

CITATION: Dimmer v. MMV Financial Inc., 2012 ONSC 7257
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dimmer v. MMV Financial Inc.
BEFORE: Moore J.
COUNSEL: *Alan Davis and Ali Mian*, for the Plaintiff
Barbra Miller, for the Defendant

ENDORSEMENT

[1] Gregory Dimmer enjoyed employment at MMV Financial Inc. (“MMV”) until 15 March 2010 when his position was terminated, without notice or cause. He brings this action for damages in lieu of notice and for other relief. The parties agree that he is entitled to damages but disagree on the nature and quantum of damages to be awarded.

[2] Mr. Dimmer held an executive position with another company in 2006 when approached by a corporate search firm for MMV. He was interviewed by MMV’s co-founders and attracted to the challenge of a senior management position with lucrative salary, benefits, bonus and stock option opportunities.

[3] Mr. Dimmer held the title of senior vice president (“SVP”) throughout his tenure at MMV, a tenure that spanned almost four years.¹ He worked within a senior management team and reported at all times to the two co-founders and de-facto operating minds of MMV. At the time of his dismissal, Mr. Dimmer was the longest serving SVP in MMV history and the only one to last more than two years at the company.

[4] The people principally involved in this matter are Mr. Dimmer and the co-founders, Mr. Mohamed and Mr. Patterson. All three are highly educated, bright, successful and articulate men. They are high income earners and were involved together in the pursuit and processing of

¹ Having been hired at the end of March 2006, he began working at MMV on 1 May 2006 and his termination came about six weeks before his fourth anniversary on the job.

loan transactions worth millions of dollars² in a highly competitive marketplace in Canada and in the United States.

[5] MMV clients were typically start-up companies in the technology, life sciences or environmental industries. Those companies had bankers and/or venture capital companies that provided senior debt financing. MMV offered subordinated debt, also known as mezzanine financing, to augment the borrower's financing needs.

[6] MMV loans were complicated and negotiated transactions evidenced by sixty page loan documents. Mr. Dimmer learned the business and sourced loan opportunities within it. He located and forged personal relationships with borrowers, bankers and venture capitalists to mine and manage loan opportunities. He worked the investment side of the business for MMV. He located opportunities for MMV to invest its capital resources in lucrative lending deals with qualified borrowers. He presented MMV lending terms, provided due diligence on potential loans, worked with counsel to finalize and document loans. Then he worked as a portfolio manager on loans placed from his pipeline of business opportunities. It required a diverse skills set. It drew upon his financial, business and sales backgrounds and his training in the niche market that MMV operated within. His was a difficult but rewarding, senior position within the MMV business model; he was both diligent and successful.

[7] He was a high income earner and ultimately became an owner of a small share of MMV, a share holding that he maintained through the trial of this action. He was fifty years old at the time of his departure from MMV and was subject to non-competition provisions during the year following his release, terms that he honoured in that interval.

[8] MMV is no longer carrying on actively in the business of placing loans. In June of 2011, marketplace competition and MMV's inability to scale or grow its business moved Mr. Patterson and his business partner, Mr. Mohamed, and their equity investors to conclude that the best course of action would be to stop booking new loans. At that point, they dismissed all but four of MMV's 13 staff in Canada and the United States.

[9] As an SVP, Mr. Dimmer knew that his role was to source his own deals. His territory at the outset was all of Canada, except for Québec and the Maritimes. MMV was not doing business in the United States at that time.

[10] Sales efforts represented only about 10% of his job function. After he obtained a loan opportunity, he needed to perform due diligence on the underwriting involved, review financial and other documents from the client company and interview senior management of the client, customers of the client and even investors.

[11] Mr. Dimmer was not given a job description in writing nor written directions on how he was expected to learn and apply the skills required to do the job. He focused on technology and biotechnology companies. He made cold calls where necessary and found that he would get

² Each transaction typically involved borrowing of between two to five million dollars.

upwards of a 50% response rate. He would investigate responses further and would follow-up with about 10 or 20% of those, if he thought that the potential loan fit was right for MMV.

