CITATION: King v. 1416088 Ontario Ltd., 2014 ONSC 1445
COURT FILE NO.: CV-12-452513
DATE: 20140325

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JACK KING	)	*Matthew Fisher*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	*Eric Kay*, for the Defendants
1416088 ONTARIO LTD. c.o.b. as DANBURY INDUSTRIAL & DANBURY SALES INC. & 1416087 ONTARIO LTD. c.o.b. as DANBURY APPRAISAL & 2184493 ONTARIO LTD. c.o.b. as DANBURY SOLUTIONS & 986866 ONTARIO LTD. c.o.b. as DANBURY CAPITAL and/or DSL COMMERCIAL	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** 24 and 25 February 2014

MEW J.

REASONS FOR DECISION

[1] The name "Danbury" has been associated with the businesses of liquidation, valuation and auctioneering in Toronto and beyond for many decades.

[2] Over the years, the corporate vehicles through which the Danbury business has been undertaken have changed several times.

[3] The current flag-bearer of the Danbury name is 986866 Ontario Ltd. carrying on business as DSL Commercial ("DSL"). It publishes a website, on the first page of which the following statement appears:

> Each year, Danbury conducts more than 100 retail and wholesale liquidations, auctions and orderly liquidation sales. Our corporate lineage spans more than 54 years, and in that time we have repositioned inventory and physical assets valued at more than $2.5 billion.

[4] When Jack King started working for Danbury on 4 September 1973 as an accountant and senior bookkeeper, his formal employer was Danbury Sales (1971) Ltd., a company owned by Bernie Weinstein. By the time his employment was terminated 38 years later, his employer was 1416088 Ontario Ltd. carrying on business as Danbury Industrial, a company owned by David Ordon, who had married and then divorced Bernie Weinstein's daughter. But despite a number of corporate manoeuvres in the intervening years, Mr. King's job remained essentially the same throughout.

[5] Mr. King was dismissed without cause in October 2011. At the time, he received no statutory termination pay, no pay in lieu of notice, no vacation pay and no pension payments.

[6] At the same time, all of the other employees of Danbury Industrial were terminated (with the exception of its President, David Ordon). Danbury Industrial ceased trading (although it continues to exist as a corporate entity).

[7] Within no more than a few months, DSL had started trading in the same lines of business, from the same premises and using the same telephone number and web address as Danbury Industrial. The President of DSL was (and remains) Jonathan Ordon, the son of David Ordon and the grandson of Bernie Weinstein.

[8] David Ordon subsequently became an employee of DSL, as did five of the other approximately 10 employees of Danbury Industrial who had been terminated by Danbury Industrial along with Mr. King.

[9] Mr. King, who was nearly 73 at the time of his termination, was not hired by DSL. He brings this action against a number of the companies who, he claims, formerly employed him over the years, as well as against DSL, for damages arising from his termination and for the payment of pension benefits to which he says he is entitled.

[10] While he was never formally employed by DSL, Mr. King claims to be entitled to be treated as if he had been an employee of DSL on the basis that (a) he did work for 986866 Ontario Ltd. (before it started trading as DSL); and (b) DSL was a common employer (along with various other companies that formally employed him or for which he did work over the years) and/or is the successor to the companies that employed him.

[11] The *prima facie* entitlement of Mr. King to statutory pay and pay in lieu of notice is not disputed. What is disputed is whether any entity other than Danbury Industrial is responsible for payment of the amounts owed. Also in contention is whether Mr. King has any pension entitlement.

The Danbury Companies

[12] Very few of the facts are disputed.

[13] The "Danbury Group" has never existed as a juridical entity or as a registered business name.

[14] A number of different companies feature in the dispute between Mr. King and the defendants. All either used or had some connection to the Danbury name.

- *Martingale Inc.* was a company solely owned by Bernie Weinstein. It owned the rights to use the trade name "Danbury". In 1995 Martingale granted 986866 Ontario Ltd. the right to use the "Danbury" name for 75 years.

- *Danbury Sales (1971) Ltd.* ("1971 Ltd.") carried on a liquidation, appraisal and auctioneering business from 1971 to 1987. It was owned by Bernie Weinstein.

