IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Logan v. Numbers Cabaret Ltd. dba Hamburger Mary's,* 2018 BCSC 130

Date: 20180129
Docket: S158293
Registry: Vancouver

Between:

Robert Logan and Kimberly Bocking

Plaintiffs

And

Numbers Cabaret Ltd. doing business as Hamburger Mary's

Defendant

And:

Hy Enterprise Inc. and Heung Won Lee

Third Parties

Before: The Honourable Madam Justice Duncan

Reasons for Judgment

Counsel for the Plaintiffs:	No one appearing on behalf of the Plaintiffs
Counsel for the Defendants:	R. LaPlante
Counsel for the Third Parties:	L. Bau
Place and Date of Hearing:	Vancouver, B.C. January 15, 2018
Place and Date of Judgment:	Vancouver, B.C. January 29, 2018

Introduction

[1] Robert Logan and Kimberly Bocking (the plaintiffs), were long time employees of Hamburger Mary's, a restaurant. The restaurant was sold to the defendant, Numbers Cabaret Ltd. doing business as Hamburger Mary's ("Numbers"), by Hy Enterprise Inc. and Heung Won Lee (collectively, "the Third Party"). Numbers continued to operate the restaurant for a few months, then closed it for renovations. Due to delays in obtaining renovation permits, the restaurant has not re-opened.

[2] The plaintiffs successfully sued Numbers for severance in lieu of notice when their employment was terminated by the restaurant's closure: *Logan v. Numbers Cabaret Ltd. (Hamburger Mary's)*, 2016 BCSC 1473. Mr. Justice Walker awarded them $38,295.68 for severance in lieu of notice after a summary trial. Numbers has paid the judgment.

[3] Numbers initiated third party proceedings against the Third Party at the same time as it filed its defence to the plaintiffs' action for damages. Numbers sought recovery against the Third Party for any damages recovered by the plaintiffs based on the language of the contract of purchase and sale for business assets between Numbers and the Third Party.

[4] The relevant contractual provisions for the purposes of this application are as follows:

> 31. INDEMNITY: The Seller and the Principal jointly and severally covenant and agree to indemnify and hold harmless the Buyer from and against any and all debts, obligations and liability, whether accrued, absolute, contingent, or otherwise (i) existing as at the Completion Date, respecting the Business Assets, except those which by the terms of this Contract are to be assumed or paid by the Buyer and the Buyer may, but will not be bound to, pay or perform any of the same and all moneys so paid by the Buyer in doing so will constitute indebtedness of the Seller to the Buyer hereunder (ii) in connection with any breach of a representation, warrant or covenant of the Seller hereunder.
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> 32. EMPLOYEES: The Seller [in this case the Third Party] will, effective the end of the day before the Completion Date, terminate the employment of any employees of the Business, and will on or prior to the Completion Date pay all amounts payable to such employees in connection with their employment by the Seller and the termination of the same, and will make within the

> applicable time limits for making same, all employee related remittances required to be made, in respect of any period prior to the Completion Date. The Buyer [Numbers] may offer employment to all employees of the Seller, subject to the completion of the transaction contemplated by this Contract.
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> …
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> 46. ENTIRE CONTRACT: This Contract embodies the entire agreement and understanding between the parties and supersedes all prior agreements, representations, warranties and understandings, whether oral or written, relative to the subject matter of this Contract.

[5] The contract was signed on June 9, 2014, but the "Condition Precedent Removal Date" in the contract was moved several times at the request of Numbers' representative, Philip Moon. The contract ultimately completed on October 30, 2014 with possession on November 1, 2014.

[6] Numbers kept Hamburger Mary's open after completion. Mr. Moon deposes that the plaintiffs were rehired on the possession date and worked until March 15, 2015, when the restaurant ceased operations for renovations. As noted at the outset of these reasons, the plaintiffs successfully sued Numbers for severance in lieu of notice as of a termination date of March 15, 2015. The plaintiffs were successful. The Third Party did not participate in that proceeding.

[7] Numbers applies under Rules 9-5, 9-6, and/or 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 for judgment in the amount of $38,295.68 from the Third Party. The heart of Numbers' position is that the contract required the Third Party to terminate the plaintiff's employment and bear the associated costs. The Third Party did not do so and, as a result, has no defence.

[8] The Third Party opposes the defendant's application for any form of summary relief and seeks to file an amended response pleading an oral agreement that supplements the express terms of the written agreement.

