Court File No. 95-CQ-62676

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)

B E T W E E N:

LIONEL F. CONACHER

Plaintiff

and

HEES INTERNATIONAL BANCORP INC.

Defendant

AFFIDAVIT OF LIONEL F. CONACHER
(sworn July 12, 1996)

I, LIONEL F. CONACHER of the City of Toronto in the Regional Municipality of Metropolitan Toronto, MAKE OATH AND SAY:

1. I am the plaintiff in this action as well as the former treasurer and a former managing partner of the defendant, Hees International Bancorp Inc. ("Hees"). As such, I have knowledge of the matters to which I hereinafter depose.

2. This affidavit is made in support of a motion for summary judgment in which I seek judgment on a portion of the claim contained in my statement of claim.

Employment With Hees

3. I was an employee of Hees from July 3, 1989 until my resignation on December 31, 1994. I began my employment as a vice-president and associate treasurer. Prior to my resignation, I was a managing partner and the treasurer of Hees.

Hees Compensation Plan

4. When I began my employment with Hees in 1989, my base salary was $45,000 per year. This was significantly below comparable market rates for investment bankers in Toronto and approximately $85,000 below my base salary at my previous employer, Citicorp Investment Bank.

5. I accepted employment with Hees, despite the low base salary, in part because of representations made to me about the non-salary aspects of the Hees compensation system. In a series of meetings held prior to my joining Hees, I was told by representatives of the company that Hees' executives were compensated through a mixture of salary, private management investment companies ("MIC"s) and share purchase plans.

6. My claim in this motion for summary judgment concerns Hees' failure to honour its obligations under options to purchase Hees common shares which were issued to me as part of my overall executive compensation. In order to understand how the share options formed part of this compensation system, and the exact role that they played, it is first necessary to describe the Hees compensation system as a whole.

Salary / Memo Accounts

7. As an employee of Hees, my annual salary was paid to me on a bi-monthly basis. However, like all other Hees executives, I was given the opportunity to have my income paid into a "memo account" which was maintained by the company. These accounts were "off

ledger" and were a closely guarded secret at Hees for the reasons set out below. Hees executives could withdraw funds from the memo account, as required.

8. Any funds left in the memo account were treated as a form of retirement allowance or deferred income. Funds which remained in the memo account did not have source deductions taken from them nor were they declared as part of our taxable income. These funds were only treated as income and had source deductions withheld from them once they were withdrawn from the memo account.

9. Through its use of the memo accounts, Hees provided me and its other executives with a degree of tax deferral which further enhanced our compensation package. The memo accounts also permitted Hees to claim that the salaries paid to its senior personnel were below those paid to persons in similar positions in public companies.

Management Investment Companies

10. As part of its overall executive compensation package, Hees also provided its executives with the opportunity to invest, on a highly leveraged basis, in Hees related companies. Participation in this type of investment was carried out using private management investment companies using MICs owned by Hees executives.

11. Hees, or a related company, would lend money to a Hees executive through that executive's MIC. This money would then be used to invest in one or more of a number of Hees related companies which were expected to grow in value over time. Any profits which an executive received as a result of his MIC investments formed part of the executive's overall compensation package from Hees.

12. As a Hees executive, I was given two opportunities to participate in MIC investments. In each case my MIC was a company named Beckwith Investment Corporation ("Beckwith") which is owned by me and my wife.

13. The first MIC investment opportunity was made available to me in May of 1990. On or about May 24, 1990, based on advice I received from Hees, I caused Beckwith to issue $300,000 in preferred shares to Edper Holdings (Ontario) Limited ("Edper Holdings") and to use the proceeds to invest in common shares of Partners Holdings Inc. ("Partners"). Attached to this affidavit as exhibit "A" is a copy of the subscription agreement dated May 24, 1990, under which Edper Holdings subscribed for the common shares in Beckwith.

14. Edper Holdings is a company related to Hees. Partners is a private holding company controlled by the senior managers of Hees (and other related companies) which, at the time, controlled Canadian Corporate Services Limited. At the time that Edper Holdings subscribed for its shares in Beckwith, Canadian Corporate Services Limited controlled Pagurian Corporation (now called the Edper Group Limited).

15. Based on information contained in a document entitled "Introduction" which deals with, among other things, the structure of Partners, I believe that Partners "...was formed in 1987 to provide the senior group managers with a financing vehicle to pool their resources and thereby become a financial partner with Peter Bronfman in the control of the Edper group." Based on my personal knowledge and this document, I also believe that the shareholders of Partners at one time included, among other Edper Group managers, Jack Cockwell ("Cockwell"), his brother Ian Cockwell, David Kerr, Tim Price, Robert Harding ("Harding") and Bill L'Heureux. A copy of the document entitled "Introduction", is attached to this affidavit as exhibit "B".

