
CANADA / JUDGMENT

Marsh Canada Limited v. BFL Canada Insurance Services Inc.

2014 BCSC 1171

COURT

Supreme Court of British Columbia

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2014 BCSC 1171 Marsh Canada Limited v. BFL Canada Insurance Services Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marsh Canada Limited v. BFL Canada Insurance Services Inc.,

2014 BCSC 1171

Date: 20140626

Docket: S128024

Registry: Vancouver

Between:

Marsh Canada Limited

Plaintiff

And

BFL Canada Insurance Services Inc. and Darren Gentile

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Plaintiff:

Mark Pontin

Counsel for Defendants:

Cameron Wardell

Place and Date of Hearing:

Vancouver, B.C.

March 4 & 5, 2014

and May 15, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2014

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I: INTRODUCTION

- [1] There are three applications before the court. The plaintiff and defendants each seek an order that the other deliver an amended list of documents. The defendants also seek an order that the question of liability be tried and determined before the issue of quantum of damages (the "severance application").
- [2] The defendants' position with respect to the production of documents is that, in light of the severance application, only those documents pertaining to liability need to be disclosed. Accordingly, I shall first deal with the severance application.

[3] The action is set for trial for 12 days, commencing March 30, 2015.

II: BACKGROUND

- [4] The following background information is taken largely from the parties' notices of application and/or the plaintiff's written submissions. I have included additional facts which are in dispute insofar as they are relevant to the applications before me.
- [5] This action is brought by Marsh Canada Limited ("Marsh") against its former employee, Darren Gentile ("Gentile"), and Gentile's new employer, BFL Canada Insurance Services Inc. ("BFL"). The plaintiff claims against the defendants for breach of Gentile's non-solicitation agreement, breach of duty of confidence, and inducing breach of contract.
- [6] Marsh's Vancouver office is home to a subsection of its national aviation insurance practice, the Pacific Aviation Group (designated as the "YVR" within Marsh). The YVR's numbers have fluctuated over the years, but it generally has had five to seven members. Gentile was the head of the YVR for almost 12 years, beginning in approximately 2000.
- [7] Vancouver is a significant market for Marsh's aviation practice and the aviation insurance industry generally, as there is great potential for growth. This market is highly competitive.
- [8] Marsh has enjoyed a significant degree of success in the aviation market, and at the national level holds approximately 50% of the available business in Canada. Marsh's share of the Vancouver market has traditionally been approximately 20% to 25%.
- [9] Within the YVR, Gentile was the most senior member. As head of the group, he was the key contact for the majority of the aviation clients serviced out of Vancouver.
- [10] Marsh alleges that as head of the YVR, Gentile had access to highly sensitive and confidential information regarding Marsh's strategy with respect to retaining past clients and approaching new clients. In addition, as part of the management committee in the Vancouver office, Gentile had access to a wide array of confidential client information, including renewal dates, details of clients' fleets, risk placement strategies, and financial information for all of Marsh's aviation clients.
- [11] As part of his employment, Gentile entered into a Confidentiality Ownership Rights and Non-Solicitation Agreement (the "CORNSA"), preventing him from soliciting Marsh's clients for a period of one year after leaving Marsh, and using or disclosing Marsh's confidential information.
- [12] On July 3, 2012, Gentile resigned his employment as a senior vice president and head of the YVR. Marsh alleges that Gentile subsequently told Derek Devitt ("Devitt"), managing director of Marsh's national aviation practice, that he was resigning for personal reasons. In response to specific questions about whether he would seek to remain in the insurance brokerage industry, Marsh says that Gentile told Devitt he would "probably" remain in the industry, and he had not "made any specific decisions". Marsh says this led Devitt to believe

that Gentile would be taking a few months off.

