

CANADA / JUDGMENT

Imperial Parking Canada Corporation v. Anderson

2014 BCSC 989

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 989 Imperial Parking Canada Corporation v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Imperial Parking Canada Corporation v. Anderson,

2014 BCSC 989

Date: 20140604

Docket: S126651

Registry: Vancouver

Between:

Imperial Parking Canada Corporation

Plaintiff

And

Herbert W. Anderson and Michael T. Menzies,

Coastal Pacific Investments Inc. and GoPark Management Inc.

Defendants

Corrected Judgment: The text of the judgment was corrected at page 2 (Table of Contents) on June 9, 2014.

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

In Chambers

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B.R.H. Johnston

Place and Date of Hearing:

Vancouver, B.C.

May 20, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2014

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Introduction

[1] The defendants each apply under Rule 7-1 for an order requiring the plaintiff to comply with their demand for further and better discovery of documents. The plaintiff resists the application on the grounds that either:

1. they have already produced all of the documents they have in respect of some of the categories sought; and
2. the balance of the documents demanded are simply not relevant to the issues in the case.

[2] For the reasons that follow, the applications are dismissed.

Background

[3] The application was argued in the context of pleadings which have been amended with the consent of the other parties, but which have not yet been filed. I proceeded with the application on the basis of counsels' assurance that these pleadings would be filed and I assume this has already taken place or will very shortly.

[4] The lawsuit is a breach of fiduciary duty claim against a former CEO (Anderson) and management consultant (Menzies/Coastal Pacific) who have set up a business (GoPark Management) in competition with the business of the plaintiff (Imperial Parking). The causes of action alleged against the defendant include breach of fiduciary duty, deceit, fraudulent misrepresentation, conspiracy, and misappropriation of confidential information. The discovery of documents in this type of case usually provides critical evidence, but it is the pleadings which identify the "material facts" or "matters in question" that inform the document discovery process.

[5] The key allegations pleaded in the unfiled Further Amended Notice of Civil Claim are that:

- at all material times, Anderson was a director and the CEO of the plaintiff and was subject to a written employment agreement that contained covenants respecting non-competition, non-solicitation, and confidentiality of corporate information;
- Menzies/Coastal Pacific entered into a written consulting agreement with the plaintiff dated December 31, 2007 which also imposed non-competition, non-solicitation and confidentiality obligations;
- by letter agreement dated June 9, 2010, Anderson and Menzies purported to amend the latter's consulting agreement by reducing its term from six years to five years and eliminating the non-competition obligation;
- this amendment agreement was executed between Anderson and Menzies to "serve their personal interests in combining together to compete" against the plaintiff in the future and the existence of the letter agreement was "intentionally concealed";
- on August 11, 2010, Anderson entered into a "termination and settlement agreement" with the plaintiff pursuant to which sums in excess of \$1 million were paid to Anderson and ongoing fiduciary obligations were acknowledged, albeit his non-competition obligation was reduced from 24 months to 18 months;
- in March 2012, Anderson and Menzies formed GoPark Management to engage in direct competition with the plaintiff, having conspired with each other to wrongfully compete with the plaintiff utilizing the latter's confidential business information.

[6] Interestingly, the plaintiff's pleading, particularly the most recent amendments to same, has been deliberately crafted to seek narrow relief expressly in order to avoid production of some of the documents and information that the defendants now seek. In particular, as against Anderson, the plaintiff seeks the following remedies:

- damages for breach of fiduciary duty, deceit and fraudulent misrepresentation, comprised of repayment of all compensation paid to Anderson under the Anderson settlement agreement;
- an accounting of all proceeds or payments received in relation to the breach of fiduciary duty and an order for disgorgement;
- rescission of the Anderson settlement agreement and an order that Anderson repay all compensation received under same along with a declaration that the Anderson non-competition obligations in his employment agreement continued until August 11, 2012 (i.e. long after the GoPark Management business was established);
- damages for conspiracy, comprised of compensation paid to Anderson under the Anderson settlement agreement; and
- punitive damages.