Issue

[9] Is Numbers entitled to the relief sought through Rules 9-5, 9-6 and/or 9-7?

Analysis

Relief under Rule 9-5

[10] Generally speaking, Rule 9-5 deals with striking pleadings. In this instance, Numbers maintains that the Third Party has no reasonable defence against the claims of the applicant and its defence should be struck and judgment entered against it. Numbers characterizes the Third Party's response as a flat denial of liability with a reference in the Legal Basis to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*ESA*").

[11] The Third Party has prepared, but not yet filed, an amended response to the third party notice dated January 8, 2018. In it, the Third Party pleads the existence of an oral agreement between Numbers and the Third Party to waive the Third Party's obligation to terminate the employees and provide them remuneration in exchange for a lower purchase price. The Third Party says that, as a result of the oral contract, Numbers agreed to assume all responsibilities and liabilities of the business, including the accumulated time worked by employees in the business prior to its purchase by the defendant.

[12] Numbers maintains that neither the original response nor the proposed amended response provides a viable legal defence to the Third Party because the alleged oral agreement cannot prevail over the express terms of the contract of purchase and sale. As a result, Numbers maintains that the Third Party response should be struck.

[13] I cannot accede to Numbers' arguments. The Third Party is entitled to file an amended response by virtue of Rule 6-1(1)(a). The proposed amendments filed in the Third Party's application response pleads an oral contract in defence of the claim against it. It is not appropriate to strike out the response in circumstances where an amendment can be made as a matter of right and the proposed amendment contains an arguable defence.

Relief under Rule 9-6

[14] Rule 9-6 allows for a court to grant summary judgment if the Chambers judge is convinced, among other things, that there is no genuine issue for trial. Numbers' application for summary judgment against the Third Party is based on the contention that the defence is factually without merit under Rule 9-6(5)(a). Numbers maintains that the filed response does not deny that the Third Party was obligated to terminate the employees under the contract, or state a basis for denying the Third Party's liability to indemnify the defendant under Clause 31 of the contract.

[15] However, as stated in *McLean v. Law Society of British Columbia*, 2016 BCCA 368*,* the question that must be asked is whether there is a "genuine triable issue". I am not convinced on the facts before me that there is no genuine triable issue, particularly in light of the proposed amendment raising the existence of an oral agreement as a defence. The issue to be determined is whether or not an oral agreement exists and what effect it has in light of the written contract between the parties. There is conflicting affidavit evidence on this point which cannot be reconciled without further analysis. As such, the matter is not suitable for summary judgment.

Relief under Rule 9-7

[16] The remaining issue is whether the matter is appropriate for resolution by summary trial.

[17] Rule 9-7(15) permits a party to apply to court for judgment on a summary trial either on an issue or generally. In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, Griffin J. extensively canvassed the jurisprudence discussing the Rule and summarized the principles from *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), a decision of a five judge panel of the Court of Appeal concerning the proper approach to summary trial applications:

> [59] The following principles emerge from *Inspiration Management*:

> 1. The intention with the summary trial rule is to shortcut some of the normal processes involved in a trial in order to expedite the administration of justice. The rule substitutes other safeguards:
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> a. first, a lengthy notice period for the application;
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> b. second, a chambers judge cannot give judgment unless she can find the facts necessary to decide the issues of fact or law; and
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> c. third, a chambers judge who can decide the issues may decline to give judgment if she thinks it would be unjust to do so: at 214.
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> 2. In determining whether the judge can find the necessary facts, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits. However, there may be other admissible evidence which will make it possible to find the necessary facts, such as evidence which corroborates one side's affidavit and contradicts the other side, or, there may be other procedures which allow the judge to find the necessary facts, such as cross-examination of the persons who gave the affidavits: at 216.
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> 3. In deciding whether it would be unjust to decide the issues, the chambers judge can consider amongst other things:
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> a. the amount involved;
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> b. the complexity of the matter, although use of the rule is not limited to simple or straightforward cases;
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> c. its urgency;
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> d. any prejudice likely to arise by reason of delay;
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> e. the cost of a conventional trial in relation to the amount involved; and
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> f. the course of the proceedings: at 214.
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> [60] The case of *Inspiration Management* sent a strong signal that the summary trial procedure could be used in complex cases and even where there were conflicting affidavits. The procedure became widely used in BC for all sorts of disputes.
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> [61] Where credibility is a material issue, and cannot be resolved by the body of written evidence, the courts have repeatedly found it difficult to find the necessary facts based on the contradictory affidavit evidence of witnesses alone, and have also found it unjust to decide the issues without allowing for the right of cross-examination: see *Mayer v. Mayer*, 2012 BCCA 77 at paras. 78-83.