[12] He obtained verbal approval from Mr. Mohamed or Mr. Patterson to send a term sheet to the prospective borrower. If the client was interested in finalizing the transaction, Mr. Dimmer would undertake due diligence on the transaction and then prepare a lengthy [often 20 pages] commitment memorandum that he would circulate to the five members of the MMV internal investment committee. He would typically run that document by Mr. Mohamed or Mr. Patterson first. It would take two or three weeks to prepare.

[13] MMV had only one or two competitors in Canada. The Canadian market was so small as compared to the American market that by 2007, MMV had decided to expand into the American market.

[14] Mr Dimmer testified that in 2007 and 2008, MMV was probably the most active lender in the venture debt financing sector in the United States, especially after the Lehman Brothers bankruptcy occurred in 2008 and the US banking industry essentially imploded.

[15] In late 2008, MMV hired Ms. April Young from Comerica Bank in the United States. Mr. Dimmer had introduced her to Mr. Mohamed. Around that time, the company decided to assign territories to senior sales executives in the United States and asked Mr. Dimmer to focus on New England, New York and New Jersey; the remainder of the country was taken away.

[16] Mr. Dimmer asked to keep certain of his contacts and geographic region but he was only able to keep certain contacts and deals in which the borrowers obtained their primary funding from Edison Ventures and deals that he had on the go from his pipeline already but he was not allowed to source new projects outside of his territory and he complied as asked.

[17] The change of his geographic territory made it more difficult for him to source and to close new deals. His commission income dropped in 2009.

[18] He was paid commissions for deals that he had worked on in 2008, including some that closed in 2009. He produced a list of seven deals that he felt he should have been paid for, that he had worked on previously and that he understood from his discussions and agreement with Mr. Mohamed and Mr. Patterson would be covered but were not.

[19] Mr. Dimmer testified, and I accept, that he was concerned that his relationships with borrowers and other people he had cultivated up to the time of this territory re-alignment at MMV would be lost. Mr. Mohamed reassured him that the company was going to look after him. He said they wanted him to be a hunter and to find new business for the company. This is in keeping with the team spirit approach to modeling MMV's sales strategy, as will be described later. In addition, Mr. Mohamed testified at this trial and did not deny having given this undertaking to Mr. Dimmer as part of the quid pro quo for obtaining his acquiescence to the re-alignments of American territories.

[20] Mr. Dimmer's output in 2009 was also adversely impacted by his inability to work on a full time basis following a serious injury suffered in February of that year and a three and one half month convalescence. He rebounded however and enjoyed a strong fourth quarter.

[21] He made a concerted effort in 2009 and 2010 to meet with new venture capital firms, at least a dozen of them, to develop new business. His expectation for the rest of 2010 was that he could get back to his earlier performance levels of eight to ten deals sourced for and funded by MMV per year worth \$20-\$25 million, despite the challenges posed by having been handed a new and smaller territory.

[22] He had not booked any deals in 2010 by the time he was let go on 15 March.

MMV executive structure

[23] Mr. Mohamed is the chief executive officer and Mr. Patterson is the Executive Vice President of MMV. They have jointly managed the business from its outset and remain business partners and the major shareholders.

[24] Mr. Patterson's responsibility has been loan origination and building a team to accomplish that. As well he was to provide direction on the credit side of the business including deciding which companies to finance, being involved in the legal process leading to documentation of loans and involvement in portfolio management thereafter.

[25] MMV is a private equity backed business which means that it had private institutional shareholders and bank financing. Mr. Mohamed, Mr. Patterson and their financiers were determined to grow the MMV business, balance sheet and staff with the goal of a five-year exit strategy.

[26] Three of the first five hires to MMV were SVP's. Mr. Patterson explained that the first three SVP's hired were sourced through contacts known to Mr. Mohamed and Mr. Patterson but they decided that for the next SVP hire, they would use Allison Soko of Heidrick and Struggles, a headhunting firm. At that time, they did not know Mr. Dimmer "from Adam".

