CITATION: Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919
COURT FILE NO.: CV-15-531723
DATE: 20180516

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
J.P. RUSTON	)	*Andrew H. Monkhouse and Samantha D. Lucifora*, for the Plaintiff
	)	
Plaintiff	)	
(Defendant to Counterclaim)	)	
	)	
– and –	)	
	)	
	)	
KEDDCO MFG. (2011) LTD.	)	*Wm. Mark Fryer and Joseph Cohen-Lyons*, for the Defendant
	)	
Defendant	)	
(Plaintiff to Counterclaim)	)	
	)	
	)	**HEARD:** February 6, 7, 12, 13, 14, 15, 16, 26, 27, 28, & March 2, 2018
	)	

V.R. CHIAPPETTA J.

Overview

[1] The plaintiff caused this proceeding to be commenced by statement of claim dated July 3, 2015 claiming that he was dismissed without notice and without cause from his position as president of the defendant and is therefore entitled to damages. The defendant responded to the plaintiff's claim by serving a statement of defence wherein it takes the position that it had cause to dismiss the plaintiff. The issues before the court, however, are not limited to those as expected in a case of determining whether there was cause for dismissal. The defendant has counter-claimed against the plaintiff. It alleges that the conduct of the plaintiff that supports cause for his dismissal is the same conduct that supports its claim for damages in unjust enrichment, breach of fiduciary duty and civil fraud.

[2] For reasons that follow, I have concluded that the evidence fails to demonstrate that the plaintiff's conduct relied upon by the defendant supports either cause for the plaintiff's dismissal or liability in unjust enrichment or civil fraud.

Background

[3] Keddco MFG (2011) LTD. (the defendant) is a Canadian corporation which manufactures and distributes products for companies within the North America oil and petrochemical industry. It has two locations; one in Sarnia, Ontario and one in Edmonton, Alberta. On June 1, 2004, J.P Ruston (the plaintiff), who is known as Scott, began working with the defendant as a sales representative.

[4] In March 2011, the defendant was acquired by Canerector Inc. ("Canerector"). Canerector is a private company located in Toronto which buys and holds business interests focused in metal fabrication and industrial manufacturing. Upon acquisition and upon recommendation of the former owner of the defendant who hired the plaintiff in 2004, the plaintiff was promoted to president of the defendant, referred to as a division manager of Canerector. As president of the defendant, the plaintiff was responsible for the general overseeing of the defendant's operations. Paul Tuzi ("Tuzi") was originally assigned by Canerector to work with the plaintiff as the liaison between Canerector and the defendant. In 2014, Amanda Hawkins ("Hawkins"), the daughter of the owner of Canerector, was employed full time with Canerector. The plaintiff began reporting directly to her and she began analyzing the business of the defendant with a view to improving its profits.

[5] On June 1, 2015 Hawkins met with the plaintiff regarding the operations of the defendant. It was Hawkins' decision to terminate the plaintiff for cause on June 5, 2015.

The plaintiff's narrative

[6] The plaintiff's narrative is one of a proud, loyal and devoted employee, who worked tirelessly to promote the defendant's sustainability and profitability. His talent and experience is limited to sales. He has a grade 12 education. As president, his role was to oversee and manage the operations of the defendant. Given his limited education and training outside of sales in Canada however, the plaintiff relied on his direct reports and deferred to their respective areas of education and expertise. In June 2015 the plaintiff was the president of a company he loved, earning a substantial income with confidence about his future. He was blind-sided and devastated when, without warning or explanation, his livelihood and his future were taken from him with serious but unfounded allegations of fraud. Unless otherwise stated, the following represents the testimony of the plaintiff.

[7] Prior to working with the defendant, the plaintiff was employed in the sales department at Huron Alloys for approximately 25 years. In 2004 Carl Keddy ("Keddy") was the owner and president of the defendant. Keddy called the plaintiff and inquired about his interest in working with the defendant as a sales representative for Eastern Canada. The plaintiff was interested and

joined the company in that role on June 1, 2004. His compensation included a base salary and a bonus.

[8] In 2005 the plaintiff was promoted to sales manager, expanding his responsibility for outside sales to Western Canada. He reported directly to Keddy. At no time while the plaintiff reported to Keddy did he have a role in finance on behalf of the defendant. Rather, the defendant's controller who reported directly to Keddy was accountable for the financial needs of the defendant.

[9] In 2006, the plaintiff assumed the branch manager role for the Edmonton location upon the resignation of its existing branch manager. The role was to be interim but lasted through until 2009 or 2010.

[10] In March 2011, Canerector purchased the defendant. Keddy retired at the time of acquisition and recommended the plaintiff to Canerector for the role as president of the defendant. Canerector accepted the recommendation and named the plaintiff president of the defendant. Canerector also named Tuzi to act as Canerector's liaison between the plaintiff and the defendant. The plaintiff reported directly to Tuzi.

[11] Initially the plaintiff and Tuzi had monthly meetings wherein they would discuss the financial results of the defendant, including the profits of the business. These meetings eventually became quarterly and in early 2014 they occurred less frequently. Shortly thereafter, in June 2014 Hawkins and Jonathon Puddy ("Puddy") replaced Tuzi in the role as Canerector liaison and the plaintiff reported to Hawkins.

[12] In late 2011, Canerector acquired CSP Products ("CSP"), a local competitor of the defendant's based in Edmonton, Alberta. CSP and the defendant merged in early 2012. The merger included CSP's partial ownership interest in a manufacturing operation in India. As president of the defendant, the plaintiff's managerial scope increased. Adriaan Light ("Light"), the former owner of CSP, became the operations manager for the defendant, working out of the Edmonton branch. He reported directly to the plaintiff. The plaintiff had no role however with CSP India. Light managed the operation in India.

[13] In 2013, upon approval by Tuzi, the plaintiff set up Keddco USA in Houston, Texas. Keddco USA became fully operational in April 2014. The US operation served two main purposes for the defendant. It served to broaden the defendant's opportunities in the US market by having a bricks and mortar presence and it supported the contract business in Alberta. The defendant lost two main contracts since its acquisition by Canerector because it did not have a presence in the USA during a time of "Buy America" mentality. The contracts represented $2-3,000,000 in swage and bull plug business which are core products for the defendant.

[14] The defendant and Keddco USA were set up as separate legal entities. The plaintiff, however, was also the president of Keddo USA. It is an agreed fact that despite being separate legal entities, Canerector treated Keddco USA and the defendant as a single unit when it came to

assessing bonuses. It is further agreed that as separate legal entities inventory was transferred to Keddco USA via sales of inventory from the defendant to Keddco USA.

[15] As the concept of selling inventory internationally was new to the plaintiff, Tuzi directed the plaintiff to speak with Rick Sawatzky ("Sawatzky"), a divisional manager of Tornado Combustion Technologies, a Canerector subsidiary that operates in Calgary and Houston that has a similar inventory transfer process. He was also directed to speak to Canerector's tax advisor. The plaintiff was advised that the defendant needed to set up a system of consistent pricing of items of inventory sold and implement the system in a way to ensure that both entities showed a reasonably equal profit. The plaintiff directed Light to coordinate intercompany sales within these parameters.

[16] Krystal Alwood ("Alwood") reported to the plaintiff as controller for the defendant. Alwood was the only controller that the plaintiff worked with as president of the defendant. As a subsidiary of Canerector, the defendant was responsible for providing monthly financial reports to Canerector. Canerector received monthly financial reports sent from and prepared by Alwood about the financials of the defendant including a detailed financial statement. Financial information about Keddco USA was also included. The plaintiff would rarely receive the monthly financial information before it was sent to Canerector. At no time did the plaintiff ask Alwood to change the financial information she prepared.

[17] On June 1, 2015 Hawkins attended at the Sarnia branch to meet with the plaintiff for what he thought were operational issues. On the morning of June 2, 2015 Hawkins and the plaintiff met again at the Sarnia branch. Hawkins asked the plaintiff for a projected year-end profit. The plaintiff told her that he was unable to answer her question on the spot. The brief meeting ended. Hawkins returned to speak with the plaintiff after lunch. Hawkins told the plaintiff to take the week off. The plaintiff asked for the reasons she was telling him to do so but Hawkins responded only with "just do it." The plaintiff went home.

[18] On June 4, 2015, the plaintiff received an alert on his phone notifying him that his email account with the defendant was no longer active. He also received a text from Hawkins directing him to attend a meeting with her the next day at another of the companies owned by Canerector in Sarnia and to bring his company issued keys, lap top and cell phone with him. The plaintiff did as he was instructed.

[19] Hawkins advised the plaintiff on June 5, 2015 that he was being terminated for cause because he committed fraud. The plaintiff asked her what she was referring to and she responded "I think you know." The plaintiff advised Hawkins that he did not know. He asked to go by the office on Saturday, June 6, 2015 to retrieve his belongings, including his mortgage documentation. The request was denied. Hawkins advised that she brought him a box containing his belongings with her. He asked that the expense reimbursements owing to him be paid. He was told they would be couriered to him but when the courier arrived on June 8, 2015, only the mortgage statements were included. The expenses were repaid thereafter. He told Hawkins that she would be hearing from his lawyer. She advised him that it will be a very expensive process.

[20] On June 5, 2015 the plaintiff was provided with a letter notifying him about his dismissal for cause. The letter was silent with respect to any details. The plaintiff had no idea as to the reasons for termination until he received the defendant's statement of defence and counterclaim dated August 5, 2015.

[21] On June 5, 2015 the plaintiff's employment health benefits were terminated. At that time, the plaintiff had completed the first tranche of a two-part dental surgery. The first tranche took place prior to termination and was paid by the defendant's health care provider. The second tranche tool place after June 5, 2015. The claim for reimbursement from the defendant's health care provider for the second tranche was denied and the plaintiff had to pay his dentist over $3,000.

[22] As at June 5, 2015 the plaintiff's three-year average annual earnings amounted to $278,476.08. He was awarded a bonus each year of his employment with the defendant. The plaintiff was without income until December 2015 when the appeal of his denial of employment insurance benefits was successful.

[23] The plaintiff worked diligently to find employment but was unable to do so until October 16, 2016 when he secured a sales position with MAC Weld Machining ("MAC"). The plaintiff left his position on January 13, 2017. He was feeling stressed as he found it difficult to succeed in the workplace environment. The office was over-crowded, there was no parking, it was mismanaged as a family owned company and the owner's son was not open to the plaintiff's ideas to improve its bottom line sales.

[24] The termination has been devastating to the plaintiff. He has not found work since leaving MAC, despite his efforts. He has had to sell his house for $20,000 under market as he required the sale proceeds to live. Further, to sustain a livelihood he has had to access his pension funds and return his leased vehicle three years prior to the natural expiry of the lease.