16. Based on my review of the answers given on Hees' examination for discovery by Cockwell, a director and former officer of Hees, and in particular the answers given to questions 50 to 58, I believe that the document entitled "Introduction" was edited in part by Cockwell and was intended to describe the ownership and governance of the Edper Group, including Partners, to potential investors. Based on Cockwell's answers on discovery, (including answers to undertakings and answers to questions initially refused by Cockwell) I also believe that the document entitled "Introduction" is accurate and correctly reflects the governance structure of

the Edper Group as of January, 1994. A copy of the transcript of the examination for discovery of Cockwell, as a representative of Hees (the "Cockwell Discovery Transcript") is attached to this affidavit as exhibit "C". A copy of the answers to undertakings and the answers to questions initially refused by Cockwell is attached to this affidavit as exhibit “D”.

17. I later caused Beckwith to sell its shares in Partners to a company called Quadco Inc. ("Quadco") for $300,000. As part of this transaction, I also received the right to repurchase the Partners shares from Quadco at any time until December 31, 1998. Quadco is a company owned by Cockwell, Tim Price, David Kerr and Ian Cockwell. Based on answers provided by Cockwell during the examination for discovery of Hees, I believe that Cockwell is a director, an officer, a holder of preferred shares and an indirect holder of common shares of Quadco. In particular, I rely on the answers given to questions 72 to 80 found at pages 24 to 26 of the Cockwell Discovery Transcript and in the answer to undertakings and refusals.

18. The second MIC investment opportunity was provided to me in August, 1990. On or about August 24, 1990, based on advice I received from Hees, I caused Beckwith to issue $100,000 in preferred shares to Kramble Holdings Inc. ("Kramble"). The proceeds from this preferred share issue were then used to purchase common shares of HPDB Investments Ltd. ("HPDB"). Kramble is related to a company called ATI Corporation, which is managed by Ian Cockwell. Ian Cockwell also owns a significant number of shares in ATI Corporation.

19. HPDB is a subsidiary of Partners and owns shares of both Pagurian and Hees. Based on my review of the answers to undertakings and refusals given on Hees' examination for discovery by Cockwell, and in particular on the answer to question 370, I believe that Ian Cockwell is involved in providing management services to Kramble.

20. Based on answers given by Cockwell during his examination for discovery as a representative of Hees, I believe that Kramble later sold its Beckwith preferred shares to Edper Holdings. The specific question and answer on which I rely is found at question 373 at page 94 of the Cockwell Discovery Transcript.

21. My understanding is that I was given an opportunity to participate in these two transactions as part of my overall compensation from Hees. This opportunity was made available to me and to other Hees executives to allow us to participate, on a leveraged basis, in the anticipated growth of Partners Holdings and HPDB, both of which are part of the group of companies related to Hees.

Share Purchase Plans

22. In addition to the base salary, memo accounts and MIC investments, my compensation package from Hees included the use of share purchase plans and, subsequently, share option plans.

23. The share purchase plan used by Hees was referred to as the Management Share Purchase Plan ("MSPP"). The stated purpose of the MSPP was to link executive remuneration with executive performance. Hees executives were encouraged to purchase common shares of Hees using money borrowed from Hees. Interest on the loans taken to purchase the shares was equal to the dividends, if any, declared on the Hees shares which had been purchased.

24. The idea behind the MSPP was that if Hees executives performed well, the share price of Hees would rise, thereby benefiting the participants in the MSPP. The difficultly, as it turned out, was what happened when the share price fell, leaving executives with significant loans which, in many cases, they could not pay.

25. I made my first purchase under the MSPP on or about September 4, 1989, using $494,100 which I borrowed from Hees. This money was used to purchase 18,000 common shares of Hees at a price of $27.45 per share.

26. I made my second purchase under the MSPP on or about March 6, 1991 using $612,450 which I borrowed from Hees to purchase 45,000 Hees common shares at a cost of $13.61 per share. Following this purchase I owned a total of 63,000 shares and was indebted

to Hees in relation to these shares in the total amount of $1,106,550, less a $25,000 credit which had been entered in my memo account.

27. Despite exemplary work efforts on the part of me and other Hees executives, the price of Hees common shares began to fall in or about November of 1990. This put significant pressure on the participants in the MSPP, since we found ourselves holding Hees shares whose value was less than our indebtedness to the company.

28. The problem presented by the drop in Hees common share prices was dealt with by Hees in at least two ways. One was to begin to issue Hees executives with options to purchase Hees common shares. The other was to arrange a transaction involving Great Lakes Holdings Inc. ("Great Lakes").