- *Danbury Sales Inc.* ("DSI") operated the Danbury business from 1987 to 2001. It was incorporated in 1987 and initially owned by 1971 Ltd. In 1995, David Ordon purchased DSI through his corporation 986867 Ontario Limited. DSI ceased active operations in 2001, but it was reactivated in 2004 and carried on the Danbury business until it ceased active operations again in 2005.

- *1440047 Ontario Inc.* ("047 Inc.") carried on business as "Danbury Industrial" from 2001 to 2004. 047 Inc. was a joint venture owned by 1416088 Ontario Inc. and Hilco Canada Auction Services Company.

- *1416087 Ontario Limited* ("087 Ltd.") carried on an appraisal business as "Danbury Appraisal" beginning in 2005. David Ordon incorporated 087 Ltd. in 2000.

- *1416088 Ontario Limited* ("088 Ltd.") carried on business as "Danbury Industrial" from 2005 to 2010 and for a period of time in 2011 until it was wound up in October of that year. David Ordon incorporated 088 Ltd. in 2000.

- *2184493 Ontario Ltd.* ("493 Ltd.") carried on business as "Danbury Solutions" from 2010 until 088 Ltd. resumed operations in 2011. David Ordon incorporated the company in 2008.

- *986866 Ontario Limited* ("866 Ltd.") began operations as an auction and liquidation company under the name "DSL Commercial" in the fall of 2011. It was incorporated by David Ordon in 1992. In 2007 Jonathan Ordon bought 49 treasury shares of 866 Ltd. and

David Ordon bought 51 treasury shares. In May 2010, Jonathan Ordon purchased David Ordon's 51 shares and became the sole owner.

[15] A chronology of events as they relate to these various corporate entities and Mr. King's involvement with them is as follows:

4 September 1973	Mr. King commenced employed with 1971 Ltd.
23 July 1981	Mr. King and 1971 Ltd. entered into a "Retirement Compensation Agreement".
1987	DSI was incorporated. Mr. King was instructed to set up the payroll, WSIB account, banking resolutions and credit card terminal account for DSI.
2001	DSI ceased operations and David Ordon used 088 Ltd. to enter into a joint venture with Hilco Canada Auction Services Company through 047 Inc., carrying on business as Danbury Industrial. Mr. King was instructed to set up the payroll, WSIB account, banking resolutions and credit card terminal account for 047 Inc.
2004	The joint venture being operated through 047 Inc. and carrying on business as Danbury Industrial was wound up, and DSI was reactivated.
2005	DSI ceased active operations and became a holding company, and 088 Ltd. became an active auction company, carrying on business as Danbury Industrial. Mr. King was instructed to set up the payroll Account, WSIB account, banking resolutions and credit card terminal account for the new Danbury Industrial.
Post-2005	087 Ltd. became active in the appraisal business under the style of Danbury Appraisal. Mr. King was instructed to set up banking resolutions, payroll and WSIB accounts for Danbury Appraisal.
May 2010	Danbury Industrial (i.e. 088 Ltd.) ceased conducting auctions for a period of time after May 2010 and 493 Ltd., carrying on business as Danbury Solutions, began conducting auctions. Mr. King was instructed to set up banking resolutions and credit card terminal account for Danbury Solutions.

2011	Danbury Industrial (i.e. 088 Ltd.) recommenced conducting auctions.
October 2011	Mr. King was instructed to set up the payroll account, source deduction account, Employment Health Tax account, WSIB account, banking resolutions and credit card terminal account for 866 Ltd. (which thereafter commenced business as DSL).
28 October 2011	Mr. King's employment was terminated.
By December 2011	866 Ltd. commenced operations in the auction and liquidation business under the style of DSL.