[25] The plaintiff made every effort to listen to the question posed to him and to answer it. He answered every question posed to him in a direct and straight forward manner. The plaintiff was easily confused however and often unable to answer questions about the financial business of the defendant in a sophisticated manner. For example, the plaintiff was unable to fully explain all line items on the defendant's financial statements, unable to explain in detail the tax concerns of an international inter-related company sale and unable to speak in an informed manner about basic accounting principles. In contrast, the plaintiff had an impressive recall about the products sold by the defendant, the prices and margins of these products and the total sales per year of the company. In my view, having observed the plaintiff throughout his testimony, the described ability was directly related to his years of experience in domestic sales and the described inability was directly related to the plaintiff's lack of education and training in accounting and business administration. I found the plaintiff to be honest and credible and I accept his evidence.

The defendant's narrative

[26] The defendant's narrative is one where the plaintiff's employment was terminated for just cause primarily as a result of a series of inappropriate actions willfully engaged in by the plaintiff for the intended and sole purpose of the plaintiff's own financial gain and benefit. The plaintiff inappropriately manipulated the defendant's financial statements and engaged in several accounting and financial improprieties over a significant and continuous period of time so as to create the illusion of the defendant earning far higher profits than it actually had. The conduct resulted in the defendant providing the plaintiff and other members of the defendant's staff with bonuses it would not have granted had it known the true state of the defendant's affairs. In addition to having cause to dismiss the plaintiff, therefore, the defendant has incurred economic losses causally related the plaintiff's conduct.

[27] Jeffrey Major ("Major"), Vice President Legal Counsel with Canerector testified on behalf of the defendant. I found Major to be honest and credible and I accept his evidence. Major testified that Canerector is akin to an investment company. It has a pool of capital with which it invests in businesses, referring to them as divisions. Canerector takes little or no role in the day to day activities of the divisions but rather relies on its division managers in this regard.

[28] Hawkins also testified of the defendant. Hawkins' father was the CEO of Canerector for over 30 years. Hawkins was involved in the business in some capacity since she was 14 years old. She is a mechanical engineer and holds a master's degree in business administration studies. Hawkins assisted Canerector with a distressed investment in mid-2011. In 2012, she became the Canerector liaison for 12 of its operating businesses. In 2013, Hawkins took over portions of the corporate office. She is now the CEO of Canerector, having been promoted to that position in early 2015 or late 2014. As CEO of Canerector Hawkins supervises the office of Canerector and serves as a member of the board of all of the operating businesses of Canerector. Unless otherwise stated below is the testimony of Hawkins.

[29] Around the time of her promotion to CEO, Hawkins conducted a financial analysis of the defendant in an effort to determine why it was showing such poor results and inferior margins. She wanted to understand: why the current business compared so poorly to its historical performance; why the margins are reducing over; how to achieve profitability in Keddco USA and how to begin to address the inventory, production planning and stocking levels. She presented these issues to the plaintiff for clarification and felt that he was not being truthful in his explanations.

[30] Hawkins therefore asked a division manager from another division of Canerector who also assisted her with Canerector operations, to attend the defendant's Sarnia office. Her main questions were whether the plaintiff was "okay" as a manager, did he require some support, were there any glaring issues of weaknesses that Canerector could address. In an email of May 11, 2015 Hawkins advised this manager that Keddy, the previous owner of the defendant, kept the plaintiff on "an incredibly short leash" and that she was concerned because "for some reasons the combined entity is far inferior to the original Keddco business." She informed him that "Scott is

a former salesman and seems to focus on these aspects, the customer relationships, whims of certain purchasing agents, reducing prices, inventory stocking etc."

[31] Hawkins then sent Major and another employee to the Sarnia branch again to determine why the margins were decreasing and why inventory was increasing. In her email to Major on May 27, 2015 she wrote that "we've heard some strange stuff about Adriaan. The India thing seems a bit bizarre. With the dependence and structure, you think Scott would be focusing on it or at least answering his plant manager's questions."

[32] Still searching for answers in terms of the poor performance of Keddco, Hawkins sent the plaintiff an email on May 28, 2015. She advised the plaintiff that her detailed analysis demonstrates that the defendant's margins have fallen dramatically across the board. She asked "why would prices fall so dramatically relative to material costs? Are we not adjusting prices based on increasing material cost? Or have we reduced prices dramatically over time?" Hawkins admitted in the email that "this is all a bit complicated" and therefore suggested a meeting on Monday, June 1, 2015 to review 2014 summary analysis she prepared.

[33] Hawkins attended the Sarnia branch on June 1, 2015. She had a discussion with the plaintiff and told him that she wanted to personally investigate the business of the defendant. She felt that the plaintiff was not answering her questions and was being both evasive and nervous. Specifically, Hawkins asked the plaintiff about pricing and margins but instead of answering her he brought her to his staff at the order desk and walked away. At the end of the day Hawkins met with the plaintiff and the branch manager. The plaintiff and the branch manager began to argue heatedly so she suggested that they should all go home and return in the morning.

[34] Hawkins sent the plaintiff an email that evening at 7:01 p.m. She advised that she would ponder the overhead allocations and any additional information required for margins. She wrote:

> I do have to say that I thought the warning I gave surrounding margins, accounting practices and inventory wasn't responded to. I gave a few concrete issues and offered bonus [for 2014] only on your promise that they would be addressed. It seems this was misplaced and without greatly improved performance we will not be able to offer further bonuses.
>
> […]
>
> I'd like us to work together as a team to solve these problems. I feel it's a shame that we did not get a handle on the business issues during better market conditions, since now we have limited resources, and preparing for the market downturn and understanding our cost structure has now become very important…We can discuss further tomorrow.

[35] The next morning, however, on June 2, 2015, Hawkins asked the plaintiff to take a few days out of the office so she could dig into the financial records and get the answers to her

questions. At this time, the plaintiff offered to take a reduced role in the business as a sales person. Hawkins thanked him but said that she still needed to investigate.

[36] Hawkins continued to speak in detail with the employees of the defendant. She analyzed the accounting of the defendant. Hawkins decided by the end of the day June 4, 2015 that the plaintiff could not continue as an employee of the defendant because: he had lied to her; he made misrepresentations to her; he manipulated the financial results; he was not fulfilling his role as president; and that he created a toxic work environment. Considering "the grave harm" caused to the business suspension or performance coaching were not options. The plaintiff's actions were intentional, he had lied to her and his actions hurt the business.

[37] In an email to her father however on June 3, 2015, Hawkins outlines a number of her issues and concerns with the plaintiff and his continued employment with the company. The email is silent with respect to lying to the plaintiff lying to her or engaging in conduct amounting to misrepresentation, fraud or misappropriation. Rather, her reasons for concern about the plaintiff were strictly related to performance and nonfinancial misfeasance. When this fact was put to Hawkins during cross examination, Hawkins testified that this was just an update email to her father from a particular day and that her father was already aware of the financial and fraudulent issues concerning the plaintiff. I do not accept this testimony. The email communications from or to Hawkins filed as evidence in this case were detailed and voluminous. There is no communication from Hawkins to her father reflecting financial or fraudulent issues concerning the plaintiff. Further, the evening before Hawkins sent an email to the plaintiff suggesting they work together to meet the needs of defendant. It defies logic therefore to accept Hawkins referenced such serious concerns to her father verbally prior to June 3, 2015 and still wanted to work together with the plaintiff on June 2, 2015. It is far more probable that Hawkins did not reference lying, misrepresentation, fraud or misappropriation in an email to Mr. Hawkins, the Chairman of Canerector, concerning the plaintiff's continued employment as president of the defendant because her concerns as of June 3, 2015 were restricted to performance and nonfinancial misfeasance.

[38] On June 5, 2015 Hawkins sent an email to Light, who was the contact for the defendant's internet and cell provider, to disconnect the plaintiff's extension and have his email account transferred to her on June 5, 2015. Light confirmed that this was done as requested by email at 1:09 p.m. on June 5, 2015.

[39] Hawkins met with the plaintiff on June 5, 2015 at the offices of another division of Canerector located in Sarnia. Bill Nichol, Chief Operating Officer, was also present. Hawkins told the plaintiff that he was being terminated for cause and that she believed he committed fraud. She did not get into the details. She believes that the time of termination is "a bad moment to have discussions about thing in the past."

[40] Hawkins provided the plaintiff with his belongings from the Sarnia branch. Upon his request, she committed to forwarding him his mortgage information, left at the branch and providing payment of his stated outstanding expenses. Hawkins took steps to expedite the

payment of the plaintiff's expenses and was advised of the details from the accountable employee by email of June 11, 2015.

[41] Hawkins acted as the division manager of the defendant for one year, commencing immediately following the plaintiff's termination. During this time, she completed a detailed analysis of the business. The defendant's loss for the year ending 2015 was over $3,000,000. Bonuses were not paid for the 2015 year but for a special bonus to one employee considering his efforts in assisting Hawkins implementing business corrections. Today the business is doing a lot better; it has reduced costs, fixed pricing and improved performance. The inventory levels are half of what they were at the time of purchase. Keddco USA was profitable for the first time in 2017 and bonuses were paid to the employees in each of 2016 and 2017.

[42] Hawkins testified that she advised the plaintiff that if he sued the defendant, the defendant would counterclaim because he caused them a large amount of damage. She admitted that the defendant would not have counterclaimed against the plaintiff had the plaintiff not caused this proceeding to be commenced. Plaintiff's counsel asked Hawkins if she had said the same thing to Light at the time of his termination from the defendant. Hawkins testified that she did not say the same thing to Light, namely that if he did not sue the defendant, the defendant would not counterclaim for damages against him. At her examination for discovery held on April 14, 2016 however, Hawkins deposed that she did tell Light the same thing; namely that if he commenced a proceeding for wrongful termination, the defendant would counter-claim for damages.

[43] Hawkins's extensive experience, training and education in business administration and the operations of Canerector was demonstrated by her testimony. She has a text book ability to absorb, understand and explain financial information. Hawkins schooled the court on specific line items of the defendant's respective balance sheets and income statements, providing sophisticated analysis on the interplay between each item and its ultimate effect on net profit. Hawkins was not forthright, however, in responding to questions from the parties' respective lawyers. Instead of directly answering the question, she attempted to determine its purpose and answered in a way that advocated the defendant's narrative. Hawkins presented to the court, therefore, as a witness who testified to what she believed the court needed to hear for the defendant to win its case and not to the truth of the direct question posed to her. The credibility of her evidence therefore cannot be accepted by the court. In my view, it is properly tested against and corroborated by objective documentary evidence prior to its acceptance.

The defendant's evidence

[44] As noted above, the defendant called only two fact witnesses, Hawkins and Major. Neither Hawkins nor Major had any experience with the day-to-day operations of the defendant until after the plaintiff's termination. In the end, the court was without the evidence from individuals with direct knowledge of the facts relied upon by the defendant in response to the claim and in support of its counter-claim.