[27] The executive search firm worked from a description of MMV's SVP position requirements as drafted by Mr. Patterson. They canvassed the market and interviewed candidates. They found 35 or 40 of them. Then Mr. Mohamed and Mr. Patterson interviewed attractive candidates and that brought them to Mr. Dimmer who they each interviewed separately and then met with together.

[28] Loan originators at MMV, the SVP's hired before Mr. Dimmer, all had financial services backgrounds. For the position ultimately offered to Mr Dimmer, however, MMV wanted good sales and technology backgrounds and someone who could be trained on financing issues.

[29] They realized on hiring Mr. Dimmer that they would need to train him on virtually every aspect of the financing business. They were somewhat concerned that he had only been with his

then current employer for about five months as it would be a disaster for MVP to hire an SVP who would leave them after only a few months.

[30] For his part, Mr. Dimmer felt that he had acquired useful skills from his prior employment engagements that would be transferable to the work he would do at MMV. He well understood technology companies because he understood their business. He knew that MMV was looking for someone with substantial financial skills and knew that he had those together with a good understanding of the market and an understanding of the technology industry.

[31] Although he did not have extensive contacts in the venture capital industry, he did have contacts in the technology industry that could become potential clients or provide an avenue to approach others who would be interested in what MMV had to offer.

[32] Mr. Dimmer came to understand that he would be an SVP reporting to the chief executive officer. He understood that there were only two other senior vice presidents at MMV at that time. His role would be the same as theirs and would involve soliciting new loans, understanding the marketplace and establishing relationships with new potential clients and their investors.

[33] The offer of employment letter to Mr. Dimmer confirmed the position involved reporting directly to the president. Messrs Mohamed and Patterson explained that that letter was a standard template that had been used in previous hires. Further, they had explained to Mr. Dimmer that he would be reporting to the co-founders.

[34] Mr. Patterson testified about the hierarchy of reporting at MMV. He explained that it was a flat company with two principal executives. They did not use hard lines of reporting as a larger company might do.

[35] Mr. Patterson testified that the terms of employment were very thoroughly explained to Mr. Dimmer. He had many questions about all aspects of the business and Messrs. Patterson and Mohamed had many questions for him as well.

[36] They knew that Mr. Dimmer had an MBA and work experience in the software business and as a financial analyst at IBM and he also had a very good sales background.

The Employment Contract

[37] Ultimately, Mr. Patterson agreed that the employment letter is the contract. That letter, dated 30 March, 2006, was written by Mr. Mohamed to Mr. Dimmer and opened by saying: "Further to our discussions, I am pleased to extend to you this offer of employment with MMV...The position is Senior Vice President and reports directly to the President & CEO of MMV " and it went on to describe the position as being part of management with responsibilities including:

- The sourcing and initiating of new investments for MMV.

- The financial structuring, due diligence process and committee approvals for new investments.
- The monitoring of investee companies with a primary focus on advancing their value to MMV.
- Work with Minhas Mohamed and Ron Patterson to advance further strategic plan and direction for MMV.
- Participate fully in any future fundraising initiatives, communication activities and other corporate development activities.

[38] The letter concluded with a reference to the MMV team concept: “These are fun and busy times at MMV and we look forward to you coming aboard our team.”

[39] The letter went on to dictate that the offer of employment was conditional upon Mr. Dimmer entering into non-disclosure, confidentiality and non-competition agreements, which he in fact did.

[40] The evidence at trial confirmed that Mr. Dimmer immersed himself in the first three of the stated responsibilities expected of him as part of management. He was not asked to participate in the last two, certainly not at a high level.

[41] Mr. Mohamed testified that it was he who drafted the employment letter; he added that he did so without wordsmithing input from legal counsel. He explained that he crafted the language used in the opening paragraph and in his description of job responsibilities with a view to making Mr. Dimmer feel that he was part of a team at MMV. In hindsight, he volunteered that he should have been more careful in his choice of words.

[42] References to the team concept abound throughout the evidence heard from MMV witnesses. Mr. Dimmer was said to have had open access to team members for guidance and support, including fellow deal originators, administrative staff and even MMV’s co-founders. Monday morning meetings were arranged and attended by all staff, in order to provide an opportunity to all to know the status and progress of team efforts to attract and manage loans for MMV.