Great Lakes Holdings Transaction

29. Great Lakes was, at all material times, a holding company controlled by Hees. Based on recent public announcements by a related company, Great Lakes Power Inc., I believe that until recently, Great Lakes was a subsidiary of Hees.

30. On or about August 9, 1993, I was given an opportunity to subscribe for 80,000 class A shares in Great Lakes (the "Great Lakes Shares") at $0.50 per share for a total subscription price of $40,000. A similar opportunity was extended to all Hees executives as well as to other individuals who were not employed by Hees.

31. I obtained the $40,000 necessary to pay for the Great Lakes Shares through a loan from Societe D'Investissement Sanford Ltée ("Sanford"). Based on my review of the corporate records for Sanford maintained by the Quebec Government, and discussions I have had with Cockwell, I believe that Sanford is an investment holding company which Cockwell uses as his personal holding company. A copy of the Quebec Government records concerning Sanford is attached to this affidavit as exhibit "E".

32. On or about February 16, 1994, I sold my Great Lakes Shares to Hees for $7.04 per share or a total of $563,200. This represented a gain of $523,200 on my original investment of $40,000, once the loan to Sanford was repaid.

33. Hees executives participating in the sale of the Great Lakes Shares (the "Great Lakes Transaction") had agreed with Hees that no individual would retain more than $400,000 in profits from the Great Lakes Transaction. Pursuant to this agreement, following the sale of my Great Lakes Shares, $123,200 was deducted from my memo account to the benefit of Hees.

34. Hees executives participating in Great Lakes Transaction had also agreed with Hees that any gains that were made from the sale of the Great Lakes Shares would be used to pay down their indebtedness under the MSPP. In keeping with this agreement I used a portion of the $400,000 to pay down the approximately $215,000 which remained outstanding on my MSPP loan following my sale, in December, 1993, of all of my Hees shares.

35. As an officer and a managing partner at the time of the Great Lakes Transaction, it was my understanding that the Great Lakes Transaction was specifically arranged by Hees to provide Hees executives with a means of paying down their MSPP loans.

Share Option Plans

36. Another response to the problem posed by the MSPP in the face of falling Hees share prices was Hees' decision to provide its executives with options to purchase Hees shares.

37. Based on my review of a copy of the minutes of the board of directors of Hees (the "Hees Board") dated November 7, 1990, I believe that the Hees Board first resolved to develop a share option plan on November 7, 1990. Attached to this affidavit as exhibit "F" is a copy of the minutes of the meeting of the Hees Board held on November 7, 1990.

38. On or about January 2, 1991, I received a memorandum from Harding, the president and a managing partner of Hees, who explained that management share allocations could now be received either under the MSPP or under a share option plan. At the time, I preferred to continue purchasing Hees shares under the MSPP and paid little or no attention to the share option plan. Attached to this affidavit as exhibit "G" is a copy of the memo from Harding dated January 2, 1991.

39. By letter dated August 28, 1992 from Hees (the "First Option Letter"), I was informed that the Hees Board had granted me an option (the "First Option") to purchase an aggregate of 60,000 Hees common shares at a price of $11.875 per share. The First Option Letter stated that the terms and conditions under which the First Option was granted were contained in the Share Option Plan of the Corporation (the "Plan"). I acknowledged acceptance of the First Option and my acceptance of the terms set out in the Plan by signing back the First Option Letter on September 17, 1992. A copy of the First Option Letter is attached to this affidavit as exhibit "H". A copy of the Plan is attached to this affidavit as exhibit "I".

40. By letter dated February 9, 1993 from Hees (the "Second Option Letter") I was informed that I had been granted a replacement option (the "Second Option") which was intended to replace the First Option. Under the Second Option, I was entitled to purchase up to 85,000 common shares of Hees at a price per share of $5.125 upon the terms and conditions contained in the Plan. I indicated my acceptance of the Second Option by signing back the Second Option Letter on June 11, 1993. A copy of the Second Option Letter is attached to this affidavit as exhibit "J".

41. By letter dated February 3, 1994 from Hees (the "Third Option Letter"), I was informed that I had been allocated a further 30,000 Hees common share options (the "Third Option") at a price per share of $12.75. Unlike the First Option Letter and the Second Option Letter, the Third Option Letter specifically referred to the options under the Third Option vesting over 5 years at 20 percent per year. A copy of the Third Option Letter is attached to this affidavit as exhibit "K".

42. It was my understanding that the First Option, Second Option and Third Option were all granted to me as part of my compensation for the work I performed for Hees. It was also my understanding that the various share options were granted by Hees for the purpose of, among other things, providing a means by which Hees executives could benefit from an increase in the value of Hees shares and use any proceeds from such an increase to pay down their indebtedness, if any, under the MSPP.