[45] It is unclear why the defendant chose not to put evidence before the court through fact witnesses who would have the knowledge of the facts relevant to the issues before the court. It would have appeared to have been its intention as of the first pre-trial on November 1, 2016 when the defendant introduced a list of 25 witnesses it intended to call, requiring the scheduled trial date to be adjourned, including Krystal Allwood (Controller for Keddco), Ken Udit (Treasurer for Canerector), Bill Nichol (Chief Operating Officer for Canerector), Martin Hudson (Vice President Finance for Canerector), Jeremy Martin (Keddco Sales Manager – Edmonton), Heather Kozak (Human Resources for Keddco), John Perz (Production Manager – Keddco Sarnia), Fabian Desrosiers (Order desk – Keddco Edmonton), Kim Searson (Keddco Sarnia Reception), Jonathan Puddy (former Canerector Liason), Lisa Bidtnes (Quality Assurance, Keddco Sarnia), Cameron Clark (Keddco Sarnia Order Desk), Mark Sorge (Shop Foreman, Keddco Sarnia), Dick Page (Former Keddco General Manager – retired), Ian Shields (Former Quality Assurance Manager, Keddco Sarnia – retired), Mike Koolen (former Keddco Production Manager – quit), and Adriaan Light (former owner CSP and Keddco Edmonton branch Manager).

[46] The defendant reduced their witness list to 18 witnesses by the second pre-trial on November 28, 2017, removing Cecil Hawkins and Fabian Desrosiers. The witness list was further reduced to 15 by December 20, 2017, although both Cecil Hawkins and Fabian Desrosiers were again included. Fourteen days before trial the defendant reduced their fact witness list to five witnesses including Krystal Allwood, Jeremy Martin (Sales Manager, Keddco Edmonton branch) and Fabian Desrosiers. During the trial however, the defendant advised the court and the plaintiff (for the first time) that it would be calling only two fact witnesses; Hawkins and Major.

[47] Direct evidence of Allwood, Udit, Nichol and Hudson with respect to accounting measures would have assisted the court in examining the defendant's claims in fraud and misrepresentation. Similarly, the evidence of Light, Martin and Desrosiers, would have assisted the court in examining the defendant's claims concerning inventory practices and inter-company sales.

[48] The defendant offered no explanation as to why the noted individuals, who were certified as being available for trial, were not called as fact witnesses despite knowledge of the relevant issues as demonstrated by emails attributed to them and filed as evidence during the trial. I agree with the plaintiff that such failure amounts to an implied admission that the evidence of the absent witnesses, particularly Allwood, Light, Martin, Nichol, Hudson, Udit, Clark, Martin and Desrosiers, would not support the defendant's position: see John Sopinka, Disney L. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2d ed (Toronto: Butterworths, 1999) at para. 6.321.

Issues

[49] During the course of the trial, the parties came to an agreement on the issues as presented by the claim and the counter-claim. During a post-trial case conference, the defendant advised that it would not be pursuing the following issues:

1. Disbursement by the plaintiff of company funds for his own personal benefit;
2. All accusations related to the plaintiff's performance as cause for termination; and,
3. A calculation of damages for the purposes of the counter-claim.

[50] The defendant has also decided not to pursue its claim for punitive damages or its claim that the defendant breached any fiduciary duties owed and made no submissions in this regard in its closing submissions.

[51] The issues before the court therefore are properly described as follows:

1. Whether the defendant had cause to terminate the plaintiff.
2. If the defendant did not have cause to terminate the plaintiff, what is the appropriate notice period owed to the plaintiff and what is the calculation of damages during the notice period?
3. If the defendant did not have cause to terminate the plaintiff, whether the plaintiff is entitled to punitive, aggravated and/or moral damages based on the nature of his termination, accusations of civil fraud and resulting litigation.
4. Whether the defendant has met its onus of proving the plaintiff engaged in conduct amounting to civil fraud. If so, what are the associated damages?
5. Whether the defendant has met its onus of proving that the plaintiff was unjustly enriched by receiving a higher bonus than would otherwise have been paid to him. If so, what are the associated damages?
6. Whether the defendant has met its onus of proving that the plaintiff breached the fiduciary duties he owed to the defendant.

Analysis

1. Whether the defendant had cause to terminate the plaintiff

[52] An employer has just cause for summary dismissal where the employee's dishonesty gives rise to a breakdown in the employment relationship: *McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 S.C.R 161, at para. 48. The evidence must first demonstrate the dishonest conduct on a balance of probabilities, and second, that the nature and degree of the dishonest behaviour warranted dismissal: *McKinley*, para. 49. Iacobucci J., writing for the Supreme Court in *McKinley*, noted at para. 48 that the breakdown in the employment relationship can be articulated in various ways: "just cause for dismissal exists where the dishonesty violates an essential

condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

[53] In Ontario, courts focus on whether the employee's behaviour was sufficiently serious to undermine the core of the employment relationship: *Fernandes v. Peel Educational & Tutorial Services Limited (Mississauga Private School*), 2016 ONCA 468; citing *Dowling v. Ontario (Workplace Safety and Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.). The Court of Appeal for Ontario at para. 105 in *Fernandes* provides the following analytical framework to determine whether the employer had just cause to dismissal an employee:

1. Determine the nature and extent of the misconduct and assess its seriousness.
2. Consider the surrounding circumstances of the employee and employer.
    - *i.* For the employee that includes his or her age, employment history, seniority, role and responsibilities.
    - *ii.* For the employer, this includes to "the type of business activity that the employer engages in, any relevant employer policies or practices, the employee's position within the organization, and the degree of trust reposed in the employee": *Fernandes* at para. 114; citing *Dowling* at para. 52.
3. Decide whether dismissal was warranted in light of the two steps above.

[54] To establish that the plaintiff's conduct was sufficiently serious as to justify dismissal with cause, the defendant submits the following conduct of the plaintiff amounts to cause for his dismissal:

(a) Manipulation of the financial statements in that he engaged in the following:

i. The unwarranted reversal of inventory reserves;

ii. The inappropriate realization of profits by the defendant on product sourced from India intended for Keddco USA; and

iii. The inappropriate realization of profits on transfers of inventory from the defendant to Keddco USA.

(b) Negligence and/or willful blindness relating to the alleged purchasing of excess inventory.

[55] For reasons set out below I have concluded that the defendant did not have cause to terminate the plaintiff. The evidence fails to demonstrate that the plaintiff engaged in the conduct the defendant relies upon to establish cause. Further, the information relied upon by the defendant to demonstrate the plaintiff's inculpatory conduct was known to the defendant in January 2015. There was no talk by the defendant of intentional acts committed by the plaintiff for his own benefit or cause to terminate the plaintiff at this time. Rather, Hawkins provided the plaintiff with a bonus for the 2014 business year and expressed her commitment to work with the

plaintiff to improve the business of the defendant. Four days prior to his termination, Hawkins again expressed her intention to work with the plaintiff as a team to solve the problems the defendant now identifies as evidence of its cause to terminate the plaintiff. Two days prior to his termination in an email to her father about her concerns with the plaintiff Hawkins is silent with respect to any conduct of the plaintiff amounting to fraud or misfeasance. On the day of the termination, Hawkins remained without any details to offer the plaintiff as to the cause for his termination.

[56] The defendant may have had its reasons to terminate the plaintiff. Hawkins described the plaintiff as difficult. The plaintiff had been negatively vocal during a general managers' meeting in December 2014. Hawkins's email to her father on June 3, 2015 outlines personality issues. These reasons do not amount to cause for dismissal. Moreover, the defendant does not rely on any of these issues to establish cause. Rather, it relies on a theory it cannot link to the plaintiff's conduct and it relies on information well known to the defendant months before the plaintiff's termination. It appears therefore on a balance of probabilities that the defendant's narrative was developed after the plaintiff's termination when the plaintiff failed to forego his right to sue for wrongful termination to avoid the defendant's counterclaim for significant damages.

a. Manipulation of the financial statements

[57] The issue before the court is whether the plaintiff orchestrated the defendant's business in such a way to ensure that a higher than actual profit was reflected in the financial statements such that a higher than actual bonus would be payable. The defendant has not satisfied its onus in proving on a balance of probabilities that the plaintiff engaged in this conduct. The evidence demonstrates that the financial statements were prepared by the controller, with input and training from Canerector, that Canerector received a detailed monthly financial package from the controller and that the financial records of the defendant clearly reflected the numbers the defendant now attributes to the self-interest of the plaintiff.

(i) The unwarranted reversal of inventory reserves

[58] The defendant states that it had cause to terminate the plaintiff because of an inventory reversal that took place in 2014 after an email between the plaintiff and Martin Hudson, copied to Ken Udit. Neither Martin Hudson not Ken Udit gave evidence at trial.

[59] This section reviews the following three aspects of the business: the role of the controller, the oversight by Canerector, and the inventory and the bonus pool.

The role of the controller

[60] Major testified that while the controllers of each division report to the division mangers, there is an obligatory dotted line reporting directly to Canerector. The controllers of all divisions owe a duty to Canerector to responsibly report the financial status of the division to it on a monthly basis. Hawkins confirmed that Canerector relies on the monthly financial information generated by the operating businesses to assess the financial situation of its investment.

[61] Hawkins further testified that the controllers for each of the divisions met together with Canerector's VP of finance every 18 months to 2 years for further training. The controllers for each of the division use Canerector's proprietary accounting system. All controllers have the ability to reach out to a representative of Canerector to discuss questions or concerns over financial issues.

[62] Every December Canerector held a meeting with all of its division managers. Mr. Hawkins sent an email to all division managers on December 8, 2014, after the meeting. He wrote in relevant part that he could not help but reflect the tension in the forum during Bill Nichol's presentation (Nichol has recently been promoted to oversee the controllers). Another relevant portion reads: "there was quite a bit of commentary at the meeting on controllers and their relationship to corporate office. I would encourage you to reflect on why corporate office feels the need to reinforce to controllers their duty in preparing financial statements."

[63] The plaintiff asked a question during Bill Nichol's presentation related to who was in charge of inventory; the division managers or the controller. Mr. Hawkins interrupted the plaintiff's question to advise that both the division manager and the controller had a role in managing the inventory. The plaintiff testified that he believed that the above noted comments however were not solely related to him as other division managers had similar questions about the role of their controllers. He further explained that his interruption referred to a specific incident wherein he had address and gave direction about the handling of a piece of inventory that had been produced in error and instead of accepting his way forward Alwood asked multiple questions about the piece of inventory to multiple parties.

[64] Chuck Hartwig, a division manager for another of the operating businesses of Canerector also asked a question during Nichol's presentation. He was terminated immediately after the December 2014 meeting.