[18] It is incumbent on litigants to come to a summary trial hearing prepared to prove their claim or defence, as judgment may be granted in favour of any party,

irrespective of which party has brought the application: *Gichuru v. Pallai*, 2013 BCCA 60.

[19] The Third Party did not take issue with the timeliness of service of the summary trial proceedings, but opposes a summary trial on the basis that the oral contract it intends to plead in its amended response requires *viva voce* evidence at a trial because the case turns on credibility. Notwithstanding the Third Party's submissions in this regard, I find the matter is suitable for a summary trial.

[20] The material filed on this application includes the contract of purchase and sale and affidavits from Mr. Lee and Mr. Moon, the principals of the seller and purchaser respectively. The Third Party did not suggest an adjournment for cross-examination on affidavits.

[21] Mr. Lee deposes that there were numerous delays by Mr. Moon in providing a deposit of $35,000 within 24 hours of the aforementioned Conditions Precedent Removal Date. The date originally set for Mr. Moon to do so was July 4, 2014. Mr. Lee deposes that Mr. Moon said he changed his mind but requested six different times that the Condition Precedent Removal Date be changed to a later date to keep his option to purchase the restaurant open.

[22] Mr. Lee deposes that on October 15, 2014, Mr. Moon asked for a lower purchase price. Mr. Lee agreed but in exchange asked that Mr. Moon waive Mr. Lee's obligation to terminate the restaurant employees. Mr. Moon would continue to employ them when he took over the restaurant because there was insufficient time to provide proper notice of termination to the employees. Mr. Lee alleges Mr. Moon agreed, but the agreement was not reduced to writing. The deal was struck, says the Third Party, because the completion of the contract had been delayed for so long that there was no time to give proper notice to the employees.

[23] Numbers notes that the lower purchase price was reduced to writing through an addendum to the contract of purchase and sale. It refers to the reduction in the purchase price and a $10,000 holdback by the buyer as assurance that there are no

further liabilities that the buyer may incur in acquiring a development and construction permit for an intended breezeway conversion resulting from any prior work that the seller may have done. The addendum is silent on the termination issue. Mr. Moon denied the existence of the alleged oral contract in his affidavit responding to Mr. Lee's affidavit.

[24] Numbers submits that Clause 32 is determinative of the Third Party's liability for the plaintiffs' severance. It required the Third Party, as the Seller, to terminate the employment of any employees and pay all amounts payable to them in connection with their employment by the Seller. It gave the Buyer the option of offering employment to the employees, subject to the completion of the transaction contemplated by the contract. Mr. Moon deposes that Numbers exercises that option and rehired the employees.

[25] In addition, Numbers relies on Clause 46, which confirmed the intention of the parties that the entire agreement was in the written contract.

[26] Numbers relies on *0722053 B.C. Ltd. v. Malloch Logging Ltd.*, 2013 BCSC 1948, a decision of Madam Justice Harris. At issue were the effects of alleged oral representations made prior to the execution of a written agreement. The agreement also included an "entire agreement" provision. Harris J. said:

> [40] Counsel for the plaintiff also referred me to the decision of our Court of Appeal in *Sultani,* with respect to the effect of the "entire agreement" clause in a guarantee. In that case, the Court considered whether there was an oral agreement between the parties varying the terms of a written agreement. In considering that issue, the Court reviewed its decisions in *MacMillan v. Kaiser Equipment Ltd*., 2004 BCCA 270 and *Turner v. Visscher Holdings Inc.* (1996), 23 B.C.L.R. (3d) 304, regarding the policy reasons for the general rule against giving effect to collateral agreements that contradict a written entire agreement clause, including the following passage from Madam Justice Newbury in *Turner* in which she stated:
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> > [38] In any event, whether one applies the wording of [the entire agreement clause] itself - an acknowledgment that no collateral agreements exist - or whether one applies the parol evidence rule to it and therefore disallows proof of the collateral contract because such a result would contradict [the entire agreement clause], the conclusion seems inescapable that the collateral oral contract cannot prevail. To rule

> otherwise would in my view render entire agreement clauses meaningless and thereby remove an important safeguard used in countless agreements in this province and elsewhere.