[43] Although Mr. Dimmer was not consulted in the process leading to the arbitrary decision by the co-founders to refine and shrink his sales territory in the United States in late 2008, the business purpose at issue was explained to him; it was sold as being good for the company and for him as well.

[44] In December 2008, MMV introduced a new hire, Ms. Young, to MMV clients and contacts in December, 2008, including people who had been involved in and important to Mr. Dimmer’s pipeline and book of business. He was not invited to be a part of that initiative. Ms. Young was awarded geographical territory that had been previously assigned to Mr. Dimmer.

[45] Ms. Young and Mr. Patterson both worked opportunities as well inside Mr. Dimmer's new territory. Mr. Patterson explained that their contacts were better than his; perhaps, from a business development standpoint that was so but from an employee relations standpoint, that was lost on Mr. Dimmer.

[46] Mr. Dimmer felt that he was on the wrong end of a double standard, for he was not allowed to poach work outside of his geographic territory and he was not given opportunities to pursue business opportunities in Ms. Young's territory, despite the fact that he had, what he considered to be, viable contacts there in 2009 and 2010.

[47] There is no claim made for commissions lost on account of the several loan transactions worked and closed, from Mr. Dimmer's new territory, by Ms. Young and Mr. Patterson but, as will be seen in what follows, the concept of team spirit trumpeted by MMV's co-founders when Mr. Dimmer was hired and throughout his term of employment and Mr. Mohamed's assurance that the results of the new territorial alignment in and after 2008 did not materialize. This is important in balancing factors affecting the length of notice of termination that is appropriate here.

[48] So too is consideration of the effect of the MMV non-competition agreement important on this issue.

After Termination

[49] The non-competition agreement that Mr. Dimmer was required to sign was very specific in mandating that for a period of one year following his termination of employment, regardless of the reason for termination, he could not compete directly or indirectly in marketing or selling a product or service that was competitive to those offered by MMV.

[50] Curiously, although Mr. Dimmer was handed a termination letter on 15 March 2010, over Mr. Mohamed's signature, containing a specific reminder of the non-competition agreement terms and stating that MMV expected him to comply with those obligations, Mr. Mohamed did not address such matters in his testimony at trial.

[51] Even more curious was the evidence of Mr. Patterson who wondered whether the non-competition agreement was enforceable at all. In any event, he volunteered his own personal interpretation of that agreement, one that was never conveyed to Mr. Dimmer, saying that it is understood in the industry that one has to earn a living and that after a company fires a person, it is okay for that person to hire on with the company's competitors.

[52] Mr. Dimmer believed that he was bound to honour the non-competition agreement and he did. He described his job search activities, including providing his recollections and documents establishing the people and organizations that he contacted in his attempt to secure a new job. He remained open to considering options in all fields that he had worked in previously but hoped to remain in the financial services industry where he had worked directly for the four years he spent

at MMV and less so but quite extensively in managing financial interests for his employers in many years before that.

[53] Mr. Dimmer produced income tax documents. He testified that he received no income from any source in 2009. He cashed in some RRSP accounts in 2010 but did not earn employment income or income from self-employment in that year.

[54] In 2011, after the one year non-competition provision expired, he began providing consulting services and earned income in that year. In December of 2011, he took on a consulting opportunity with the Integrated Private Debt Company and accepted full-time employment with that company effective 1 July 2012. He is still employed there as a Managing Director.

[55] His work now is comparable to the roles and functions he performed at MMV.

Special Damages

[56] MMV paid Mr. Dimmer a monthly car allowance, in addition to his salary and bonus. The car allowance of \$500 per month annualized to \$6,000. Mr. Dimmer claims that amount plus the additional cost of Sun Life Extended Health insurance coverage that he lost on leaving MMV and paid \$3,048.10 to re-acquire. He had full prescription cost coverage at MMV but the cost effective coverage he took after he left lead to a deductible expense of \$428.91 (20% of prescription costs not covered) plus dental expenditures from April 2010 to December 2010 of \$607.00. The total claim for these special damages is \$10,084.01.