- [13] Marsh alleges that Gentile's statements were untrue. It asserts Gentile had been negotiating to join BFL, a Marsh competitor, for at least four months. Marsh says Gentile had received the final version of an offer of employment from BFL five days earlier, and had obtained a confidential side agreement from BFL indemnifying him from claims by Marsh.
- [14] At the time of his departure, Gentile had surreptitiously taped his conversations with Devitt and the head of Marsh's Vancouver office, Jason Scharfe ("Scharfe").
- [15] The taped conversations form one of the primary bases for BFL's severance application. BFL alleges that Devitt, Scharfe and Brenda Hill ("Hill"), a senior broker at Marsh, swore false and/or misleading affidavits in support of Marsh's injunction application, an application that ultimately did not proceed.
- [16] It is Marsh's contention that since joining BFL, Gentile, in breach of the restrictive covenants in the CORNSA, has actively solicited Marsh's clients either directly or through other BFL employees. Further, Marsh alleges that Gentile has misused Marsh's confidential information for the purpose of soliciting its clients.
- [17] Marsh says that in just a few short months after his resignation, Gentile propelled BFL's previously non-existent aviation insurance practice into a significant player in the Vancouver market. It says he has done so by executing a deliberate strategy, known and supported by BFL, to unlawfully attack Marsh's client base.
- [18] In August 2013, Marsh's counsel wrote to Gentile and BFL, seeking assurances concerning the alleged misuse of Marsh's confidential information, and disclosure of Gentile's activities pursuant to covenants in the CORNSA that continued in force. On August 14, 2013, counsel responded jointly on behalf of Gentile and BFL, asserting that they had not breached any obligation owed to Marsh, and that they were under no legal obligation to provide the information requested. Marsh took this as a repudiation of Gentile's agreement with Marsh.
- [19] This action was commenced on November 16, 2012. In the notice of civil claim (the "NOCC"), Marsh alleges that Gentile breached restrictive covenants prohibiting him from soliciting Marsh's clients, and misused Marsh's confidential information, all contrary to the express terms of the CORNSA. Marsh claims against BFL for breach of duty of confidence and inducing breach of Gentile's agreements with Marsh. Marsh alleges BFL recruited Gentile for the express purpose of soliciting Marsh's clients in order to build its western Canada aviation practice.
- [20] On December 12, 2012, BFL and Gentile filed a response to civil claim (the "Response"). They deny that Gentile took or used any confidential information from Marsh, and that BFL conspired with Gentile before his resignation with respect to the transfer of clients afterwards. The Response also denies that Gentile breached any enforceable contractual provision restricting his entitlement to solicit clients of Marsh.

- [21] On January 22, 2013, Marsh filed a notice of application seeking an interim injunction restraining BFL and Gentile from dealing with clients and former clients of Marsh. Marsh also sought certain injunctive and specific relief relating to the distribution and return of confidential information it alleged to be in the possession of BFL and Gentile (the "injunction application").
- [22] In support of the injunction application, Marsh filed affidavits of Devitt, Hill and Scharfe. BFL and Gentile say that each of these affidavits contains statements that are false. They also say that the affidavits sworn by Devitt and Scharfe contain statements suggesting Devitt and Scharfe colluded to present similar false and/or misleading evidence to the court.
- [23] On March 6, 2013, the defendants filed a response opposing the injunction application on the basis that the restrictive covenant relied upon by Marsh was unenforceable, and that there was no evidence Gentile misappropriated confidential information or solicited clients of Marsh. The defendants also took the position that any potential damages could be calculated (and paid) with relative ease, making injunctive relief inappropriate. As stated above, the injunction application did not proceed to hearing.
- [24] From February to August 2013, the parties delivered lists of documents and corresponded with each other with respect to document production. Marsh alleges it was obliged to bring an application to obtain what it considered to be proper documentary disclosure, and even then the defendants failed to comply with their obligations in that regard.
- [25] For its part, BFL also made a demand for additional documents which it says Marsh ought to have disclosed but had not.
- [26] Marsh and BFL both allege that much of what has not been disclosed by them to the other party contains confidential and competitively sensitive information, including internal communications, communications with clients, records of fees, commissions and revenues received by BFL, and Marsh's strategies for developing and maintaining its clients.
- [27] On August 8, 2013, BFL filed and delivered the severance application. It also sought to postpone its document disclosure obligations.
- [28] The same day, BFL also delivered a number of additional documents that had not been previously disclosed (the "Additional Documents"). These documents included a draft offer of employment by BFL to Gentile dated February 6, 2013, with a contemplated start date of February 27, 2013. The Additional Documents also included the final version of Gentile's employment agreement with BFL, dated June 28, 2012, being five days before Gentile resigned from Marsh.
- [29] The Additional Documents also disclosed that shortly before Gentile's resignation from Marsh, BFL entered into a "confidential" side letter agreement, separate from Gentile's employment agreement. This indemnity agreement provides, in part:

As a separate agreement and understanding, and not for distribution without the undersigned's agreement, BFL Canada Insurance Services Inc. will provide appropriate indemnification both in terms of legal fees that you may incur and/or damages levied against you for actions that may be taken by your previous employer arising out of your joining our firm.