[7] As against Menzies/Coastal Pacific, the plaintiff seeks:

- rescission of the June 9, 2010 letter agreement or a declaration that the same is void or unenforceable;
- a declaration that the Menzies non-competition period remains in force and effect until August 31, 2014 (i.e. well after the establishment of the GoPark management enterprise);
- damages for participation in Anderson's breach of fiduciary duty, comprising the compensation paid to Anderson under the Anderson's settlement agreement and also the compensation paid to Menzies/Coastal Pacific under their consulting agreement;
- damages for deceit, fraudulent misrepresentation and conspiracy, comprised of compensation paid to Anderson/Menzies/Coastal Pacific under their respective agreements;
- an accounting of all proceeds or payments received in relation to the said breach of fiduciary duty and an order for disgorgement of same; and
- punitive damages.

[8] As against the defendant GoPark Management, the plaintiff claims an accounting of all proceeds or payments received in relation to the other defendants' breach of fiduciary duty and an order for disgorgement of same.

[9] All parties acknowledge that the heart of the case is the circumstances surrounding the execution of the June 9, 2010 letter agreement which eliminated the Menzies non-competition obligation. The plaintiffs are essentially claiming that this was a secret agreement made in furtherance of a conspiracy to permit competition that would not

otherwise have been permissible. The concealment of that transaction is the basis of the deceit allegation underlying the claim for rescission of the Anderson termination and settlement agreement dated August 11, 2010.

[10] Anderson is represented by his own solicitor and has filed his own Response to Civil Claim. The defendants Menzies, Coastal Pacific, and GoPark Management are all represented by the same solicitor and have filed their own separate Response to Civil Claim.

[11] The key components of Anderson's defence are set out in his Response as follows:

- as a matter of law, the non-competition and non-solicitation obligations in his employment agreement were void and unenforceable;
- the June 9, 2010 letter agreement with Menzies was not concealed but rather was fully disclosed to the plaintiff's management team;
- there is therefore no proper basis for setting aside the Anderson settlement agreement which validly reduced the non-competition period and which contained a release of all claims that remains enforceable; and
- Anderson denies all of the alleged breaches and wrongdoing and says that in any event the same "did not cause the plaintiff to suffer any loss, damage or expense".

[12] In their Amended Response to Further Amended Notice of Civil Claim, the other defendants deny any breaches or wrongful conduct on their part and "put [the plaintiff] to the strict proof thereof". They also allege other material facts and legal bases on which liability is avoided including:

- the June 2010 letter agreement was made in the context of the plaintiff's prospective sale to third parties i.e. for legitimate business purposes;
- the execution of the letter had nothing to do with any conspiracy or personal interest in future competition with the plaintiff;
- their non-solicitation and non-competition obligations terminated on August 31, 2011 in accordance with the letter agreement, and the March 2012 establishment of GoPark Management was perfectly proper;
- the said restrictive covenants were, as a matter of law, unenforceable and void in any event;
- in any event, the Menzies consulting agreement expressly permitted the latter to pursue new business, including new business in competition with the plaintiff, subject to the latter being able to exercise prescribed rights of first refusal;

- GoPark Management was established for the purpose of furthering the business of another parking services enterprise, Precise Park Link Inc. This book of business was one that Menzies was entitled to pursue in any event because the plaintiff would have declined any opportunity to pursue same and, indeed, the already existing relationship with Precise Park Link had been adversarial and was formally terminated by the plaintiff in July 2012; and
- in any event, the plaintiff has not suffered any damage, loss or expense as a result of any of the actions of the defendants.

Discovery of Documents under Supreme Court Civil Rule 7-1

- [13] Much of the discussion which follows is derived from *Beihl v. Strang*, 2010 BCSC 1391, *Edwards v. Ganzer*, 2012 BCSC 138, and Kent "Discovery of Documents Under Supreme Court Civil Rule 7-1: Technical and Evidentiary Conundrums", 70 Advocate 703, (2012).
- [14] The Supreme Court Civil Rules which came into effect July 1, 2010 impose limits on the discovery process. The "new" rules changed the procedure for discovery and inspection of documents.
- [15] Rule 26 of the former Supreme Court Rules required each party upon demand to deliver a "list of documents that are or have been in the party's possession or control relating to every matter in question in the action". The old rule was broadly interpreted in accordance with the test described in the famous case, *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.) in which the Court of Appeal stated:

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to train of inquiry, which may have either of these two consequences ...