[16] According to his compensation records, Mr. King's formal employers between 1973 and 2011 were as follows:

- From 1973 to 1987: 1971 Ltd.
- From 1984 to 1985 and 1987 to 1988: Danbury Sales Limited
- From 1987 to 1990 and 1999 to 2000, and in 2004: DSI
- From 2000 to 2003: Danbury Corp.
- From 2005 to 2011: Danbury Industrial

[17] Some of the Danbury companies were more active than others. Some were activated or deactivated as needs arose. To a greater or lesser extent, Mr. King undertook work for most if not all of the entities listed in the chronology above. He did so in the regular course of his employment. He testified that his work frequently involved transferring money within the Danbury group of companies, sometimes as many as 60 times a week. He reported to Barry Lockyer, who was the Chief Financial Officer. His colleagues included Don Lee, the Chief Auctioneer, with whom he worked for 15 years; Bob Lyons, the Auction Supervisor, with whom he worked for 30 years; and Patrick King, an auction helper with whom he worked for 8 years. While all of these individuals were terminated at the same time as Mr. King, by no later than February 2012 they had been hired by DSL in similar if not the same capacities as before.

The Winding-Up of Danbury Industrial and Start-Up of DSL

[18] The evidence of David Ordon was that Danbury Industrial started to experience financial difficulties in 2008. Two files in particular went bad, and the company ended up in litigation. The situation was sufficiently serious that, for a period of time, the active business of Danbury

was moved over to Danbury Solutions in order to protect the business against a possible failure on the part of Danbury Industrial. Although by 2011 the situation had improved sufficiently for the business to be moved back over to Danbury Industrial, the health of the business continued to be precarious. According to David Ordon, by the end of October 2011, he had had enough. He was at odds with the bank and a key loan had been called. He decided to terminate all of Danbury Industrial's employees and to wind up the business.

[19] David Ordon did not immediately start a new company. He says he first went to a firm of accountants to get advice on winding up all of the Danbury companies.

[20] But in the meantime, 866 Ltd., which, since 2010, had been wholly owned by his son, Jonathan Ordon, went into the auction and liquidation business. The first auction was lined up for December 2011, less than two months after Danbury Industrial closed its doors. David Ordon no longer had any ownership interest in this company and did not lend it any money. Jonathan Ordon confirmed that he was able to establish the business with the assistance of financial support from his grandfather (Bernie Weinstein) and his mother. However, in March 2012, David Ordon became an employee of DSL. He continued as an employee until 31 December 2013. Since then, he has been an independent business consultant.

[21] As noted above, in April 1995, 866 Ltd., which at that time was wholly owned by David Ordon, acquired a 75-year licence to use the Danbury name and the "Danbury Sales" logo from Bernie Weinstein's company, Martingale Inc. The telephone line and, subsequently, website address for the Danbury businesses were also owned by 866 Ltd.

[22] It was explained that when, in 1995, Bernie Weinstein sold David Ordon the "Danbury" name, he had done so in the hope one of his grandchildren would come into the business and keep the Danbury name in the family. This was the rationale underlying Jonathan Ordon's purchase of 49 shares of 866 Ltd. from his father in 2007 and his subsequent purchase of the other 51% ownership in May 2010.

[23] Jonathan Ordon started working at Danbury Industrial in 2005 after graduating from university with a degree in computer science. When Danbury Industrial closed its doors in October 2011, Jonathan Ordon was one of the employees who lost his job. He had known that things were not going well but says it still came as a surprise when the day actually came and Danbury Industrial stopped trading.

[24] Jonathan Ordon said that he had wanted to remain involved in the business. Initially, he spoke to a competitor in the United States to explore the possibility of opening up a branch operation in Toronto. The U.S. company made an offer at the end of October or early November of 2011, which Jonathan Ordon turned down. Instead, he and Don Lee, the Chief Auctioneer of Danbury, decided to go into business, using 866 Ltd. – the owner of the Danbury name. He acknowledged that the choice of the business name – DSL Commercial – was influenced by the old company name of Danbury Sales Ltd.

[25] As early as 20 December 2011, DSL conducted a sale of assets on consignment.

[26] The initial employees of DSL were Jonathan Ordon and Donny King. Other former Danbury Industrial employees then joined the business in February 2012. According to Jonathan Ordon, some of them had already found other work after being laid off from Danbury Industrial at the end of October 2011.