[57] MMV paid a statutory termination benefit of \$6,923.08 plus Mr. Dimmer's claim for outstanding travel expenses incurred in February 2010. It made no other payments arising from his employment.

[58] There is a claim asserted for the value of unused vacation days as at the date of termination. Mr Dimmer claims \$4,153.85; MMV calculates that claim to be about \$1,000 less but it does not otherwise dispute the quantum of special damages claimed

[59] MMV made no dividend or other payments arising from the ownership of shares purchased through Mr. Dimmer's stock option entitlements.

Stock Options

[60] As a term of employment, effective on his start date, Mr. Dimmer became entitled to receive a grant of 50,000 options from MMV's Employee Stock Option Plan ("ESOP") at a nominal strike price of US \$0.30 per share. Options vested incrementally at the rate of 25% of the total offered upon the end of each year of employment.

[61] Following his termination and in accord with the provisions of the ESOP, Mr. Dimmer acquired 47,917 common shares. Had his termination been delayed for six more weeks to his fourth anniversary, he could have purchased a further 2,083 shares.

[62] He claims damages for the loss of opportunity to purchase those additional shares and values them now at CDN \$14,997.60 (net of acquisition strike price).

[63] This claim cannot succeed. First, the evidence at trial falls far short of establishing a fair market value for those shares on a balance of probability basis. Mr. Patterson was cross examined on the point and explained that until the wind up process is complete, until the rights of preferred shareholders have been paid and until the recovery upon the MMV inventory of existing loans outstanding, including good and bad loans, is known, the value remaining for common shareholders to share in is too speculative to predict.

[64] Second, any right to purchase MMV shares must be grounded in the terms of the ESOP. Section 4.12 of the ESOP addresses termination of employment. It provides that where MMV terminates employment without cause or adequate reasonable notice or without any or adequate compensation in lieu of such reasonable notice, then any options held that are exercisable at the *Termination Date* (emphasis added) shall continue to be exercisable for thirty days more.

[65] But Termination Date is a defined term³ and means the date of termination of employment. It specifically does not mean the date on which any notice period would expire.

[66] The definition is unambiguous and clearly defeats the claim made in this case to damages arising from Mr. Dimmer's inability to purchase the balance of the 50,000 shares referred to in the stock option provision of the employment agreement. This right was not yet exercisable at the date of termination.

Mitigation

[67] MMV raises the issue of failure to mitigate damages. It pleaded that Mr. Dimmer failed to make reasonable efforts to secure suitable alternative employment. It argued that Mr. Dimmer intentionally narrowed the focus of his post termination job searches to positions in the private equity financing area while his background and education permitted of alternative employment in a broader area.

[68] MMV called no evidence to support this position. There is no basis in the evidence before me to find that any further or different approach to job hunting on Mr Dimmer's part after he was terminated by MMV would have produced employment or self-employment opportunities other than those he ultimately grasped.

[69] In support of this defence, it was incumbent upon MMV to lead evidence that Mr. Dimmer failed to pursue alternate employment opportunities that were of a comparable nature and reasonably adapted to his education, training, experience and abilities, and that such

³ Section 2.1(hh) of the ESOP

opportunities were not only available, but that if pursued, Mr. Dimmer could have minimized the damages sustained.⁴

[70] I am satisfied that Mr. Dimmer undertook reasonable job search efforts both within and beyond the financial services industry. In the result, MMV cannot, upon either branch of the mitigation test, be successful in asking this court to eliminate or reduce Mr. Dimmer's entitlement to damages for wrongful dismissal.⁵

Quantum of damages

[71] Throughout his time at MMV, Mr. Dimmer earned a base salary of \$120,000 per year. His earnings grew with the success he achieved in sourcing deals that were funded by MMV in a given calendar year.

[72] On deals producing loan amounts up to a total of US \$12 million each year, he earned bonus income of 0.50%. On fundings of deals totaling over US \$12 million, his bonus percentage rose to 1%.