[Emphasis in original.]

- [16] As applied in B.C., the above principle obliged parties to make discovery of often a very substantial number of documents, many of which were subsequently determined to be largely irrelevant to the issues in dispute. However, according to the introduction to the new rules, "Peruvian Guano is mortally wounded if not already dead".
- [17] Rule 7-1 contemplates the following:
- production within 35 days of the end of the pleading period,
 - of a list of documents that are or have been in the party's possession or control,

- which could, if available, be used by any party of record at trial to prove or disprove a material fact [emphasis added], including
- all other documents to which the party intends to refer at trial,
- mandatory ongoing discovery of additional documents initially omitted through inaccuracy/incompleteness or arising through subsequent possession/control, by way of "prompt amendment" of the list of documents,
- the ability of a party to make demand for discovery of additional documents not set out on the list which "relate to any or all matters in question in the action" (the "old" test) provided justification is supplied, and
- prohibition of the use at trial of any document of which discovery has not been made.

[18] In short, Rule 7-1 contemplates a two-tier document discovery process involving:

1. initial discovery that may be relatively narrow; and
2. further discovery on demand of broader classes of documents.

The First Tier

[19] The first tier of document discovery applies the "probative of material facts" test. It is much more narrow than any Peruvian Guano "direct/indirect, relating to matters in question/train of inquiry possibility" test.

[20] The concept of "material facts" requires a careful analysis and understanding of the causes of action/defence in each case. Each cause of action, whether it is negligence, breach of contract, conspiracy or simple debt, is broken down into constituent elements i.e. the components that must be established on the evidence in order to make out the cause of action/defence. The factual underpinnings of these elements are the "material facts" and to the extent that they can be proved/disproved by way of documents, the latter are the documents that must be initially disclosed under Rule 7-1(1).

[21] Under the new rules, plaintiffs and defendants must plead the "material facts". Part 1 of the notice of civil claim requires the plaintiff to "set out a concise statement of the material facts giving rise to the plaintiffs claim". A defendant's response to civil claim must admit, deny or disclaim knowledge of those facts, must set out the defendant's own version of the facts including any additional "material facts relevant to the matters raised".

[22] Hence, reference to the facts that have been specifically pleaded in the pleadings can assist in determining what are the "material facts" in relation to which document discovery must occur. If the pleadings are poorly drafted or otherwise inadequate, careful analysis of the material elements of the cause of action sought to be pleaded will be required to "inform" the proper document discovery process.

The Second Tier

[23] Subsections 7-1(10) and (11) provide for the second tier of the new document discovery process. They allow a party to demand the listing/production of additional documents or classes of documents beyond what has already been disclosed. But there is a major difference between the two subsections, namely,

- a demand under Rule 7-1(10) is for additional documents that should have been disclosed under subrule (1) i.e. documents that are probative of a material fact or any other document to which the party intends to refer at trial, whereas
- the additional documents that may be demanded under Rule 7-1(11) are for such additional documents within the listing party's "possession, power or control" and which "relate to any or all matters in question in the action" i.e. the Peruvian Guano discovery under the former rules with the addition of the word "power".

[24] A demand for broader discovery of documents under Rule 7-1(11) must be accompanied by:

- a written demand identifying additional documents or classes of documents with reasonable specificity, and
- an indication of the reason why such additional documents or classes of documents should be disclosed in the case.

[25] This "two-tiered" process of initial narrow discovery of documents followed by broader discovery of documents upon justifiable demand requires a rigorous assessment of the adequacy of any party's discovery of documents. Casual, pro-forma approaches should be avoided. Counsel have an ethical and professional duty to be diligent and to act with scrupulous integrity with respect to the pursuit and assessment of what documents must be produced and what documents need not be produced.