[65] Hawkins admits that the plaintiff's outburst at the managers meeting caused concerns.

The oversight by Canerector

[66] Major and Hawkins both testified that that Canerector takes a hands-off approach to its operating businesses and relies on the division managers of each operating business to run the day to day operations of the business. The evidence reflects however that through the liaison and the respective board of the operating business, Canerector is provided with thorough and extensive financial information about each operating business.

[67] As noted above, the controller of each operating business prepares a monthly financial package. Alwood prepared these packages on behalf of the defendant. Major testified that the monthly financial packages serve only one purpose; to ensure that Canerector receives a clear picture of the financial status of each division for the purposes of assessing how Canerector as a whole is doing financially. Major further testified that the monthly financial packages contain a

lot of information including an income statement, balance sheet, inventory report, report on accounts payable/receivable (summary and detailed), jobs report and sales summary report.

[68] Major described the monthly financial reports as extensive. Hawkins described the monthly financial reports as detailed.

[69] At year end, Canerector is provided with the financial working papers of each of its divisions and Canerector approves the year end financials of each of its divisions.

Inventory and the bonus pool

[70] In 2011 Cecil Hawkins authored a document with respect to corporate culture. Hawkins testified that the purpose of the document is to describe in broad stokes how Canerector operates and that it is given to the division managers of operating businesses upon acquisition by Canerector.

[71] In the 2011 document, Mr. Hawkins informs that the company's bonus plan is not tied to any indicator except profit. The document further describes that the bonus pool is 15 percent of the division's yearly pre-tax profit net of head office fees and putative loan interest. The bonus pool is described as a specific calculation by formula without discretion. However, Mr. Hawkins goes on to explain that each division is encouraged to create a reserve and hold back a small portion of the bonus pool to cover what he describes as "bad years."

[72] Both Major and Hawkins testified to yet another discretionary aspect of the bonus pool calculation, beyond the creation of a reserve. The Canerector liaison has the ability to add or take away certain items of the bonus pool calculation such as the inventory reserve or depreciation on a one-time basis depending on what is fair for a particular division. Hawkins explained that the purpose of the one-time adjustments is to eliminate windfalls or temporary hits that would untie the bonus payable from the actual financial performance of the operating business. Such decisions are made by the Canerector liaison in conjunction with the CEO. It is the liaison's responsibility to ensure that the bonus pool is appropriate for the respective division.

[73] Once the bonus pool is settled, discussions commence between the liaison and the division manager in terms of allocation. The division manager receives the largest bonus (usually one third to one half of the bonus pool) and has the ability to allocate the remaining bonus pool amongst his staff based on their level of responsibility and job function.

[74] The plaintiff admits that he understood the Canerector bonus formula for the most part. He knew that higher profit meant a higher bonus.

[75] In the 2011 document referenced above document, Mr. Hawkins instructs as follows:

> Private companies want to make as much profit as possible but we try to keep as much of it as we can. This means structuring our affairs so that we can reduce our taxes.

[…]

> There is a lot of flexibility in inventory valuation. Public companies are very reluctant to write down their inventory because it reduces profit. We embrace such reserves, because in Canada at least they reduce taxes which would otherwise be payable.

[76] The inventory reserve comes out of the net profit. The net profit would be lower the higher the reserve number is. The bonus pool would therefore be smaller if the inventory reserve is higher.

[77] The plaintiff's testimony is that the goal for the defendant is to maintain inventory as low as possible but not too low to impact the servicing of customer demands. Ideally a company wants to sell and replace their inventory four times annually with an intention to sell more inventory in a year that it carries and to sell it as quickly as possible to realize the greatest profit. He states that the direction to set the inventory reserve for the purposes of affecting the available bonus pool was at all times controlled by Canerector.

[78] The first bonus payable to the plaintiff based on the Canerector bonus formula was the 2011 bonus, payable in 2012. Prior to payment, the plaintiff sent Tuzi two emails requesting that an exception be made for him and his staff when applying the Canerector bonus formula. Specifically, he asked that the depreciation that resulted solely and directly from Canerector's asset purchase of the defendant and CSP be added back to the calculation of net profit for bonus purposes (the depreciation add-back). Tuzi agreed and recalculated the profit of the defendant for bonus pool purposes with the depreciation add back. The depreciation add-back increased the bonus pool available to the plaintiff and his staff in the following manner in 2012 and 2013 respectively:

- 2012 – from $168,662.51 based on the Canerector bonus formula to $286,677 based on the depreciation add back
- 2013 – from $29,451.48 based on the Canerector bonus formula to $136,587 based on the depreciation add back

[79] On November 19, 2013, Jeremy Martin, the sales manager from the Edmonton branch, reached out to the plaintiff to highlight the fact that a significant amount of the CSP inventory remained unsold and recommended that the inventory be written off or returned to its manufacturer for credit. On December 9, 2013 Alwood provided the plaintiff with three different slow-moving reports of the CSP inventory for his review; slow moving as at October 26, 2013 for inventory with less than two turns since January 2011, slow moving as at November 30, 2013 for inventory with less than one turn since January 2011 and a spreadsheet analysis of the CSP inventory that remained in stock at November 30. The analysis demonstrated that the total value of CSP inventory at the time of acquisition was $1,898,706.88. The defendant had accounted for an inventory reserve of $375,000. At almost two years post acquisition however, $763,184.72 in valued inventory remained from the initial purchase.

[80] In an email dated December 16, 2013 the plaintiff advised Martin Hudson that he was comfortable with keeping a $120,000 reserve against inventory. The plaintiff did not mention the concerns raised by Martin. I accept his evidence that Martin was an industrial salesman so he has limited familiarity with the CSP branded inventory. The plaintiff felt that Martin was not putting enough effort into selling it and he terminated Martin shortly after the November 2013 emails. By email dated December 19, 2013 Hudson advised that he decided that the reserve against inventory should properly be fixed at $250,000.

[81] In an email form Hudson to the plaintiff dated January 9, 2014 Hudson suggests an inventory reserve of $250,000 and asks the plaintiff if he had time to discuss what would be a good reserve. The plaintiff responds by email dated January 10, 2014 informing that the defendant is different than most Canerector divisions in that it is not a job shop. He suggests an inventory reserve of $200,000. By email of the same day Hudson thanks the plaintiff for his recommendation, advising him that is "sounds reasonable." The plaintiff's 2014 bonus was therefore $95,337.

[82] In an email from Hawkins on May 30, 2014 to general managers she writes in relevant part that the company must re-examine its policy on inventory. The plaintiff expressed his concerns that a change in policy would result in an increase in inventory reserve which would negatively impact the bonus pool. Hawkins assured the plaintiff by email dated June 24, 2014 that "we're free to make any adjustment for bonus purposes based on the scenario and details. What I'm hoping to get away from is the accountants making these judgment calls and constant arguments with the divisions."

[83] In an email from Hudson on June 24, 2014 to all controllers he set out the changes to Canerector's accounting policies effective June 2014 month end, including a change to the treatment of aged inventory. Specifically, for the purposes of controlling holding onto inventory for too long, new accounting procedures would be implemented to reduce the value of inventory by 25 percent if it were one year old, 50 percent for 2 years, 75 percent for 3 years and 100 percent for 4 years. Alwood forwarded this email to the plaintiff as an FYI. Hawkins testified that the controllers of the operating businesses were accountable to implement this policy.

[84] The plaintiff responded to the email the same day advising Hudson that:

> [T]he inventory provision formula makes no sense with regard Keddco. We are not a job shop like most of the other divisions. Inventory is the lifeline of our business. To write it down by the amounts in place and then add back overstated profit margins when sold will dramatically change our ability to track margins.

[85] Hudson responded to the plaintiff the same day, writing:

> In your case the current Keddco inventory aging would suggest increasing the provision significantly as you have significant values in the less than 1 and less

> than 2 years categories. At the moment, you have no inventory per the aging greater than 4 years. The intent to write down actual products was intended for the greater than 4 year category. As such it should not impact your ability to track margins at a product level… I realize this may be an impact in the current year if the inventory aging does not improve but the policy does apply to all and the problem of excessive inventory needs to be addressed.

[86] The plaintiff admits that he understood that commencing in 2014 Canerector had a mandatory policy with respect to inventory, that it viewed inventory negatively and that Canerector wanted everyone to account for inventory that was sitting in the warehouse for too long. He further understood that he knew that the new policy would reduce profit on the income statement and would therefore decrease the bonus pool.

[87] In his email of December 8, 2014 to division managers, Mr. Hawkins wrote in relevant part:

> We expect your income statement and balance sheet to very conservative. If divisions have receivables outstanding for more than 120 days, or inventory which has sat around for years, or problem contracts for heaven's sake take the appropriate provision. Don't require Bill, Amanda or me to come knocking and tell you to do the right thing. This is not only required by generally accepted accounting principles but it is also fair play and ethics. The bonus should not be consciously "gamed" In any way. If it is, the offending division manager will be terminated.

[88] By email on January 29, 2015 to the plaintiff, Hawkins advised the plaintiff that for reasons stated therein the bonus pool would be only $61,000 significantly lower than previous years. She advised that there were a couple of factors that the defendant in a tough spot for bonus purposes. Specifically, she noted that it was a shame that in 2013 there was no reserve assigned, the depreciation was over-credited and that there was an inappropriate reversal of inventory that helped to increase the bonus in 2013, a down year. Hawkins expressed her concerns with the business of the defendant as follows:

a. why does the current business compare so poorly to its historical performance;
b. why are margins reducing over time;
c. how do we get USA to profitability; and
d. how can we begin to address the inventory, production planning and stocking levels.

[89] After receiving the email, the plaintiff met with Hawkins. Hawkins reconsidered the calculation of the bonus pool upon discussion with the plaintiff. For the purposes of the 2014 bonus she agreed to put Keddco USA's loss to the reserve, add back $250,000 more in depreciation for a total of $450 ,000and add back $100,000 more in inventory for a total of $300,000. Hawkins testified that the plaintiff learned that she was not going to include the loss to Keddco USA in the bonus pool when she advised him by email in February 2015 of her revised

bonus calculation. The add-backs increased the 2014 bonus pool from $61,000 to $163,986.64. The plaintiff's 2015 bonus was $98,897.

[90] Hawkins further advised the plaintiff that going forward "I think we're aware of how decreases in the inventory reserve will be viewed as wells as depreciation." The plaintiff testified that he understood this to mean that there would be no add-backs in calculating the 2015 bonus and that it would be calculated by "the book."

[91] Hawkins testified that she told the plaintiff at this time that he could no longer be aggressive with the accounting as he had done for the purposes of the 2013 bonus.