[73] Although he earned income in all or part of the years 2006–2010, his bonus income varied in each year and the parties disagree on how best to calculate any bonus income entitlement he may have during the notice period applicable in this case.

[74] They agree that it took several months in 2006 for Mr. Dimmer to move through the learning curve and establish himself in the marketplace, so the bonus income earned in that year was and was expected to be lower than normal. In that year he worked for MMV from 1 May through to 31 December with no time off for illness. He earned salary of \$80,000 plus bonus income of \$26,985 for a total income of \$106,895.

[75] In 2007, he worked full time and earned salary of \$120,000 plus bonus of \$181,575 for a total of 301, 575.

[76] In 2008, he again worked full time and earned salary of \$120,000 plus bonus of \$203,076 for a total of \$323,076.

[77] In 2009, the year in which he was disabled for 3.5 months, he earned salary of 118,730.82⁶ plus bonus of \$38,564 for a total of \$157,294.82.

[78] In 2010, he worked full time until his discharge on 15 March; he earned salary of \$26, 327 but no bonus income.

⁴ *Link v. Venture Steel Inc.* [2008] O.J. No. 4849 (S.C.J.) at paras. 46 and 49; upheld on this point on appeal 2010 ONCA 144 (C.A.) at paras. 71 – 74.

⁵ *Link v. Venture Steel Inc.*, [2008] O.J. No. 4849 (S.C.J.), at para. 50.

⁶ MMV voluntarily continued salary payments for almost all of the time Mr. Dimmer worked part time or not at all.

[79] In describing a best case scenario for Mr. Dimmer, it is argued that the court should consider only bonus income earned in 2007 and 2008, the years in which he worked on a full time, full year basis. His average bonus earnings on that basis would be \$193,325.50.

[80] MMV argues that that analysis overlooks the fact that Mr. Dimmer did earn bonus income from his deals sourced and funded in 2006 and 2009 and that he was actively pursuing deals in 2010 as well. By excluding those years, the court would be ignoring the fact that bonus earned is dependent upon success and Mr. Dimmer should not be compensated without reference to his failure to succeed in booking deals in those years.

[81] An alternative suggested for Mr. Dimmer calculates his average salary and bonus for 46.5 months of employment from 1 May 2006 to 15 March 2010 normalized in 2009 to reflect his three and one half months of disability. This produces an average salary and bonus combined income of \$240,278.

[82] An annual average income arrived at by averaging the best case and the secondary case scenario annual numbers produces an average of \$276,302.01.

[83] MMV submits that the court should refer to the value of the deals Mr. Dimmer sourced and that MMV funded and calculate commission earned on a monthly basis over, in the alternative, a four year average (2006-2009), a three year average (2007-2009), a two year average (2007-2008) or a two year average (2008-2009). Further MMV calculates commission alternatives with/without consideration of the \$12 million threshold at which the bonus rate changes from 0.50% to 1.0%.

[84] For comparison purposes, the figures MMV calculated for annual average commission income with growth in the commission percentage factored in on the (2007-2008) two year model produces \$161,250 as the appropriate annual bonus income, just over \$30,000 less than the MMV figure.

[85] In my view, the question is less concerned with the mathematics of the models used but rather with whether any of the many alternatives suggested produce a fair result for the parties and a result most reflective of the evidence before the court.

[86] It is always a difficult matter to assess future income from bonus entitlements in situations where, as here, the level of sales upon which bonus will be calculated is uncertain. It is all the more difficult where, again as here, the bonus income earned in prior years has followed an irregular and unpredictable pattern. In such circumstances courts have embraced the concept of predicting the future from historical averaging.