[27] During the course of his evidence, Jonathan Ordon acknowledged that the logo used by DSL is very similar to that previously used by Danbury Sales Ltd. in the 1980s. Asked to explain DSL's boast of a corporate lineage spanning more than 54 years (as found on the first page of its website), Jonathan Ordon – unconvincingly – explained that the reference was to the experience of his company's employees, not to its connection with the other Danbury companies that had previously carried out the Danbury business.

[28] The DSL website also contains the following narrative:

> There's no substitute for experience. While the statement may sound cliché, it rings true when selecting a resource for asset disposition. Rely on our experience to ensure a more successful sale. Call Danbury now.

When asked to explain the exaltation on his company's website to "call Danbury now", Jonathan Ordon stated that as he owned the name, he had the right to use it. It was, he said, part of the "goodwill" 866 Ltd. acquired from Martingale Inc.

[29] He acknowledged that DSL continues to operate and use the Danbury name in certain marketing. While he claimed that the phrase "Danbury Group" is no longer used, he acknowledged (as he had to) that the term "Danbury Group" could also be found on his company's website. Indeed, the website itself is accessed through two URLs, one of which is danburysales.com.

[30] Jonathan Ordon acknowledged that DSL uses the same offices, desks, chairs and telephone system that Danbury Industrial used. DSL did, however, have its own computers set up. While he professed not to know that Mr. King had set up the credit card terminals for DSL, Mr. Ordon acknowledged that he had delegated this task to Barry Lockyer at a time when both Mr. Lockyer and Mr. King were still working for Danbury Industrial. Jonathan Ordon explained that he did this in anticipation of the auction he was going to be running in December. This explanation tends to undermine the assertion that a clean break existed between the termination of Danbury Industrial's business and the commencement of business by DSL.

The Retirement Compensation Agreement

[31] On 23 July 1981, Mr. King was asked to attend a meeting at the offices of 1971 Ltd.'s solicitors. David Ordon was also there. Mr. King was asked to sign a document, prepared by the solicitors, called a "Retirement Compensation Agreement". Neither Mr. King nor David Ordon

was able to recall what had led up to this agreement being prepared and signed. Nor can Mr. King recall providing any financial consideration for the agreement (which contains the usual reference to "consideration of the premises and of the covenants and agreements herein set forth, and for other good and valuable consideration, receipt of which is hereby acknowledged"). One of the recitals to the agreement describes Mr. King as having being employed by the corporation since 4 September 1973 (which is correct) in an "executive capacity" (which is incorrect). The key elements of the Retirement Compensation Agreement include the following:

(a) If Mr. King continues in employment of the corporation (1971 Ltd.) (including its heirs, executors, administrators or successors) until his 65th birthday, Mr. King may retire and he or his spouse would be entitled to retirement compensation.

(b) The retirement compensation would be payment to Mr. King of the monthly sum of $736.60 for life.

(c) In the event of Mr. King retiring but then dying before receiving 120 monthly payments, monthly payments would be made instead to Mr. King's spouse until the total number of monthly payments made to Mr. King and his spouse equal 120.

(d) During the period of receipt of retirement compensation, Mr. King shall not engage directly or indirectly in any business that is substantially similar to the business of the corporation (unless the corporation has first consented in writing).

(e) During the period of receipt of retirement compensation, Mr. King shall, at the request of the corporation, be available in an advisory or consulting capacity.

[32] It appears to be common ground that there was no discussion of the Retirement Compensation Agreement following its execution at any time until following Mr. King's termination by Danbury Industrial. David Ordon had forgotten about the agreement and Jonathan Ordon was not aware of it at all until receiving the statement of claim in the present action.

Issues

[33] The parties have narrowed the issues to be determined to the following:

a. Which of the defendants is liable for payment of the plaintiff's statutory termination pay, vacation pay and pay in lieu of notice?

b. Does any compensation payable to Mr. King include retirement compensation?

Discussion

The liability of the various defendants

[34] It is common ground that Danbury Industrial would be responsible for payment of statutory termination pay, pay in lieu of notice and vacation pay. But Danbury Industrial has ceased trading and is unlikely to be able to satisfy any judgment recorded against it.

[35] Most of the other defendants also are dormant and/or judgment proof. The exception, of course, is DSL, which continues to trade under the Danbury name.