[30] On October 31, 2013, Marsh responded to BFL's demand for documents. It was prepared to disclose certain of the documents demanded under an express confidentiality order, provided that BFL made reciprocal disclosure.

[31] On January 30, 2014, counsel for Marsh demanded production of further documents. When these applications were heard on March 4 and 5, 2014, the time for BFL's response to this demand had not yet expired. Accordingly, the applications were then adjourned and later reset to May 15, 2014, such that all outstanding issues relating to documentary disclosure could be dealt with at the same time. By May 15, 2014, the parties had resolved many, but not all, of the outstanding issues relating to documentary disclosure.

III: THE SEVERANCE APPLICATION

A: The Legal Principles

[32] Rule 12-5(67) provides:

The court may order that one or more questions of fact or law arising in action be tried and determined before the others.

[33] The factors to be considered are:

- Is severance likely to result in a significant saving of time and expense?
- Could the issue to be tried first be determinative?
- Are the issues of liability and damages intertwined?
- Is there a compelling reason to justify severance other than time and expense?

See *Nguyen v. Bains*, 2001 BCSC 1130 at para. 11, cited in *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2006 BCSC 1716 at paras. 21-22.

[34] There is a presumption that a plaintiff is entitled to have its claims decided in one trial. Multiplicity of proceedings and "litigation in slices" is to be discouraged. Furthermore, severance should only be ordered where there exist "extraordinary, exceptional or compelling reasons" for doing so: *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180 at para. 11; *Carreiro v. Flynn* (2005), 195 O.A.C. 315 (S.C.J.) at para. 7; *Moore v. Brazauro Resources Corporation*, 2013 BCSC 341 at para. 26.

B: The Parties' Positions

[35] The defendants' position includes:

- a trial of the issues of liability and damages will take much longer than one of liability alone. The damages portion of the trial will involve the court canvassing financial information for many hours, potentially with the assistance of expert evidence;
- if liability is established, ascertaining the quantum of damages will essentially be one of simple arithmetic. If liability is determined in the plaintiff's favour, then this will likely lead to settlement. If liability is not established, then the proceedings will come to an end;
- the issues of liability and damages are not intertwined;
- severance would protect BFL's legitimate interest in protecting its financial and commercially sensitive information;
- the interests of justice favour severance as disclosure of much of the financial information sought by the plaintiff would seriously damage BFL's commercial interests. Conversely, the exemption from disclosure until liability has been established would not injure the plaintiff's interests in any way;
- the plaintiff has implicitly accepted that the issue of liability can be tried separately by applying for injunctive relief;
- the plaintiff's representatives, Devitt and Scharfe, "have shown themselves to be untrustworthy and should not be allowed access to BFL's commercially sensitive financial records in the absence of proven liability"; and
- the plaintiff's claim is not a particularly strong one.

[36] The defendants submit that Scharfe's and Devitt's alleged dishonest behaviour is what makes this case "exceptional" insofar as severance is concerned. The basis for these serious allegations surrounds the circumstances of Gentile's departure from Marsh.

[37] They say that much of what Scharfe deposes to in his affidavit of December 18, 2012, is simply not borne out by the tape recording which Gentile made without Scharfe's knowledge. This includes whether Scharfe asked Gentile if he was leaving to work for a competitor or whether he had spoken to any clients about his resignation, and if Gentile told Scharfe that he would return to the industry in "three or four months" or if he was considering leaving the insurance industry altogether.

[38] The defendants make similar allegations with respect to Devitt's affidavit of December 7, 2012, and what he deposes to have occurred at his meeting with Gentile, which was also surreptitiously taped by Gentile.

[39] They say that as "unsavoury" as the tape recordings may have been, had Gentile not acted as he did, he would have been in a very difficult position to respond to the Scharfe and Devitt affidavits.