[87] In *Serrao*,⁷ Low J. stated that there is ample authority for the use of an historical average of income for purposes of quantifying damages in a wrongful dismissal action. This approach is often applied where the employee's income fluctuates from year to year. Low J. explained that this approach is appropriate when income depends, for example, on sales or on corporate

⁷ *Serrao v. National Bank Financial Inc.* [2004] O.J. No. 2821 (S.C.J.), at para. 27

performance. “The use of an historical average is least unfair both to the employer and the employee and, in the absence of factual or expert opinion evidence as to the level of income that would have been achieved by the employee during the period of reasonable notice, the most reasonable approach is to use an average.”⁸

[88] In a more recent decision of the Ontario Court of Appeal, Gillese J.A. endorsed the use of historical average earnings as a factor to consider in calculating potential future earnings.⁹

[89] The models suggested by the parties assume bonus income was earned on a regular monthly basis throughout the year but it just wasn't. Mr Patterson testified that fully 40% of MMV's annual business was booked in the fourth quarter of each year. Mr Dimmer booked 6% or less in bonus in six of nine of the first two quarters of the years he worked in from 2006 into 2010. That he generated low deal bookings in the first two quarters of 2009 and the first quarter of 2010 was not unusual for him or for MMV in general.

[90] In these circumstances, I propose to calculate bonus entitlement from a model applying historical bonus earnings upon a quarterly basis and by applying a fairness factor to reflect the reasons for Mr Dimmer's zero level of bonus earnings in several quarters.

[91] Mr. Dimmer worked through all or part of 17 quarters while at MMV. He started midway through the first quarter in 2006 and spent the next quarter coming up to speed and learning his new job before he began booking loans and earning bonus income. He earned no bonus income in the first quarters of 2009 and 2010; that was not unusual in MMV's experience. Having been disabled in the second and third quarters of 2009, he earned no bonus income in the third quarter of that year. I deduct those five quarters from my consideration of average bonus income by quarter, for they do not represent his normal bonus earning experience.

[92] The total bonus income earned was \$434,199.24;¹⁰ on my analysis, that equates to \$36,183.27 per applicable quarter, or \$144, 733.08 per year.

Reasonable Notice Period

[93] Each case requiring consideration of an appropriate reasonable notice period applicable to a termination of employment without cause will differ from virtually all others, at least in some significant respects. So, the starting point for consideration of this issue in this case is the approach outlined in *Bardal*,¹¹ where McRuer C.J.O. wrote:

There can be no catalog laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the

⁸ *Ibid.*

⁹ *Clark v. BMO Nesbitt Burns Inc.* 2008 ONCA 663, [2008] O.J. No. 3789, at paras 36-37.

¹⁰ Taken from Exhibit 9 and the evidence of Mr. Patterson.

¹¹ *Bardal v. Globe & Mail Ltd.*, [1960] O.J. No. 149 at para. 21; cited with approval in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986. at para. 22 and in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 81

employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[94] As noted above, the character of Mr. Dimmer's employment included the invitation by MMV to join its team in an all for one and one for all adventure into the mezzanine financing or subordinate lending business. MMV undertook to support Mr Dimmer's efforts, including specifically, in and after 2008 when it determined to reduce his geographical territory. It failed Mr Dimmer in this respect and I must weigh this failure in considering the fair notice question.

[95] I am also mindful of the fact that MMV was a major player in a niche market in the nature of the lending business it engaged in, first in Canada and later in the US market as well. MMV had very few competitors in Canada and few, if any, in the US, particularly after the melt down of credit and banking sectors there, in and after 2008. Indeed, by June of 2011, market conditions were sufficiently unfavorable that MMV stopped booking loans at all. Discharging Mr. Dimmer in the midst of the prevailing market conditions made it more challenging for him to find income earning opportunities.

[96] In *Cronk*,¹² the Ontario Court of Appeal recognized that senior managers may not find other employment of the same level of responsibility or remuneration within a reasonable period of time and recognized the principle that senior employees are entitled to lengthier periods of notice.