[36] The plaintiff takes the position that all of the named defendants are liable. He undertook work for all of them. In particular, in connection with DSL, he carried out some of the preparatory tasks necessary for DSL to be able to commence business. He also monitored DSL's essentially-dormant bank account over several years prior to that.

[37] Furthermore, DSL has inherited the Danbury business, to which the plaintiff contributed so much of his working life. The plaintiff argues that there is no clear water between the termination of the business of Danbury Industrial and the establishment of DSL. It is essentially the same business, carried on by many of the same people, from the same premises, using the same telephone number and website address and liberally using the Danbury name.

[38] The defendants say that Mr. King and the other employees of Danbury Industrial were terminated because the company was unable to pay its creditors and went out of business. They claim that there was a clean break between the demise of Danbury Industrial and the subsequent establishment of DSL as a trading entity under different ownership and management, and that accordingly, only Danbury International can be liable to Mr. King.

[39] Both sides point to *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 397, as a leading authority on the definition and application of the "common employer" doctrine in a common law context. The starting point for the Court of Appeal in that case was the statement by Stacey Ball in *Canadian Employment Law* (Aurora: Canada Law Book, 1999) vol. 1 at p. 4-1:

> The courts now recognize that, for the purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

[40] In *Downtown Eatery*, the plaintiff had been employed by a single-site nightclub in downtown Toronto. However, as described by the Court of Appeal, at para. 27,

> [B]eneath the surface of lights, liquor and entertainment, there was a fairly sophisticated group of companies involved in the operation of the nightclub.

One company was the owner and lessor of the premises. Another company leased those premises from the first company. That company also owned the trademark and held the liquor and adult entertainment licences. Yet another company owned the chattels and equipment of the nightclub, and a further company paid the nightclub employees, including the plaintiff. All of these companies were owned and controlled by the personal holding companies of the two individual owners of the business.

[41] The Court of Appeal made reference, at para. 30, to a British Columbia decision, *Sinclair v. Dover Engineering Services Ltd.* (1987), 11 B.C.L.R. (2d) 176 (S.C.), aff'd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.), in which Wood J. (at first instance) stated, at p. 181:

> As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

[42] The Court of Appeal proceeded to find that although an employer is entitled to establish complex corporate structures and relationships, courts should be vigilant to ensure that such arrangements do not work an injustice in the realm of employment law: *Downtown Eatery*, at para. 36. The evidence in *Downtown Eatery* supported a conclusion that the group of companies involved functioned as a single, integrated unit in relation to the operation of the nightclub: *Downtown Eatery*, at para. 40.

[43] When examined for discovery, David Ordon had acknowledged that the sale of the shares in 866 Ltd. to his son was motivated by the expectation that, as Jonathan Ordon got better at what he was doing, he would take over the business. According to David Ordon, "the business is only the name. It's nothing more".

[44] From 1995 until the date of Mr. King's termination, the Danbury business name was owned by 866 Ltd. Mr. King undertook work for that company, albeit limited to monitoring its inactive bank statements and, shortly before his dismissal, setting up the various accounts necessary for DSL to start trading.

[45] The defendants note that Mr. King was never formally employed by Danbury Appraisal, Danbury Solutions or DSL. Upon termination, Mr. King prepared his own Record of Employment. He did so not as an employee of the "Danbury Group" but, rather, as an employee of Danbury Industrial. While acknowledging references in various documents to the "Danbury

Group" both before the termination of Mr. King's employment and subsequently by DSL, the defendants assert that such references are at best "vague".

[46] Furthermore, the defendants say that providing some incidental services to various corporate entities that did not actually employ Mr. King, including the work undertaken by Mr. King in respect of setting up various accounts and processes to enable DSL to start up in business, did not necessarily make him an employee of those entities.

[47] In *Gray v. Standard Trustco Ltd.* (1994), 8 C.C.E.L. (2d) 46 (Ont. Ct. Gen. Div.), the court held that an employee who had undertaken work for a subsidiary company, which had been incorporated for a single purpose and for which employees of the parent company had provided certain services, was not in any employer/employee relationship with this subsidiary absent an intention to create such a relationship. To similar effect, in *Jones v. CAE Industries Ltd.* (1991), 40 C.C.E.L. 236 (Ont. Ct. Gen. Div.), it was held that the true employer must be ascertained on the basis of where effective control over the employee resides.