Resignation

43. In January 1994, during my annual performance review, I told Harding that I was not happy with the compensation system in use at Hees, particularly with respect to the possibilities for future compensation. I told Harding that I would wait to see what would happen over the next six months and that, if things did not improve, I would begin to consider other employment.

44. On or about April 21, 1994, I met with Harding and Cockwell to discuss compensation. Once again I expressed my concerns with the future compensation available at Hees. Neither Cockwell nor Harding were prepared to commit to any concrete action to alter the compensation system and so I suggested that I might have to look outside Hees for other employment. Following the meeting, Harding informed me that he would get back to me at the end of the summer with a more concrete idea of what Hees was prepared to do.

45. I met again with Harding and Cockwell in or about August 1994. Following this meeting I determined that I would leave Hees. On September 15, 1994, I informed Hees that I would leave the company at the end of 1994.

46. Following my announcement, arrangements were made for me to continue in my employment with Hees until December 31, 1994. In discussions that I had with Harding, it was agreed that I would assist Hees in the process of finding and training someone to replace me as

treasurer. It was always my understanding that I was to remain an employee, and the treasurer of Hees, until my resignation took effect on December 31, 1994.

47. From the announcement of my resignation on September 15, 1994 until the date of my resignation on December 31, 1994, I was paid my normal salary by Hees. Until December 22, 1994, I continued to work on Hees business out of my office on Hees premises. From December 23 to 31, 1994 I took planned holidays.

Exercise of Share Options

48. On December 15, 1994, I met with Harding and discussed with him my intention to exercise my option to purchase 85,000 Hees common shares at $5.125 per share pursuant to the Second Option. Harding told me that in his view, the Second Option was subject to a vesting provision and that only 40 percent of the options under the Second Option had vested. He went on to say that if I caused Beckwith to redeem the preferred shares which it issued to Edper Holdings and Kramble, he would go before the Hees compensation committee to ask that a further 20 percent of the options be vested. I rejected Harding's position on vesting and told him that I would meet with him on December 21, 1994, at which time I would tender payment in return for 85,000 Hees common shares in exercise of the Second Option.

49. By letter to Hees dated December 16, 1994, I confirmed my intention to exercise the Second Option for 85,000 common shares of Hees. I also confirmed that I would meet with Harding on December 21, 1994 at 10:00 a.m. to tender my cheque and an executed notice of exercise, in return for the appropriate share certificate. I also confirmed my earlier agreement with Hees that my resignation was to be effective December 31, 1994 and that I would remain in Hees' employ until that date. A copy of my letter to Hees dated December 16, 1994 is attached to this affidavit as exhibit "L".

50. Harding responded to my letter of December 16, 1994 by letter to me dated December 20, 1994. In his letter, Harding stated, among other things, that he wished me to

vacate my Hees office as soon as possible, but that, as earlier agreed with me, Hees would continue to pay me my salary through to the end of December. A copy of Harding's letter to me dated December 20, 1994 is attached to this affidavit as exhibit "M".

51. On December 21, 1994 at or about 10:00 a.m., I met with Harding and tendered my cheque in the amount of $435,625, representing payment in full for 85,000 Hees common shares pursuant to the Second Option. I also presented Harding with an executed notice of exercise in which I formally exercised the Second Option. Harding, on behalf of Hees, refused to accept my cheque and refused to accept the notice of exercise. A copy of my cheque in the amount of $435,625 and a copy of the executed notice of exercise are attached to this affidavit as exhibits "N" and "O", respectively.

52. By letter to Hees dated January 5, 1995, to the attention of Harding, I informed Hees that I considered its refusal to accept my tender as a repudiation by Hees of its obligations under the Second Option. A copy of my letter to Hees dated January 5, 1995 is attached to this affidavit as exhibit "P".

Damages

53. On December 21, 1994, the day on which I sought to exercise the Second Option, Hees common shares were trading at $12.625 per share. Under the Second Option, I had a right to purchase up to 85,000 Hees common shares at a cost of $5.125 per share.

Vesting

54. In response to my claim for damages resulting from Hees' refusal to accept my exercise of the Second Option, Hees has alleged, among other things, that the Second Option contained a vesting provision under which only 40 percent of my option to purchase up to 85,000 Hees common shares had vested. While I expressly deny the existence of any such vesting provision with respect to the Second Option, for the purposes of this motion for

summary judgment, I seek damages plus interest and costs only in relation to 40 percent of the 85,000 Hees common shares available under the Second Option. I am taking this position without prejudice to my ability to claim damages with respect to the remaining 60 percent of the Second Option at trial.

SWORN BEFORE ME at the City of)
Toronto in the Municipality)
of Metropolitan Toronto)
this 12 day of July, 1996)

A Commissioner for Taking Affidavits, etc.
IAN GODFREY

LIONEL F. CONACHER