[26] Competent and ethical counsel can reasonably disagree in any given case on the materiality of certain facts or the relevance of documents related to such facts. Indeed, Rule 7-1 expressly contemplates such disputes being brought for and resolved by the court. But proper and professional conduct does not permit deliberate non-disclosure of documents which are required to be disclosed, nor knowing disregard of the Rules based on cynical assumptions respecting strategy or cost. The discovery of documents under the new rule demands good judgment and utmost integrity, perhaps even more so than in the past.

Application to the Present Case

[27] The two applications brought by the defendants are similar but not identical. The defendant Anderson seeks an order requiring the plaintiff to deliver a further amended list of documents listing "all of the documents described and listed in Schedule A" to the notice of application. Schedule A then lists 22 categories of documents; the descriptions are often general and lack focus e.g. "all emails and other correspondence between Alan Copping and

Michael Menzies from August of 2010 to December of 2011", or "all documents relating to the City of Coquitlam's decision to terminate its parking management contract with the plaintiff, including, without limitation, a copy of the parking management contract and termination letter".

- [28] The demand is said to be made "in accordance with Rule 7-1(10) and (11)" without specifically identifying which category is demanded under which subrule. Since the test for additional production under each subsection is different, counsel should assist the court by specifically identifying which subsection applies to each additional document being sought. The lack of focus combined with the broad generality of document description is not helpful.
- [29] Upon the hearing of the application, the court was advised that the applicant was no longer pursuing production of some 14 of the 22 categories of documents that had been listed. This was also the first time counsel for the plaintiff had been advised of that intention and, with some justification, he protested the time and expense that had thus been wasted.
- [30] The remaining categories of documents in respect of which the defendant Anderson continues to seek further and better production by way of a further amended list of documents from the plaintiff include:
5. All communications services and inset or communications and correspondence between Alan Copping and the Plaintiff's in-house counsel from April 2010 to December 2011 relating to Michael Menzies and the Consulting Agreement.
 7. The complete file where the plaintiff kept a copy of the Menzies' Consulting Agreement.
 13. All emails and other correspondence between Alan Copping and Michael Menzies from August of 2010 to December of 2011.
 16. All documents evidencing that Bentall Kennedy, Oxford Properties Group, Brookfield Office Properties, Abbotsford General Hospital, RCMP "E" Division site, the City of Harrison and the City of Kelowna were the Plaintiff's customers or potential customers from August of 2010 to August of 2012.
 17. All documents evidencing any and all profits and/or revenues generated by the Plaintiff as a result of work and services that it performed for Bentall Kennedy, Oxford Properties Group, Brookfield Office Properties, Abbotsford General Hospital, RCMP "E" Division site, the City of Harrison and the City of Kelowna.
 18. Copies of all bids and proposals that the Plaintiff submitted to Abbotsford Regional Hospital, RCMP "E" Division site, the City of Harrison and the City of Kelowna from August of 2010 to August of 2012 [additional names deleted at application].

19. Copies of any rejection and termination letter that the Plaintiff received from Abbotsford Regional Hospital, RCMP "E" Division site, the City of Harrison and the City of Kelowna from August of 2010 to August of 2012 [additional names deleted at the application].
 20. All communications and correspondence between the Plaintiff and the following companies and entities from August of 2010 to August of 2012: Bentall Kennedy, Oxford Properties Group, Brookfield Office Properties, Abbotsford Regional Hospital, RCMP "E" Division site, the City of Harrison and the City of Kelowna.
 21. All documents relating to the City of Coquitlam's decision to terminate its parking management contract with the Plaintiff, including, without limitation, a copy of the parking management contract and termination letter.
- [31] For their part, the other defendants seek an order requiring the plaintiff to amend its list of documents to list three categories of additional material namely:
- (a) Documents that evidence the allocation of responsibility for parking management activities (including, without limitation, violation issuance and enforcement, payment collection, upkeep and maintenance, staffing, security, and installation of meters) as between Impark and its affiliates and subsidiaries;
 - (b) Documents that evidence Impark's loss or damage, or lack thereof, associated with the defendants' alleged competition including, without limitation, the following documents or categories of documents:
 - (i) Contracts or customers Impark had and that Impark alleges GoPark has acquired; and,
 - (ii) Records evidencing the financial performance of contracts or customers that Impark had and that Impark alleges GoPark has acquired including, without limitation:
 - (A) Financial statements for the period 2010 to present;
 - (B) Profit and loss statements for the period 2010 to present;
 - (C) General ledger excerpts for the period 2010 to present;
 - (D) Internal analyses and reports;
 - (E) Internal memoranda and correspondence; and,
 - (F) Correspondence with customers or former customers.
 - (c) Documents relating to Impark's interest, or lack thereof, in any contracts or customers at issue in this litigation including, without limitation, strategic and marketing plans, business and financial projections, and proposals.