[48] It is worth noting that both of these authorities were considered by the Court of Appeal in *Downtown Eatery*. The Court of Appeal viewed these cases as encouraging a holistic view of the employment relationship. The court adopted the same position, as underscored by its recognition of respect for legitimate corporate arrangements on the one hand and fairness to employees on the other.

[49] According to the defendants, the cause of Mr. King's termination was Danbury Industrial going out of business. This is not a case, they say, in which DSL is a "phoenix" company. Indeed, Jonathan Ordon's rights to the use of the Danbury name were acquired in 2010 when he purchased the remaining tranche of his father's shares in 866 Ltd. That transaction was unconnected in any way with the subsequent demise of Danbury Industrial.

[50] The defendants' position is untenable. DSL has too many attributes in common with other companies who have traded under the Danbury name to escape from liability to the plaintiff.

[51] DSL is the current incarnation of the business that the plaintiff worked for over a period of 38 years. Far from there being clear water between the termination of the business by Danbury Industrial and the recommencement of business by DSL, the groundwork for DSL's start-up was already being laid, with assistance from the plaintiff, in October 2011 while the plaintiff continued to be formally employed by Danbury Industrial. Indeed, from May 2010 to October 2011, David Ordon's company (Danbury Industrial) had been using the Danbury name and goodwill even though Jonathan Ordon's company (866 Inc.) was the sole holder of the licence to use the name. This further supports the interconnectedness of the entities.

[52] With respect to the other defendants, DSI is a formal employer of the plaintiff. Danbury Solutions actively carried out the Danbury business for a period of time and, hence, was the

plaintiff's *de facto* employer. Although the situation is less clear with respect to Danbury Appraisal, the overall inter-connectedness of the Danbury businesses, and the plaintiff's contribution to all of those businesses, including Danbury Appraisal, was such that it, too, should be considered to have employed the plaintiff, pursuant to the common employment doctrine.

The validity of the Retirement Compensation Agreement

[53] So far as the issue of retirement compensation is concerned, the defendants' position appears to be that because, after 1981, the Retirement Compensation Agreement was never discussed again, and in the absence of any evidence that the agreement was formally assigned, the contract should no longer be regarded as binding.

[54] In *Sawko v. Foseco Canada Ltd.* (1987), 15 C.C.E.L. 309 (Ont. Dist. Ct.), the plaintiff, a foundry product engineer, started working for the defendant in 1975. He had an agreement providing for termination, by either party, on the giving of three months' notice. In 1978, the plaintiff took up a new position with the company with increased responsibilities and salary. No mention was made of the 1975 agreement. In 1985, he was terminated without cause. The District Court found that the plaintiff was no longer bound by the May 1975 contract, as it had not subsisted in the mind of any parties, especially after 1978 when the plaintiff took up his promotion. Trotter D.C.J. noted that nine-and-a-half years had gone by between May 1975 and January 1985 without the first contract ever having been mentioned, despite "very substantial changes" in the plaintiff's status. He had gone from being a "fledging engineer" to a position of major importance: *Sawko*, at p. 315. There was "no comparison whatsoever" between what the trial judge described as "the two types of employment": *Sawko*, at pp. 315-36.

[55] That is not the situation in Mr. King's case. The evidence is that, throughout his 38 years with the various companies in the Danbury Group that employed him, he undertook substantially the same tasks. Although his formal employer changed from time to time, until his ultimate termination in 2011, there was never a record of employment issued or, with one exception, any attempt to memorialize the terms of his employment.

[56] That exception was a "Letter of Understanding" dated 5 April 1989. Interestingly, that document makes frequent references to the "Danbury Group of Companies" and Mr. King's obligations to this group, but there was no evidence led at trial to explain the genesis for this document or to suggest that it in any way represented a departure from or change to the duties and responsibilities of the plaintiff.