[92] In March 2015, upon reviewing the financial information from February 2015, Hawkins learned that CSP branded inventory in bulk became a year older every January 10, the anniversary of the purchase of CSP by Canerector. She sent an email to the plaintiff asking "what is this inventory and why is it so difficult to move?" She questioned whether it would be better to scrap the inventory or sell it at a discounted price. The plaintiff provided Hawkins with the details of the inventory advising that he "would like to try to sell these products at a reduced price before we disposition them. The slowdown in the oil patch certainly isn't going to help but I can't say honestly that these products are unsellable at this point." He requested the bulk of the year to try and sell the CSP inventory informing that "the sales force is focused on these items given the slowdown and I would like to give them opportunity to move these and reduce the potential loss to the company."

[93] In an email from Hawkins to Major on May 20, 2015: "An argument in favour of Scott is that the CSP deal seems to be our absolute worst." I am not sure Scott was well placed to handle the transition. Perhaps we've shouldered Scott with a terrible burden." And on May 21, 2015 Hawkins wrote that she "feels that Scott has a weakness in understanding his statements."

Findings regarding the defendant's argument that the plaintiff manipulated financial statements

[94] The defendant's position is that the plaintiff was terminated for cause because of his conduct in effecting an unwarranted inventory reversal for the purposes of the 2013 bonus payable in 2014 (the 2013 inventory reversal). The defendant has failed to establish the unwarranted inventory reversal as cause for the plaintiff's dismissal. I make this conclusion for the following reasons taken together:

1. Neither Martin Hudson nor Ken Udit who made the decision to reverse the inventory were called to testify.

2. Mr. Hawkins informed all of his operating businesses that "there is a lot of flexibility in inventory valuation."

3. I accept the plaintiff's evidence that as of December 2013 he believed that the CSP branded inventory remained saleable if directed efforts were put into selling it.

4. Hudson, who was provided with detailed financial information of the defendant, believed the inventory reversal "sounds reasonable." As the VP of Finance for Canerector, it was Hudson who made the decision on the 2013 inventory reversal.

5. Canerector changed its policy on inventory in May 2014, for all of its operating businesses, not just for the defendant.

6. Hawkins learned of the 2013 inventory reversal and believed that the 2013 inventory reversal was inappropriate as early as January 2015 upon her specific and informed analysis of the financial information of the defendant. She nonetheless made the decision not to terminate the plaintiff but to reverse the inventory in 2015 for the purposes of the 2014 bonus, thereby significantly increasing the amount of the plaintiff's 2014 bonus.

7. Hawkins learned of the issue with the CSP branded inventory in March 2015. I accept the plaintiff's evidence that at that time he directed the sales team to focus on these items and sell them in order to reduce the potential loss to the company. He asked for the end of the year to achieve the desired sales but was not permitted to do so as he was terminated in June 2015.

8. There was no indication that the 2013 inventory reversal was the reason for the plaintiff's termination until the defendant served the plaintiff with his statement of defence and counter-claim.

(ii) The inappropriate realization of profits by the defendant on product sourced from India intended for Keddco USA

[95] Included in the acquisition by Canerector of CSP was partial ownership of a manufacturing operation in India. Keddco USA acquired some of its inventory from India. The defendant submits that the sale of these products was accounted for first as a sale of inventory from India to the defendant and then as a sale of inventory from the defendant to Keddco USA. The defendant's position is that the plaintiff was terminated for cause because of his conduct in effecting the accounting of the sale of inventory from India to Keddco USA through the defendant when the inventory was transferred directly from India to Keddco USA. The defendant has failed to establish the realization of profits by the defendant on product sourced from India intended for Keddco USA as cause for the plaintiff's dismissal. I make this conclusion for the following reasons taken together:

1. I accept the plaintiff's uncontested testimony that as Light had previous experience with manufacturing products in India he was responsible for sourcing product from India for Keddco USA. Light initiated all transfers of inventory

from India and made all the decisions about the content of the purchase order including pricing and shipping.

2. Light was not called to testify at trial.

3. I accept the plaintiff's uncontested testimony that he never dealt with orders for Keddco USA from India or the pricing or the shipping those orders.

4. Hawkins testified that she had no reason to believe that the plaintiff ever dealt with orders for Keddco USA from India or the pricing or the shipping of those orders.

5. Hawkins testified that Light was the one responsible for pricing the transfers of inventory to Keddco USA.

6. There is no evidence (ie. the invoices) demonstrating that the transfers occurred as alleged.

7. There is no evidence of the price lists that Light created.

8. There was no policy in terms of how the transfer of inventory from India to Keddco USA were to take place.

9. I accept the uncontested evidence of the plaintiff in terms of the business reason for the transfer of inventory through Canada to ensure pricing consistency because the CSP India inventory was cheaper than the inventory coming from Canada.

10. The defendant has not pointed to a particular accounting rule that was offended by the transfer of inventory through Canada.

(iii) The inappropriate realization of profits on transfers of inventory from the defendant to Keddco USA

[96] Keddco USA was incorporated in 2013. It was fully operational by April 2014. Its establishment was the plaintiff's idea. I accept his testimony that he believed that a presence in the USA would assist to support the business in Canada and attract new business in the USA.

[97] The defendant's position is that the plaintiff was terminated for cause because of his conduct in effecting the realization of profits on transfers of inventory from the defendant to Keddco USA. The defendant supports its positon in part by the defendant's profit margins for the year ending December 2013 noting that the defendant earned a profit margin on its sales of inventory to Keddco USA more than its average sales margin for the year. The defendant has failed to establish the realization of profits on transfers of inventory from the defendant to

Keddco USA as cause for the plaintiff's dismissal. I make this conclusion for the following reasons taken together:

1. I accept the plaintiff's uncontested testimony that he authorized the sale of inventory from the defendant to Keddco USA by instructing Light to sell $500,000 in inventory from the defendant to Keddco USA. For tax purposes, he directed Light in accordance with the guidance he received from Canerector; to keep the sale prices consistent and to set the prices in a manner that would have both entities realize a similar profit. All other details were left to Light's discretion including the specific inventory items to be sold and the respective cost of sale.

2. Light did not testify at trial.

3. On January 31, 2014 Light sent the plaintiff an email about the price structure he was planning to employ for Keddco USA. The plaintiff responded by email February 5, 2014 advising Light that "it looks good" as he does not have "a feel for the US market yet so we will see how it goes and reevaluate at year end." The plaintiff's testimony was that he was unsure if Light was referring to how he was going to price sales from Keddco USA or the sale of inventory between the defendant and Keddco USA.

4. After the plaintiff's termination, Major immersed himself in the business of the defendant to better understand its status and infuse both stability and potential for growth. It was his impression after speaking with Light and others about Light that Light was unethical and he would not trust him.

5. I accept the plaintiff's uncontested testimony that some of the products sent to the US market were at a higher gross margin than other products that the defendant sells in Canada as the margins in the US market are higher.

6. I accept the plaintiff's uncontested testimony that it is not fair to compare average profit margins of sale as different products sell as different margins. There is no evidence of the domestic profit margins on the sale of the specific items transferred to Keddco USA.

7. There is no evidence before the court in terms of what profit margin is expected for each specific item, only that all items have different sales margins.

8. I accept the plaintiff's uncontested evidence that some products sell at a 50 to 60 percent profit margin while others are as low as 26 percent.

9. The financial information reflects at least one product that was sold from the defendant to Keddco USA at a negative margin.

10. There was no policy in place directing that the intercompany sales be transferred at a specific profit margin.

11. The intercompany sale of inventory was reflected in the monthly financial information reviewed by Canerector.

12. Hawkins conducted a detailed financial analysis of the defendant in January 2015. The financial documentation she reviewed reflected the volume of intercompany sales of inventory. Hawkins testified that she was not aware of the volume of sales between the defendant and Keddco USA as the income statement reflected intercompany sales to all of Canerector's divisions. I do not accept this testimony. Hawkins testified that at this time she also reviewed the financial information of Keddco USA. The income statement of Keddco USA reflected the purchase of inventory consistent with that reflected as intercompany sales from the defendant. There is no evidence of misrepresentation by the plaintiff in terms of the 2014 financials about what portion of Keddco Canada's sales were made up by the intercompany transfers.

13. On April 7, 2015, Hawkins emailed the plaintiff to inquire about his thoughts and projections for the US operation. She asked him about the odds for achieving profitability in the short term and what the losses might look like until this achieved. She questioned "are we throwing good money after bad considering the market? At what point should we sit back and evaluate?" the plaintiff responded informing that "our plan is to reach profitability by the 4th quarter and beyond." He further informed "my plan is to evaluate progress in September regarding staff and efforts. At the year-end we can evaluate the branch. Remember the branch has only been open and fully operational for 1 year." The plaintiff was terminated prior to September 2015.

14. I accept the plaintiff's uncontested testimony that there was a plan in place to secure a customer in the US who would be interested in purchasing the products transferred.

15. I accept the plaintiff's uncontested testimony that the products sold to the US market were more suited for sale in that market so he is not surprised that they were transferred to Keddco USA.

16. The defendant and Keddco USA are separate entities that are accounted for as one entity for bonus purposes. Both parties retained experts to testify at trial. Both experts agree that in consolidated statements the intercompany transfers would be cancelled out. While the transfer of inventory to Keddco USA would result in a profit more immediately on the income statements of Keddco over time once the inventory was sold there would be a corresponding loss to Keddco USA. Hawkins agreed that she had no indication that the plaintiff was going to leave

Keddco. I accept the plaintiff's evidence that he had no intention to leave the company.

17. The plaintiff only learned in February 2014 that Keddco's USA performance would be forgiven for the calculation of the 2014 bonus. There is no evidence that he sought to have Keddco USA losses to be excluded.

18. The plaintiff agrees that sale of the inventory to Keddco USA increased the profit to the defendant as it would be recorded as a sale by the defendant such that the income statement would reflect the marginalized profit. Further, the aging inventory would not be subject to a write down based on the mandatory inventory rules put in place in June 2014. The same inventory however, now owned by Keddco USA would not decrease the profit of Keddco USA as it would appear on the balance sheet as an asset. The end result would be an increase in the profits shown by the defendant in a year with no corresponding decrease in the profits shown by Keddco USA in the same year and ultimately an increase in the base number payable for bonus purposes for the plaintiff and his staff. I accept the plaintiff's testimony that this was an unintended side effect of providing Keddco USA with inventory that he believed had a good chance of being sold in the US market. I accept his evidence that he was not concerned about the volume of transfers because he understood that while they were separate legal entities that his performance was being based on both entities so a profit in one meant a corresponding loss in the other.