[32] The Notice of Application does not identify which subsection of Rule 7-1 the defendants are invoking. It merely refers to "Rule 7-1" without more. At the hearing, counsel advised that the application was being brought under Rule 7-1(10) but also stated that Rule 7-1(11) could also be invoked because it had issued to the plaintiff detailed correspondence outlining the rationale for the further production that was being demanded.

[33] The Anderson Notice of Application was filed August 30, 2013. The Notice of Application of the other defendants was filed May 7, 2014. The application record included six affidavits filed by four different legal assistants each attaching the numerous letters between counsel constituting the six-month bombardment of demands and replies respecting perceived inadequacies in document production. It is almost impossible to figure out from this material the current status of particular documents and particular demands, all of which has been muddled even further by the fact that examinations for discovery have been held since the first application was filed and which have resulted in yet further requests for additional material.

[34] Rule 7-1(11) requires that any written demand for additional documents or classes of documents must identify same "with reasonable specificity". Where the demand is overly broad and vague, the "lack of specificity which characterizes [the] application is fatal to its success": *Lit v. Hare*, 2012 BCSC 1918 at para. 68. In that case, the court noted at para. 68:

It is difficult for the court to adjudicate on a document production application where what is sought are "all documents not yet produced" in broadly defined categories.

[35] That observation applies with equal force to the applications in this case.

[36] The plaintiff has performed extensive document searches which are described in detail by counsel's letter of September 18, 2013. The search for email material alone yielded approximately 3,800 documents and more than 9,000 documents if one included attachments to emails. All of this material was delivered to counsel and reviewed for materiality.

[37] The letter goes on to state:

If, despite these extensive efforts, you still take the position that further document production is required from [the plaintiff], we are open to considering reasonable requests for specific searches for properly defined categories of material documents .

[38] Plaintiff's counsel advises that Impark has repeatedly offered to conduct further document searches if the defendants provide a reasonable list of search terms and dates, yet this has simply not occurred.

[39] The plaintiff argues:

In spite of Impark's substantial document search efforts, production of numerous documents that fall within these demands, and offers to conduct additional reasonable searches for properly particularized documents, Mr. Anderson claims Impark's document production is somehow deficient. He provides no argument or evidence to support this point and has not pointed to a single document he believes exists but that has not been produced.

[Emphasis added.]

[40] I am inclined to agree that the lack of specificity in most of the demands is fatal to the application. However, there are two other points to be made.

[41] First, counsel advises that, except for the categories of documents relating to damages discussed below, there has been a diligent search for documents of the sort demanded by the defendants, that the documents in question have been reviewed and all appropriate production has been made under the rule. Earlier in these reasons I emphasized the professional conduct and ethical obligations of counsel in respect of the document disclosure process. I accept counsel's assertion in this case that a diligent document search has been undertaken and that all available material has been produced. In such circumstances, particularly given the lack of specificity in the residual demands, there is no proper basis on which a further order should be made, whether pursuant to Rule 7-1(10) or (11).

[42] The application by Menzies/Coastal Pacific/GoPark is somewhat more specific. It identifies three categories of documents which are being sought namely:

1. documents relating to the allocation of parking management activities;
2. documents relating to Impark's losses; and
3. documents relating to Impark's interests in contracts or customers.