[57] Under these circumstances, there is no good reason not to give effect to the Retirement Compensation Agreement. There is no dispute that Danbury Industrial would qualify as a "successor" to 1971 Ltd. using the ordinary and natural meaning of that word in context. Given the findings already made with respect to the liability of the other defendants under the common employer doctrine, it would be reasonable to regard as a successor to 1971 Ltd. any of the

Danbury companies, including DSL, claiming or utilising the benefit of the Danbury name and goodwill.

Conclusion

[58] The defendants are jointly and severally responsible for payment of compensation to the plaintiff arising out of his termination on 28 October 2011.

[59] The parties have agreed that the plaintiff is entitled to 24 months of pay in lieu of notice. Taking into account eight weeks' pay that the plaintiff received prior to trial, his net damages for wrongful dismissal are $148,562.57. He is also entitled to pre-judgment interest.

[60] The plaintiff is also entitled to receive retirement compensation. Rather than engage in an evaluation of his pension entitlement, the plaintiff suggests limiting his recovery to the minimum amount payable under the retirement compensation agreement, namely $88,392 (i.e. $736.60 per month for ten years).

[61] The plaintiff could have retired and started receiving retirement compensation when he turned 65, over ten years ago. Having not done so, the issue arises whether he should be entitled to receive his retirement compensation now, as a single lump sum, or whether he should receive only those amounts that would have accumulated from the date of his termination to the present time, with a declaration as to his entitlement to future benefits.

[62] In *IBM Canada Ltd. v. Waterman*, 2013 SCC 70, 11 C.C.E.L. (4th) 169, an issue arose whether an employee who was wrongfully dismissed at the age of 65 should have deducted from the compensation in lieu of notice that was awarded to him pension benefits that he had received during the notice period. The Supreme Court of Canada found that the employee's retirement pension was not an indemnity for wage loss, but rather a form of retirement savings. Even though, as in Mr. King's case, the employee's retirement compensation was fully funded by the employer, the "insurance exception" to the compensation principle was held to apply.

[63] While the logic of *IBM Canada* would permit a finding that the plaintiff's pension entitlement would engage on the date of termination of his employment, the plaintiff appears to be urging that the principle should be stretched further so that Mr. King can receive ten years' worth of retirement compensation now.

[64] Had Mr. King retired on 29 October 2011, he would have been entitled to start receiving retirement compensation. The minimum that he, his spouse or, indeed, his estate would receive would be ten years' worth of compensation.

[65] However, having decided when he reached the age of 65 to continue working, rather than take his retirement compensation, it would run contrary to the agreement that the parties made to

effectively back-date the commencement of his retirement compensation entitlement to the day he turned 65 in order to award him the ten-year lump sum that he has requested.

[66] Accordingly, the plaintiff should be entitled to damages in an amount equivalent to $736.60 per month from 28 October 2011 to the date of judgment. The plaintiff is also entitled to a declaration of continued entitlement to receipt of retirement compensation in accordance with the agreement, which, if the circumstances so warrant, his spouse or his/her estate may assert. Pre-judgment interest is applicable on those pension payments that have already fallen due.

[67] The plaintiff shall have his costs of the action on a partial indemnity scale. If the parties are unable to agree on the quantum of costs, the plaintiff shall file a bill of costs and a written submission of not more than three pages within ten working days of the date of release of this judgment, and the defendants shall provide a written submission of no more than three pages in response within five working days thereafter. I also may be spoken to in the event that there are any issues relating to the calculation of pre-judgment interest.

Mew J.

Released: 25 March 2014

CITATION: King v. 1416088 Ontario Ltd., 2014 ONSC 1445

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JACK KING

Plaintiff

– and –

1416088 ONTARIO LTD. c.o.b. as DANBURY INDUSTRIAL & DANBURY SALES INC. & 1416087 ONTARIO LTD. c.o.b. as DANBURY APPRAISAL & 2184493 ONTARIO LTD. c.o.b. as DANBURY SOLUTIONS & 986866 ONTARIO LTD. c.o.b. as DANBURY CAPITAL and/or DSL COMMERCIAL

Defendants

REASONS FOR JUDGMENT

Mew J.

Released: 25 March 2014