[97] In the instant case, Mr. Dimmer was a senior executive at MMV. He reported directly to the co-founders, the two most senior executives in the company. He was the face and voice of his employer to the borrowers he extended MMV lending opportunities to in Canada and in the United States and to their venture capitalists and bankers as well. He offered loans of millions of dollars each upon complex, negotiated terms with little direction from Messrs Mohamed or Patterson. He managed a portfolio of tens of millions of dollars of booked loans for MMV. There was no evidence at this trial that he ever disappointed MMV's executives or its investment committee in this respect. His contribution to the success of the enterprise was, by any measure, considerable; in 2006, his booked transactions accounted for 11% of the MMV total; in 2007, his share grew to 23%; in 2008, his share was 39%; and in 2009, it was 11%. Mr. Dimmer's loans averaged 24% of MMV total loans booked and that ranked him as the most productive of any SVP during his tenure. He was responsible for important parts of MMV operations. Considering these facts, the nature of this employment favours a longer notice period.¹³

[98] While he brought considerable skills and experience with him on leaving MMV, his interest lay in the loan financing field and, as his mitigation efforts have demonstrated, he experienced considerable difficulty obtaining alternate, suitable employment.

[99] As noted above, MMV required Mr. Dimmer to agree to be bound by a non-competition agreement as a term of his employment and it insisted that he abide by the agreement for one

¹² *Cronk v. Canadian General Insurance Co.*, 25 O.R. (3d) 505, at paras. 20-21.

¹³ *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, at para. 21

year following his dismissal. Mr. Dimmer complied. In my view, this agreement effectively eliminated any opportunity to obtain similar employment during that year and it seriously impeded his ability to obtain employment at all, even in fields beyond the reach of the non-competition agreement. This too is a factor weighing in favour of a longer notice period.

[100] MMV correctly points out that it did not target Mr. Dimmer for hire and undertake to steal him away from another employer. That said, however, MMV did retain the services of a corporate search agency that located Mr. Dimmer and others as potential candidates for the job of SVP at MMV. Messrs. Mohamed and Patterson then met with, extensively interviewed and offered the position to Mr. Dimmer knowing full well that he was employed and had not reached out to them for this job. MMV hired Mr. Dimmer away from CIT. That factor must be weighed in the balance and tends to extend the notice period required on termination.

[101] While Mr. Dimmer did not acquire an ownership stake in MMV during his tenure there, it is clear that one was offered to him as part of the ESOP referenced above. He was told that the value of MMV's common shares at the time he was hired was substantial, perhaps as high as \$10 per share. At that level, the strike price available to him (of 30 cents each) presented him with a very attractive investment opportunity; he might realize about 30 times his acquisition price. The opportunity to earn a capital gain from share purchasing in MMV common shares was sold to him as a lucrative and tax effective advantage to working at MMV. The opportunity was important to Mr. Dimmer as he considered the job offer. It was important to him even after the termination of his employment, for he then took the steps necessary to buy the shares available to him (representing about 1% of the 7% of company ownership available to employees). As there were very few employees at MMV in the plan, Mr. Dimmer's share ownership stake may yet produce significant capital gains for him.

[102] The MMV promise of a potentially lucrative ownership opportunity was a feature of the employment offer to Mr. Dimmer that would be difficult for him to duplicate in the market place, as is evidenced by the fact that he was unable to secure a like offer after his termination.

[103] Mr. Dimmer was fifty years of age at the time of his dismissal, having spent virtually four years in the employ of MMV. His experience, training and qualifications, as detailed above, were considerable and undoubtedly are recognized and rewarded by his current employer; however in respect of the MMV offer to him for compensation in lieu of notice, in my view, they were not sufficiently recognized by MMV.

[104] Through the process of weighing and balancing the factors to be considered in determining reasonable notice in the particular circumstances of this case, I am of the view that a period of twelve months notice is appropriate.

Disposition

[105] Mr. Dimmer shall have judgment for damages in lieu of notice in the sum of \$120,000.00 for salary, plus \$144,733.08 for bonus, subject to the adjustments as detailed above; being an addition of \$10,084.01 for special damages, plus \$4,153.85 for the value of unused

vacation days, less \$6,923.08 paid for the statutory termination benefit. The net damages award is therefore \$272,047.86.

[106] In addition, Mr. Dimmer shall recover costs of the action. If the parties cannot agree upon costs issues, I may be spoken to.

MOORE J.

DATE: 19 December 2012