[43] With respect to the first category, the defendants argue the documents are material to the interpretation and enforceability of the non-competition clause in the Menzies' consulting agreement that is central to the lawsuit. In particular they note the agreement prohibits involvement in "any undertaking competitive with the Business", and that the term "Business" is defined to mean "activities carried on by [the plaintiff]". Unlike other provisions in the agreement, there is no phrase including Impark's subsidiaries or affiliates.

[44] The plaintiff responds that there is no allocation of parking management activities and types of customers as between Impark and its affiliates because the businesses simply do not operate that way. In other words, there are no documents to produce.

- [45] Secondly, the plaintiff points to the totality of the language in the restrictive covenant ("notwithstanding the foregoing", "including without limitation" etc.) and the generality of the prohibited activities means the defendants' interpretation of the agreement lacks merit. I agree on both counts and find no basis for ordering for the production of this category of documents.
- [46] The second category of documents demanded by the defendants relates to Impark's damages or losses sustained (or not sustained) as a result of the defendants' conduct. It is claimed these "damages documents" may be relevant to the trial judge's assessment of the appropriateness of an order for accounting and disgorgement as well as the claim for punitive damages. They say the plaintiff cannot by its surgical pleading "constrain the defendants, or the court for that matter, from inquiring into the appropriateness of any particular remedy".
- [47] The plaintiff replies that it is not seeking compensatory damages for its own actual losses but only disgorgement. The plaintiff has deliberately narrowed its pleadings to expressly remove claims for compensatory damages in tort based on the plaintiff's own loss thereby rendering the latter subject irrelevant. It argues "a litigant is dominus litis and free to withdraw any particular relief sought" thereby eliminating the necessity for document discovery related to the relief in question, citing *Fortunato v. The Toronto Sun* (2001), 55 O.R. (3d) 371 (S.C.J.).
- [48] In any event, the plaintiff says a breach of fiduciary duty claim does not require proof of actual loss or damage. The case law has consistently reaffirmed the principle that faithless fiduciaries must account for ill-gotten profits regardless of any loss to their principal: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 at 622; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 618 and 657; *Beyer-Brown & Associates Ltd. v. S & R Interiors Ltd.*, 2007 BCSC 327 at para. 52; and *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177 at paras. 75-77.
- [49] The plaintiff is frank in acknowledging it has expressly amended its pleadings to avoid production of its new confidential information. It says, in effect, "these defendants have already stolen our old/former confidential information, and we are simply not prepared to produce any new confidential information developed since their departure even though it means forgoing any remedy for compensatory damages".
- [50] Again, I find myself in agreement with the plaintiff's argument. Because the relief sought is limited to disgorgement of monies received and not compensatory damages in tort, the extent of loss or damage actually sustained by the plaintiff as a result of the defendants' allegedly illegal conduct has become irrelevant. To the extent it might affect any award of punitive damages, it is still open to the defendants to argue the plaintiff's failure to adduce evidence in that regard means any such award should be negated or made in only a modest amount.

- [51] The last category of documents in respect of which production is sought are those relating to the plaintiff's interest, or lack thereof, in the contracts or clients secured by GoPark Management. The defendants say the Menzies consulting agreement actually permitted Menzies to pursue new business in competition to the plaintiff subject to the plaintiff's prescribed rights of first refusal.
- [52] Again, this argument must fail. The clause in question, paragraph 1.8 of the consulting agreement, makes it clear that the exception only applies "during the term" of the agreement, whereas the non-competition covenant applies for a period of two years following that term. The claim against the defendants, except for the allegedly "secret" June 2010 letter agreement eliminating the non-competition covenant, relates to the defendants' conduct after the termination of their contractual relations with the plaintiff. The restrictive covenant carves out an exception for "deals" which were actually refused by the plaintiff in accordance with section 1.8 of the agreement while it was in force, but there was no evidence presented on this application as to the existence of any such "refused deals" and hence the whole issue is moot.
- [53] For all of these reasons, the defendants' applications for an order requiring the plaintiff to further amend its list of documents is dismissed. Given the plaintiff's pleading machinations in response to the application when it was first filed, costs are not awarded to the plaintiff in any event of the cause but rather shall be in the cause.

"N. Kent J."

The Honourable Mr. Justice N. Kent

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