19. Major testified that Keddco USA is still operating and that there are still intercompany sales between it and the defendant. He is unaware of the profit margins on the sales or if there is a policy in place to direct the process of such sales.

b. Negligence and/or willful blindness relating to the alleged purchasing of excess inventory

[98] In 2013, the defendant recalled a specific product due to its failure. As a result of the recall the plaintiff retained an engineer to investigate the cause of the defect and to recommend a preventative way forward. The engineer recommended upgrading to a higher grade of steel in an effort to prevent a similar occurrence in the future. The plaintiff decided to follow the recommendation.

[99] By way of purchase order dated December 16, 2013 the defendant purchased the upgraded raw material known as bar stock at a cost of US$413,620. The plaintiff authorized the purchase. At the time of authorization, the plaintiff understood that the distributor of the bar stock required it to make a minimum purchase and that there were certain sizes that would not be used in a reasonable time by the defendant considering its history of production. The plaintiff felt that he had no choice in the matter; that the new bar stock had to be purchased to meet the recommendations of the engineer and protect the defendant from customer concerns going

forward. In June 2014, however, the defendant ordered more upgraded bars again at a minimum purchase level and again including sizes that would not be required or used by the defendant in a reasonable amount of time.

[100] The defendant's position is that the plaintiff was terminated for cause because of his negligence and/or willful blindness effecting the purchase of bar stock. The defendant has failed to establish negligence or willful blindness on the part of the plaintiff. I make this conclusion for the following reasons taken together:

1. The first purchase is entirely defendable in accordance the business judgment rule, the purpose of which is to help with hindsight bias as there is no legal expectation of perfection from a president: see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at paras. 154-5.

2. I accept the plaintiff's uncontested testimony is that he was not aware of the second purchase in June 2014.

3. I accept the plaintiff's uncontested testimony that the plaintiff did not authorize the second purchase, despite there being a policy in place for him to authorize such purchases given the dollar value of the purchase.

4. The plaintiff made efforts to transfer some of the bar stock to other Canerector division managers.

5. Hawkins testified that she believes the second purchase was a mistake.

6. Cameron Clark an employee of the defendant in the Edmonton branch made the purchase. He remains employed with the defendant. He did not testify at trial.

7. Other than Hawkins bald statements there is no evidence demonstrating a loss to Keddco as a result of the purchase of the bar stock.

8. The bar stock levels appeared high is the only hearsay evidence the defendant put forward of overstocking.

Conclusion on whether the defendant had cause to terminate the plaintiff

[101] For these reasons, I have concluded that the defendant did not have cause to terminate the plaintiff. The defendant has failed to demonstrate that the plaintiff misrepresented the defendant's financial performance or that he made efforts to hide that he had mismanaged the company as alleged.

2. If the defendant did not have cause to terminate the plaintiff, what is the appropriate notice period owed to the plaintiff and what is the calculation of damages during the notice period?

a. What is the appropriate notice period owed to the plaintiff?

[102] The defendant has failed to prove cause for dismissal. The plaintiff did not have a contract limiting his entitlements upon termination. The plaintiff is entitled to reasonable common law notice: see *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986.

[103] To determine the length of the common law notice period, courts consider the *Bardal* factors: the age of the employee, the character of his or her employment, the length of service, and the availability of similar types of employment, considering the experience, training, and qualifications of the employee. Each case is unique, and notice must be determined in the context of the particular dismissal: *Bardal v. Globe & Mail* (1960), 24 D.L.R. (2d) 140 at p. 145.

[104] The plaintiff was 54 years old at the time of his dismissal as President, the highest level of management, with Keddco. He was employed for 11 years (June 4, 2001 to June 5, 2015) and had 45 people reporting to him. In terms of the availability of similar employment the plaintiff is seeking a high-level position within the Sarnia area. He needs to remain in this area for family reasons including his obligations looking after his elderly father who is terminally ill. Also relevant is the fact that the plaintiff's highest level of education is grade 12 and his uncontested testimony that there are no meaningful competitors of Keddco in the Sarnia region and few in Canada generally.

[105] The plaintiff was terminated on serious allegations of cause. I accept that this is an elongating factor. Keddco also failed to assist the plaintiff with his job search and refused to give him a letter of reference or even a letter confirming his position.

[106] The plaintiff is three years post termination and remains out of work and was only temporarily employed during that time.

[107] The facts of this case are similar to those of *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, where Mr. Singer was 51 years old at the time of his termination without cause from his position as President and General Manager of one of the employer's two divisions. As President, Mr. Singer reported directly to the chief financial officer of the defendant's parent company, which was also Canerector. His length of service was 11 years and 4 months, having begun with the defendant's predecessor in October 2005 before assuming his role as President in 2012.

[108] The Court of Appeal upheld this court's finding of a common law notice period of 17 months: *Singer*, at para. 9; see *Singer v. Nordstrong Equipment Limited*, 2017 ONSC 5906. In reaching this 17-month figure, Diamond J. noted that older, longer-term employees in senior and managerial positions may be entitled to a longer period of notice considering the difficulties they may face in finding new employment. Although the employer had argued that the motion judge over-emphasized this factor in his analysis of the *Bardal* factors, the Court of Appeal disagreed.

[109] The *Singer* decision is applicable to the facts of this case. There are some differences however which impact on the appropriate length of common law notice. For example, the

plaintiff is older, has family ties to a smaller area for the purposes of finding similar employment, was terminated for serious allegations of cause and was not provided a letter of reference. Considering the context of the termination and the directives as set out in *Singer*, in my view, a notice period of 19 months is appropriate in the circumstances.

b. What is the calculation of damages during the notice period?

[110] The compensatory principle underpins an award for damages, where the goal is to return the employee to the financial position they would have been in had the employer provided reasonable notice, subject to the employee's ability to mitigate her losses: see *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315, at para. 1. Thus the employer must compensate the wrongfully dismissed employee for all losses that flow from its failure to provide adequate notice: *Paquette v. TeraGo Networks Inc.*, 2016 ONCA 618, at para. 16. The failure to provide reasonable notice amounts to a breach of an implied term of the employment contract: *Sylvester*, at para. 15. Recoverable losses include benefits that the employee would have earned throughout the common law notice period: *Paquette*, at para. 16; citing *Davidson v. Allelix Inc.* (1991), 7 O.R. (3d) 581 (C.A.), at para. 21.

[111] The composition of the plaintiff's compensation during the notice period consists of the following:

i. Base salary
ii. Car allowance
iii. Health and dental benefits
iv. RRSP contributions
v. Bonus
vi. Mitigation earning to be deducted

i. Base salary

[112] The plaintiff's base salary is $13,385.75 per month.

ii. Car allowance

[113] The plaintiff's car allowance was $700 per month. Car allowances are frequently included in notice periods. There is good reason for this. The goal is to put the employee in the same financial position he would have been in had such notice been given. Had such notice been given the plaintiff would surely had use of his car allowance: see *Marques v Delmar International*, 2016 ONSC 3448, at paras. 9-16.

iii. Health and dental benefits

[114] There is no evidence before the court in terms of the value for the benefit claim. However, the law in Ontario remains that a wrongfully dismissed employee may claim the pecuniary value of lost benefits flowing from a wrongful dismissal. Such a claim is not limited to actual losses incurred: *Davidson v. Allelix Inc.* In *Singer* the employee did not provide evidence that he suffered a loss on his benefits package, nor that he replaced it: para. 15. Applying *Davidson v. Allelix*, the Court of Appeal at para. 19 held that the employee was entitled to an amount in damages equaling the replacement cost of his benefits for the duration of the reasonable notice period.

[115] In *Camaganacan v. St. Joseph's Printing Ltd*., 2010 ONSC 5184, at para. 23 this court held that 10 percent of base salary was a fair way to assess the replacement value of the employee's benefits package, which in that case included RRSP contributions. In *Nasager v. Northern Reflections Ltd*., 2010 ONSC 5840, at para. 8, the defendant employer accepted that the employee was entitled to payment in lieu of benefits at the 10 per cent rate of the employee's monthly base salary.

[116] Another approach is to base the award for lost benefits on the amount that the employer paid as part of the benefits package. In *Galea v. Wal-Mart Canada Corp*., 2017 ONSC 245, the most recent case to cite *Camaganacan*, Emery J. doubled the employer's portion of the premiums to provide the employee with funds to acquire similar coverage as to what she enjoyed under the group benefits plan: paras. 166-174. In so doing, Emery J. did not find that the *Camaganacan* approach to fix the benefits compensation at 10 percent of the employee's base salary was inappropriate, but instead based his finding on the evidence presented by the defendant in that case. Here there is no evidence on what the employer paid into the benefits package.

[117] Jurisprudence directs therefore that a reasonable approach is to fix benefits at 10 percent of base salary. The plaintiff is therefore awarded the amount of $1,338.57 per month over the notice period relating to his health and dental benefits, set at 10 percent of his base salary.

iv. RRSP/Pension contribution

[118] This court may make an award for the employer's RRSP contributions.

[119] In *Fermin v. Intact Financial Corp.*, 2016 ONSC 5631, at para. 33, A.J. O'Marra J. found that the wrongfully dismissed employee was entitled to 16 months' reasonable notice plus benefits and RRSP contributions. In that case the employer conceded that the employee was entitled either to continue to be covered under its benefit plan and to participate in its pension plan, or to receive an amount equivalent to the costs of the two plans in her damages award: para. 9.

[120] In *Peticca v. Oracle Canada ULC*, [2015] O.J. No. 1985, at para. 11, Myers J. found that the wrongfully dismissed employee was entitled to the 6 percent per month of her base salary that she had paid toward her RRSP for the length of her reasonable notice period. (Recall that in

Camaganacan, RRSP contributions were included in the benefits package, meaning the 10 percent approximation discussed above included pension contributions: para. 23.)

[121] The plaintiff's uncontested evidence is that he contributed 5 percent per month of his base salary every year towards his RRSP/Pension. He is therefore entitled to the amount of $669.28 per month over the notice period.

v. Bonus

[122] According to the Court of Appeal in *Singer* at para. 21, and in *Paquette*, at paras. 30-1, a wrongfully dismissed employee is entitled to compensation for the loss of his or her bonus during the reasonable notice period if the following test is met:

> (1) Was the bonus an integral part of his compensation package, triggering a common law entitlement to damages in lieu of bonus?; and
>
> (2) If so, is there any language in the bonus plan that would restrict his common law entitlement to damages in lieu of a bonus over the notice period?

[123] The uncontested evidence is that the plaintiff received a bonus every year of his employment that constituted a significant amount of his overall compensation (41.68 percent over a 3-year average).

