaintiff should not be able to deprive Devencore of their contractual and equitable rights because of their payment and accounting system. Any trust would not extend to money that does not beneficially belong to the plaintiff.

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MR. ANNABLE WAS NOT CONSTRUCTIVELY DISMISSED

[100] Mr. Annable claims that he was constructively dismissed by Devencore when it failed to pay him his 50% commissions in accordance with the Agreement.

[101] Given my finding with regards to the contractual dispute, Devencore was operating within the terms of their employment agreement when it paid Mr. Annable 25% of the BCLDB Commission and the April Commission. Indeed, Devencore did not breach – either through one action or a series of actions – the Agreement. Therefore, Mr. Annable was not constructively dismissed. Rather, he quit.

DEVENCORE IS NOT ENTITLED TO THE REPAYMENT OF RECOVERABLE DRAWS

[102] Given the findings I have made, Devencore's counterclaim must fail. Moreover, as I understand their position, Devencore conceded that this would be the result if Mr. Annable was unsuccessful in proving his claims with respect to the amounts owing to him.

[103] As stated in the Agreement, the advances are against future commissions. The Agreement does not say that Mr. Annable must repay these amounts as a debt to Devencore in the event that Mr. Annable does not earn sufficient commissions for the advances to be repaid from.

[104] Given that the defendant has succeeded in showing that Mr. Annable is *not* entitled to more commission from this litigation and given that he quit his employment, the counterclaim cannot attach to any future commissions and must fail.

DISPOSITION AND COSTS

[105] In conclusion, I dismiss the plaintiff's claims and the defendant's counterclaim.

[106] Devencore requested that the parties be given the opportunity to make submissions on costs after judgment was rendered. Consequently, should the

parties be unable to come to an agreement on costs, they may arrange with Supreme Court Scheduling to speak to the matter before me.

“Majawa J.”

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