[41] Following this authority, as well as the Supreme Court of Canada's decision in *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515, the Court in *Sultani* declined to give effect to the alleged oral representation on the basis that it would "run afoul of the parole evidence rule and be inconsistent with previous authority" that "a written contract in clear terms ought not to be varied or qualified by extrinsic evidence".

[42] In the instant case, both corporate parties are commercial entities and Mr. Malloch is an experienced businessman who had signed promissory notes and guarantees in the past. Mr. Malloch agreed that he understood the nature of the legal arrangements which the defendants entered into and the defendants received consideration for their promise to pay and to guarantee payment to the plaintiff of $287,242.52. While it is recognized that there are circumstances in which the parole evidence rule does not apply, I do not find such circumstances to have been established in this case.

[43] Based on the above authorities, I conclude that even if the oral representations alleged were proven, the defendants are not entitled to rely on them as are directly contrary to the terms of the Promissory Note and Guarantee.

[emphasis added]

[27] In *Balfour v. Tarasenko*, 2016 BCCA 438, Dickson J.A., for the Court, said:

[44] A contract involves an exchange of promises, acts, or acts and promises, as a result of which each party receives something of value from the other. The promises are reciprocal undertakings as to the future conduct of the promisors. A promise based solely on a past act or obligation is simply gratuitous, and not binding in nature. In order to create an enforceable bargain, a promise must be supported by new consideration: see G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Carswell, 2011), at 3-5, 82-85, 108.

[45] In *The Law of Contract in Canada*, Professor Fridman explained the modern meaning of consideration. In doing so, he noted, with approval, the definition expressed by Barry C.J. in *Robertson v. Robertson* (1933), 6 M.P.R. 370 at 389 (N.B.C.A.):

> The principal requisite and that which is the essence of every consideration, is that it should create some benefit to the party promising or some trouble, prejudice or inconvenience to the party to whom the promise is made.

[46] A binding contract may be evidenced in writing, orally, by conduct or by a combination thereof. When reduced to writing, subject to certain exceptions, extrinsic evidence is not admissible to add to, subtract from, vary or contradict its terms. While in principle a related but independent oral collateral agreement may also be concluded, such agreements are rare and an intention to create binding legal relations must be proved strictly. In

> addition, and importantly, to be enforceable an alleged collateral contract cannot stand if it clearly contradicts the terms of the written agreement: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515.
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> [47] In *Athwal*, D. Smith J.A. reviewed the principles of contractual interpretation that apply to written contracts. She stated:
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> > [42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.
> >
> > [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention".
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> [emphasis added]

[28] Counsel for the Third Party suggested that the parties were not sophisticated business people and should not be held to the same standards as commercial litigants in other cases. In other words, the parol evidence rule and the jurisprudence concerning entire agreement clauses should not be applied strictly in the circumstances, or at least its application to these parties should be the subject of a trial.

[29] On a review of the contract and the affidavits of the principals, I find that Mr. Lee's assertion of the existence of an oral agreement to waive Clause 32 in exchange for a lower purchase price is simply not credible. It is directly contrary to the express terms of the contract.

[30] The parties clearly outlined the conditions attached to the reduced purchase price in the written addendum, which is silent on the issue of termination. They affixed their signatures to a contract which contained an entire agreement clause. And the very first clause in the contract states:

> 1. CONTRACT: This document, when signed by all parties, is a legally binding contract. READ IT CAREFULLY. The parties should ensure that everything that is agreed to is in writing. For the purposes of Clauses 2.6, 31 and 32, the parties may wish to designate as "Principals" those individuals who are the operating mind of the Business.
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> [emphasis added]

[31] This matter was not one in which a great deal of sophistication was necessary. The parties did not have to draft the contract. It was supplied by the Third Party's real estate agent.

[32] In addition to relying on an oral agreement as a defence, the Third Party's proposed amendments to its pleadings refers to s. 97 of the *ESA*, which states:

> If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

[33] The Third Party filed an *ESA* adjudicator's decision which referred to some confusion over termination dates for the employees of Hamburger Mary's. The adjudicator found that the employees were continuously employed despite the disposition of the business.