[124] Hawkins testified that in fiscal 2015 Keddco showed a significant loss such that no employee was given a bonus for 2015 but for Desrosiers. She further testified that all staff received a bonus for 2016. No documents were filed with the court to support the financial situation of Keddco in fiscal 2015 or fiscal 2016 or the calculations for bonuses for either year. Nothing was submitted to the court to substantiate the bald statement with respect to the bonuses paid by Keddco in 2015 or 2016. The defendant undertook to provide the plaintiff with financial documentation to evidence Keddco's financial position post termination. The defendant failed to comply with this undertaking. The lack of documentation to demonstrate an issue relevant to this court and the failure to comply with an undertaking directly speaking to the issue is problematic for the defendant particularly in light of the court's concerns pertaining to the credibility of Hawkins.

[125] There was some indication during the email communications between the plaintiff and Hawkins in furtherance of the 2014 bonus that in 2015, there would be no flexibility with the accounting of inventory for the purposes of calculating the 2015 bonus. This approach, however, would be contrary to the corporate culture document referenced above, authored by Mr. Hawkins, which clearly outlines that for the purposes of calculating bonuses there is a lot of flexibility in inventory valuation. It would further be contrary to the historical approach of awarding bonuses as demonstrated by the evidence before the court. The evidence before the court demonstrates that the calculation of bonuses involved a negotiation between the plaintiff and his liaison wherein the liaison would ultimately make a decision in terms of how to fairly amend the bonus pool as calculated from the set formula of 15 percent of the division's profit

net of head office fees and putative loan interest. It was not a matter of whether the set formula was to be amended in favour of a greater bonus but rather to what extent the amendments would be made.

[126] The court is left without any credible evidence on the treatment of Keddco's bonuses post termination. I do not accept the bald statement of Hawkins that Keddco did not pay the staff bonuses for the 2015 year. The defendant failed to file supporting documentation in this regard, despite its relevance and the fact that it undertook to do so. The defendant also failed to provide the court with the bonus formula calculations for fiscal year 2015 and 2016 despite their relevance. The evidence before the court demonstrates a consistent historical pattern wherein the plaintiff received annual bonuses every year of his employment prior to termination. Subsequent to acquisition by Canerector, Keddco's bonuses were consistently calculated, pre-termination, with flexibility in inventory valuation and depreciation. For these reasons, in my view, the plaintiff should properly receive his bonus earned during the entire notice period in accordance with the pre-termination treatment of the Canerector bonus, pro-rated over the notice period.

[127] Following the guidance by the Court of Appeal in *Singer*, I conclude that a two-year average is the most fair assessment for the bonus payment, calculated on a pro-rated amount. The plaintiff received a bonus in 2014 of $95,337 and 2015 of $98,987 for an average of $8,096.83 This is particularly so in this case as the bonus received in 2013 was $139,667. See *Singer*, at para. 25, where the Court of Appeal for Ontario awarded the employee a bonus based on the average monthly value of his bonuses for the two years preceding his dismissal, pro-rated for the length of the reasonable notice period.

[128] Also as directed by the Court of Appeal in *Singer*, the plaintiff is also entitled to a "stub bonus" period from the time he worked in 2015, namely January 1 to June 5. To calculate the bonus for the employee's final year of employment, the motion judge in *Singer* considered the correspondence between the parties, the range of past bonuses, and a document that outlined Canerector's policy on profit sharing. The Court of Appeal at paras. 10-14 found no error in calculating the bonus for the final year of employment using this approach.

[129] Using the same two-year average, the stub period over five months is $40,484.16.

vi. Deduction for mitigation

[130] Upon termination an employee must make reasonable efforts to mitigate some or all of her losses. The employer bears the onus to prove that the employee failed to do so. Where the employer makes that argument, "the question is whether [the employee] has stood idly or unreasonably by, or has tried without success to obtain other employment": *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, at p. 331; see also *Chambers v. Global Traffic Technologies Canada Inc.*, 2018 ONSC 2000, at paras. 93-94.

[131] In his examination in chief the plaintiff testified to all of his efforts to find alternate employment, applying to approximately 80 positions and removing his title of President from his

resume in an effort deter prospective employers from concluding he was overqualified. The plaintiff further testified that he was only able to secure a temporary position at Mac-Welding but left that position for reasons he explained that were personal to him. This evidence is uncontested.

[132] The plaintiff was not asked one question about mitigation in cross-examination. There is no evidence before this court therefore that the plaintiff failed to mitigate his damages.

[133] The plaintiff has conceded that the amount of income he earned at Mac-Welding from October 17, 2016 to January 14, 2017 should be reduced from the overall damages awarded in the amount of $20,509.44.

3. <u>If the defendant did not have cause to terminate the plaintiff, whether the plaintiff is entitled to punitive, aggravated and/or moral damages based on the nature of his termination, accusations of civil fraud and resulting litigation</u>

[134] The plaintiff is seeking $200,000 in combined punitive, aggravated and/or moral damages from Keddco. More specifically, the plaintiff is seeking $150,000 relating to punitive damages and $50,000 relating to moral and/or aggravated damages.

[135] Punitive damages are meant to address wrongs on the part of the defendant "that are so malicious and outrageous that they are deserving of punishment on their own": *Honda Canada Inc. v. Keays*, 2008 SCC 3, [2008] 2 SCR 362, at para. 62. By contrast, moral/aggravated damages are compensatory damages meant to compensate the plaintiff for the manner in which he or she was dismissed: *Honda*, at para. 60.

i. Punitive Damages

[136] Punitive damages serve to punish the defendant's behaviour and deter similar misconduct, not to compensate the plaintiff. Only where compensatory damages are insufficient to satisfy the goal of denunciation and deterrence do courts imposed a punitive damages award. The Supreme Court of Canada has held that misconduct worthy of such a sanction must be "so malicious, oppressive and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; cited in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 36. In a contracts dispute such as a wrongful dismissal action, an independent actionable wrong on the part of the defendant is required: *Whiten*, at para. 149. This wrong "can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation": *Whiten*, at para. 82.

[137] In *Whiten* at para. 111 the Supreme Court also provides that the punitive damages award must observe the proportionality principle by remaining rationally connected to the underlying goals of retribution, denunciation and deterrence. Thus the punitive damages award must be proportionate to the following: the level of blameworthiness of the defendant's conduct, the

degree of vulnerability of the plaintiff and the harm or potential harm directed at them, the need for deterrence, the gain wrongfully obtained through the defendant's misconduct, and finally to the overall penalty imposed on the defendant: *Whiten*, at paras. 111-126.

[138] This issue was recently canvassed in the employment law context in *Galea v. Wal-Mart*, 2017 ONSC 245, where at para. 293 this court observed that in a wrongful dismissal case, the aspects of proportionality discussed in *Whiten* "relate to the importance of the employment relationship and the vulnerability of an employee at the time of termination." Emery J. found that the power imbalance between the employee and employer, the defendants' "indifference to the litigation process and the manner of dismissal on termination" warranted a higher punitive award: "Wal-Mart's conduct both before termination and since termination towards [the employee] has been, in a word, deplorable": para. 294. The punitive damages award was set at $500,000: para. 305.

[139] In *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669, the Court of Appeal lowered the trial judge's punitive damages award from $550,000 to $450,000, and upheld the finding that the defendant-municipality engaged in malicious prosecution. The original award is at the higher end of the spectrum for punitive damages awards upheld on appeal: para. 221. Having accepted that the employer's misconduct was sufficiently high-handed and reprehensible to warrant punitive damages—in particular that it lasted for a decade, and had a long-term and devastating effect on the employee—the majority emphasized that courts must consider the overall damages award when selecting an appropriate punitive quantum, at para. 228:

> First, where, as here, the injured plaintiff is already entitled to significant compensatory damages and substantial costs (including, in this case, a significant costs premium) that have elements directed at punishing the defendant, the proper approach is to take this other compensation into account in fashioning a fit punitive damages award. This requires the trial judge to step back and examine the punitive elements of the other compensation already awarded to the plaintiff to determine, in effect, whether there is a shortfall between the amount of that compensation and the total amount required to accomplish the objectives of retribution and deterrence and denunciation of the defendant's misconduct. The amount of the shortfall, if any, sets the quantum of the punitive damages to be awarded.

[140] Cronk J.A., writing for the majority in *Pate Estate*, also observed that the punitive damages award should be reduced to avoid any potential double compensation for the wrongfully dismissed employee, considering that the same factors were included in the trial judge's calculation of compensatory damages, costs, and punitive damages: see para. 236. The same caution against double compensation (or double punishment) was noted in *Keays*, at para. 60.

[141] In the wrongful dismissal action of *Gordon v. Altus*, 2015 ONSC 5663, Glass J. found that a punitive damages award of $100,000 was appropriate due to the employer's "outrageous" behaviour in attempting to terminate the employment relationship outside of the agreed upon arbitration process based on unsubstantiated allegations against the employee: para. 39. The independent actionable wrong on the part of the defendant was to terminate the employment relationship and avoid arbitration, meaning it "failed to perform honestly the employment contract" with that employee: para. 41.

[142] I have concluded that the plaintiff is entitled to punitive damages of $100,000. I make this conclusion for the following reasons taken together:

1. Hawkins admitted that during the termination meeting she threatened the plaintiff saying that if he sued Keddco, Keddco would counter-claim against him. A counter-claim was commenced against the plaintiff for $1,700,000 alleging fraud and misrepresentation. The defendant did not report the alleged fraud to the police.

2. Hawkins deposed at her examination or discovery that she had threatened another Keddco employee upon termination (Light) in the same manner.

3. Hawkins attempted to intimidate the plaintiff at the termination meeting. The plaintiff was vulnerable at this time. When the plaintiff advised her that he was going to consult a lawyer, she proceeded to caution him "how expensive that process could be." The process was rendered expensive in significant part by the actions of the defendant. The parties agreed on May 13, 2016 at civil practice court to a timetable for a five-day summary trial on January 30, 2017. The parties attended a pre-trial on November 1, 2016 wherein for the first time the defendant presented a witness list of 25 witnesses they intended to call. The trial date previously scheduled on consent was ordered vacated and the parties were ordered to attend to be spoken to court to reschedule the trial date. It was only on January 22, 2018 that the plaintiff learned that the defendant intended to call only five witnesses. As the trial went on, the plaintiff learned that the defendant intended to call only two fact witnesses and one expert witness. This conduct prolonged the adjudication of the issues and caused the plaintiff to prepare for witnesses in vain. The defendant demonstrated an indifference to the litibation process.

4. The defendant did not advise the plaintiff of its particular allegations of cause at the termination meeting. The plaintiff learned of the allegations for the first time when he received the defendant's counter-claim.

5. The defendant in their pleading relied on performance based grounds for cause and personal attacks. The grounds were dropped after the trial as no evidence was led to substantiate the allegations.

6. The defendant in their pleading also relied on "disbursement of company funds for his own personal benefit" as a ground for termination. No evidence was led on this ground. It too was dropped after the trial.