[34] As I understand the Third Party's position, it is that, notwithstanding Clause 32, the adjudicator's ruling bolsters the contention that the employees were employed in a continuous and uninterrupted manner and the defendant is liable to them for severance and other employment-related expenses.

[35] Counsel for Numbers cites *Major v. Philips Electronics Ltd*., 2005 BCCA 170 for its commentary on s. 97 of the *ESA* wherein Smith J.A., for the Court, said:

> [25] I agree with the trial judge that s. 97 of the *Act* does not extinguish the respondent's common-law action against the appellant since the section applies only

> "for the purposes of this Act". I do not think the trial judge's reference to *Kennett v. Superior Millwork Ltd.* (2003), [2004] 2 W.W.R. 162, 2003 ABQB 650, aff'd [2005] A.J. No. 189 (Q.L.), 2005 ABCA 84 was useful, since the *Act* contains nothing similar to the relevant Alberta statute's express provision that it does not affect any civil remedies or any agreement, common-law right, or custom that provides equal or greater benefits or obligations than those provided under the statute. Nevertheless, the trial judge's conclusion is sound.
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> [26] The object and purpose of the *Act* was identified in *Helping Hands Agency Ltd. v. British Columbia (Director of Employment Standards)* (1995), 15 B.C.L.R. (3d) 27, 131 D.L.R. (4th) 336 (C.A.), where the question was whether the purchaser of the assets of a business was liable under s. 96 (now s. 97) of the *Act* to pay vacation pay of the vendor's employees who were thereafter employed by the purchaser. In holding that the purchaser was liable, the Court, *per* Legg J.A., said, at para. 18,
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> > From my reading of the ESA as a whole I conclude that the general purpose of the legislation is to afford protection to the payment of an employee's wages which may not be available to the employee at common law.
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> Legg J.A. went on to say, at para. 22, that the effect of s. 96 (now s. 97) is that,
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> > ... for the purposes of the ESA, the employment of the employee is not terminated by the sale and it is deemed to be continuous and uninterrupted by the sale.
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> [27] Thus, s. 97 of the *Act* is intended to supplement the common law – it does not strip employees of their common-law rights. Since the respondent relied in this case on his right at common law to claim damages for the appellant's breach of their employment contract, s. 97 of the *Act* is not relevant.
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> [emphasis added]

[36] I draw from the decision in *Major* that the *ESA* provides protection to employees rather than supplanting their rights to make claims at common law. The Third Party did not explain in submissions how, in light of that decision, s. 97 of the *ESA* affords it a defence to a clear contractual term.

[37] Furthermore, this Court is not bound by the adjudicator's decision which was made in a different legal context. The Third Party did not attempt to advance an argument of *res judicata* respecting the adjudicator's factual findings.

[38] In summary, I am satisfied that this case is suitable for disposition under the summary trial rule. The issue of the alleged oral agreement is before the court in the proposed amended pleadings and the affidavit of Mr. Lee. The oral agreement relied

on by the Third Party as a defence to Numbers' claim against it contradicts the entire agreement clause in the guarantee as well as the express term in the contract about employee termination.

[39] There is no suggestion that Mr. Lee did not understand the terms of the contract, including the entire agreement clause. I find Mr. Lee's affidavit evidence about the oral agreement is not credible when viewed in the context of the parties' dealings as a whole.

[40] The contention that the purchase price was lowered by the oral agreement to account for Numbers agreeing to take on the expense of terminating the employees is also at odds with the written addendum concerning the reduction in the purchase price. The parties addressed the subject matter of that addendum in writing. There was no mention of the termination issue. I cannot accept that the parties agreed in writing on a lower purchase price on certain terms, but deliberately chose to omit reference to the termination issue as part of the agreement to lower the price.

[41] Finally, in light of the express contractual language in Clause 32 concerning termination of employees, s. 97 of the *ESA* does not provide the Third Party with a defence. It exists to protect employees, not to supplant the terms of a written agreement.

[42] Numbers has proven that it entered into a contract with the Third Party and the Third Party breached the term of the contract which required it to terminate the existing employees and give them notice or pay them severance. Numbers bore the financial burden of the judgment against it in favour of the plaintiffs and is entitled to judgment against the Third Party for $38,295.68. As the successful party, the defendant is entitled to its costs at Scale B.

"Duncan J."

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The Honourable Madam Justice Duncan