7. The defendant retained an expert to opine on the liability of the issues raised by its counter-claim. It did not retain an expert with respect to damages. On the seventh day of trial the defendant dropped its damage claim from $1,700,000 to $1, which it said it would waive is awarded. It does not appear that the defendant had any intention of proving damages but rather was using the claim of $1,700,000 strategically to intimidate the plaintiff.

8. The defendant accused the plaintiff of fraud and then chose not to call any witnesses who could provide direct evidence to substantiate the allegations. Again, it appears that the counter-claim was merely a tactic employed by the defendant to induce the plaintiff to drop his claim.

9. The serious allegations made against the plaintiff were found to be entirely unfounded.

ii. Moral/aggravated damages

[143] As noted above the purpose of an award for moral/aggravated damages in employment law is to compensate the plaintiff for the manner of his or her dismissal: *Honda*, at para. 60. Employers have an obligation of good faith and fair dealing in the manner of dismissal: *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701, at para. 95. Moral damages are recoverable if the employer breaches that obligation by behaving in a way that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" during dismissal: *Honda* at para. 58; citing *Wallace*, at para. 98. Moral damages are separate and above of the normal negative impacts that result from one's employment being terminated: *Honda* at para. 56.

[144] In *Galea*, Emery J. reviewed the appellate jurisprudence and summarized the factors to assess whether a wrongfully dismissed plaintiff is entitled to moral damages as follows, at para. 232:

1. Where an employer has breached its duty of good faith and fair dealing in the manner in which the employee was dismissed;

2. Conduct that could qualify as an employer's breach of good faith or the failure to deal fairly in the course of a dismissal includes an employer's conduct that is untruthful, misleading or unduly insensitive, and a failure to be candid, reasonable, honest and forthright with the employee;

3. Where it was within the reasonable contemplation of the employer that the manner of dismissal would cause the employee mental distress;

4. The wrongful conduct of an employer must cause the employee mental distress beyond the understandable distress and hurt feelings that normally accompany a dismissal; and

5. The grounds for moral damages must be assessed on a case by case basis.

[145] *Galea* at para. 256 also noted that courts can examine post-termination conduct as part of the assessment of moral damages. For pre- and post-termination conduct to be relevant to the moral damages analysis, this conduct must be "a component of the manner of dismissal": see *Doyle v. Zochem,* 2017 ONCA 130, at para. 13; citing *Gismondi v. Toronto (City),* 64 O.R. (3d) 688 (C.A.), at para. 23, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 31.

[146] In *Doyle*, the evidence demonstrated that the employer behaved in a way that was misleading and unduly insensitive toward the wrongfully dismissed employee, Ms. Doyle. In particular, after the decision to terminate Ms. Doyle had been made, the employer informed her that she would be able to keep her job if her performance improved. Second, the employer conducted a superficial investigation of Ms. Doyle's sexual harassment claim, which was based on years of alleged inappropriate behaviour against a colleague, and suggested that she abandon that claim during the termination meeting—which itself was described "cold and brusque": paras. 18, 23-27. The following components of termination were conceded by the defendant-employer as relevant to an award of moral damages, at para. 14:

> that employees had been instructed by Wrench to "dig up dirt" on the performance of Doyle; that Doyle was told her job was not in jeopardy when, in fact, Wrench had already put the "wheels in motion" with respect to her termination; that an employee advised Wrench about Doyle's medical condition in breach of her privacy; and that Doyle's keys were taken from her purse and her car was brought around.

[147] The Court of Appeal in *Doyle* upheld the award of $60,000 for moral damages: para. 42.

[148] Medical evidence is not required to justify an award for moral or aggravated damages: see *Galea*, at para. 270. In *Slepenkova v. Ivanov*, 2009 ONCA 526, the Court of Appeal found no error regarding the trial judge's assessment of moral ("*Wallace*") damages that did not depend on medical evidence. The moral damages award was upheld based on the finding of fact that pager messages sent by the employer to other employees "that [Slepenkova] failed to adequately perform her duties was unfounded and damaging to her reputation": para. 5.

[149] In the reasons for decision at the first trial in *Pate Estate*, cited at *Pate v. Galway-Cavendish and Harvey (Township),* 2009 CanLII 70502 (ON SC) at para. 77, this court found that the plaintiff was entitled to moral damages in the amount of four months' income based on reputational harm, in particular for "bad faith conduct in the manner of his dismissal, which

caused additional humiliation, embarrassment and damage to his self worth and self esteem." The moral or aggravated damages award made in that first *Pate Estate* trial has not been subject to appeal, beginning with the first appeal in 2011: see *Pate v. Galway-Cavendish*, 2011 ONCA 329, para. 22. The 2013 *Pate Estate* appeal referred to "the total compensation to which Mr. Pate is already entitled under the trial judge's other damages awards" as one reason, in addition to the costs award and the wrongful dismissal damages, to reduce the punitive damages award according to the proportionality principle: para. 239. This is not a direct endorsement of the moral damages award at the 2009 trial but instead recognizes that Mr. Pate was entitled to the other damages awards made at trial.

[150] I have concluded that the plaintiff is entitled to moral damages of $25,000. I make this conclusion for the following reasons taken together:

1. The defendant failed to be candid with the plaintiff during the termination meeting in terms of the reasons for his termination for cause.

2. Hawkins acknowledged that facing a claim of financial fraud would negatively affect the plaintiff stating "I mean going through a lawsuit is probably very stressful and costly."

3. The defendant made personal attacks against the plaintiff in its pleading and only dropped such allegations after trial after it was brought to its attention by me that no evidence was led to substantiate the allegations.

4. The defendant publically made unfounded allegations of financial fraud as against the plaintiff. These allegations will follow him on his career path for the rest of his life.

5. The plaintiff's evidence is that the termination strongly affected him. I accept his evidence that the termination and the allegations of cause and the $1,700,000 counter-claim has been "devastating" and "very stressful" and "weighs on you a lot."

4. <u>Whether the defendant has met its onus of proving the plaintiff engaged in conduct amounting to civil fraud. If so, what are the associated damages?</u>

[151] The defendant submits that the plaintiff's conduct amounts to civil fraud justifying the defendant to recover the losses it incurred as a result thereof.

[152] To make out the tort of civil fraud, the defendant must establish on a balance of probabilities the following four-test as summarized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 87:

(1) A false representation by the defendant;

(2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness);
(3) The false representation caused the plaintiff to act;
(4) If the plaintiff's actions resulted in a loss.

[153] The defendant has failed to satisfy its onus of proving that the plaintiff engaged in conduct amounting to civil fraud. As more particularly set out above, neither the oral testimony nor the documentary evidence demonstrate on a balance of probabilities that the plaintiff misrepresented the performance of the defendant or that he knew or was reckless in this regard. The defendant has failed to show that any representation made by the plaintiff that caused Keddco or Canerector to act in a certain way. The bonuses paid to the plaintiff for 2012 and 2013 were determined by Canerector liaisons. At the time of the payment of the 2014 bonus payment, Hawkins knew of the allegedly inappropriate inventory reduction. The defendant has also failed to prove damages. For inter-company transfers, all witnesses agreed that eventually when the items were sold the profit would "net out to zero." Moreover, the defendant's expert was retained only to provide an opinion on liability and his report was based on the incorrect assumption that the performance of Keddco and Keddco USA were not being treated as a single unit when assessing bonuses.

5. Whether the defendant has met its onus of proving that the plaintiff was unjustly enriched by receiving a higher bonus than would otherwise have been paid to him. If so, what are the appropriate damages?

[154] The defendant submits that the plaintiff was unjustly enriched as he engaged in conduct that resulted him in receiving substantial bonus payments that he otherwise would not have received. I have determined that the plaintiff did not engage in conduct that resulted him in receiving substantial bonus payments that he otherwise would not have received such that an analysis in terms of unjust enrichment is not required. I will conduct the analysis in any event.

[155] To make out its claim for unjust enrichment, the defendant must demonstrate an enrichment on the part of the plaintiff, a corresponding deprivation, and that there was no juristic reason that would justify the plaintiff's enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980.

[156] The defendant alleges the enrichment to be "as much as $344,001 in bonus payments he would not have been entitled to." The defendant led no evidence however to substantiate this number. Further, the defendant has led no evidence of a corresponding deprivation and failed to put forward a submission with respect to an absence of a juristic reason for the plaintiff's enrichment. At the end of the day, Canerector determined the amount of the plaintiff's bonuses upon full and detailed disclosure of Keddco's business. There is no basis for a claim in unjust enrichment.

Judgment

[157] For reasons set out above, Judgment to go as follows:

1. A declaration that the defendant did not have cause to terminate the plaintiff's employment without notice or pay in lieu thereof;

2. The defendant shall pay to the plaintiff damages in the amount of 19 months of base salary in lieu of reasonable notice, minus mitigation earnings for a gross amount of $233,857.81, less applicable statutory deductions and/or withholdings ($13,387.75 monthly minus $20,509.44 in mitigation);

3. The defendant shall pay to the plaintiff damages in lieu of the stub bonus time worked between January to June 5, 2015 based on a 2-year average bonus payment in the amount of $40,484.16, minus applicable statutory deductions and/or withholdings;

4. The defendant shall pay the plaintiff damages in lieu of the lost opportunity to participate in the bonus program during the 19-month notice period based on a 2-year average bonus payment, equivalent to $153,835.97, minus applicable statutory deductions and/or withholdings ($8,096.63 monthly).

5. The defendant shall pay to the plaintiff damages in lieu of employment benefits during the 19-month notice period including car allowance ($13,300 or $700 monthly) and health insurance benefits ($25,432.83 or $1,338.57 monthly) and RRSP value during the 19-month notice period ($12,716.32 or $669.28 monthly).

6. The defendant shall pay to the plaintiff punitive damages in the amount of $100,000.

7. The defendant shall pay to the plaintiff moral damages in the amount of $25,000.

8. Pre-judgment interest is awarded on the above noted amounts in the amount of one percent per annum and post-judgment interest is awarded on the above noted amounts in the amount of three percent per annum.

9. If the parties are unable to agree on an appropriate costs award, I will receive written submissions of not more than five pages excluding appendices. The plaintiff shall submit his submissions within 30 days of this decision. The defendant shall submit responding submissions within 30 days thereafter. The plaintiff shall submit replay submissions, if any, within 30 days thereafter.

V.R. Chiappetta J.

Released: May 16, 2018

CITATION: Ruston v. Keddco Mfg. (2011) Ltd., 2018 ONSC 2919
COURT FILE NO.: CV-15-531723
DATE: 20180516

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

J.P. RUSTON

Plaintiff
(Defendant to Counterclaim)

– and –

KEDDCO MFG. (2011) LTD.

Defendant
(Plaintiff to Counterclaim)

REASONS FOR JUDGMENT

V.R. Chiappetta J.