- [40] The defendants also submit that there is no credible evidence that Gentile solicited any clients or that he took any confidential information with him when he left Marsh. In fact, he has deposed to the contrary, and there is no evidence that Gentile has been untruthful.
- [41] In addition, the defendants allege that Marsh has acted improperly to gain a competitive advantage in these proceedings. This is evidenced by Marsh's seeking an injunction on false and misleading affidavits, and then not proceeding when the weaknesses of its position were established.
- [42] Marsh's position includes:
- the evidence does not disclose a "compelling" case for severance;
 - when the trial date was set for March 30, 2015, counsel agreed that all issues could be tried in 12 days. If the issues of liability and quantum were severed and discovery was limited as sought by the defendants, then the overall proceedings would be prolonged unnecessarily;
 - since the defendants seek an order for divided discovery, if they are successful, then there will have to be two rounds of document discovery, two rounds of examinations for discovery, and likely additional applications with respect to document production;
 - the defendants have not provided any "case-specific evidence" to substantiate their allegations that there will be a real likelihood of time and expense saving if severance were ordered;
 - both the plaintiff and defendants are concerned about the disclosure of confidential information. The plaintiff has proposed entering into an express confidentiality order under which documents can be disclosed to a limited number of persons on both sides. BFL's response has been to proceed with the severance application;
 - the defendants' submission that Devitt and Scharfe "have shown themselves to be untrustworthy" and are willing to "misuse the court's process" is highly unfair. It is not borne out by the tape recordings that Gentile made of their conversations. In fact, it is Gentile himself who is guilty of deception. He misled his former colleagues about the reasons for his departure from Marsh and the fact that he had been negotiating with BFL for five months prior to leaving. Furthermore, he had obtained an indemnity from BFL against potential claims from Marsh; and
 - the plaintiff had valid reasons for not proceeding with the injunction application, in particular that the flow of clients to BFL had largely come to an end by the time it would have been heard.
- [43] In summary, Marsh submits that the defendants' application for severance is akin to using a "sledgehammer" when a "scalpel", that is, a confidentiality order, is what is required in the circumstances of this case.

C: Discussion

[44] When the legal principles to which I have referred are applied to the facts of this case, I conclude that the severance application should be dismissed. I reach this conclusion for the following reasons.

Is severance likely to result in a significant saving of time and expense?

[45] The parties are in agreement that 12 days for trial is sufficient for both liability and quantum of damages.

[46] The defendants have provided no case-specific evidence as to how severance would result in a significant saving of time and expense. In fact, I accept the plaintiff's submission that, if anything, the length and cost of these proceedings may be increased, not decreased, if severance is granted.

Could the issue to be tried first be determinative?

[47] The defendants submit that if liability is tried first, then this could be determinative and would put an end to the action.

[48] This could potentially be the case in every court action. The authorities are clear that severance is the exception, not the rule. Unitary trials are preferred and "litigation in slices" is to be avoided.

[49] BFL submits that settlement will likely occur should the plaintiff be successful in establishing liability. But there is no evidence to support this submission, except for the statement that damages will essentially be a mathematical exercise.

[50] When I consider the allegations in the NOCC, I am unable to conclude that the issue of damages will be as simple a calculation as the defendants submit in the event liability is established against them.

[51] In fact, when one considers the defendants' submissions on this point within the context of their seeking bifurcated discovery of documents and examinations for discovery, the thrust of their position must be that if liability is determined against the plaintiff, then this will be determinative.

[52] This is presumably why the defendants also submit that the plaintiff has a relatively weak case.

[53] On the basis of the evidence before me on these applications, it is simply not possible for me to assess the relative merits of the plaintiff's and defendants' cases.

Are the issues of liability and damages intertwined?

[54] The defendants say that the issues of liability and damages are not intertwined, and that the plaintiff seeks documents that are relevant only to quantum of damages.

[55] It is clear from the NOCC that Marsh seeks remedies in addition to damages. These include, as against BFL, a constructive trust over all contracts and business opportunities derived from the use of its confidential information. As against Gentile, it also seeks specific performance of the CORNSA.

[56] In addition, Marsh will have to prove some measure of loss in order to succeed on liability. To that extent, there will, in my view, be some overlap between the discovery of documents and examinations for discovery insofar as both liability and quantum of damages are concerned.

Is there a compelling reason to justify severance other than time and expense?

[57] The defendants point to what they allege is clear evidence of Devitt and Scharfe giving false and/or misleading affidavit evidence. They say that this conduct, when considered within the context of their being provided with access to BFL's commercially sensitive financial information, is a compelling reason to justify severance.

[58] I do not accept this submission. First of all, in his affidavit sworn November 14, 2013, Devitt provides a response to what is alleged are significant differences between his Affidavit #1 and the transcript of the tape-recorded conversation with Gentile.

[59] He states that he gave evidence about his discussions with Gentile "from memory as best I could" and "I think my evidence was on the whole accurate". He says that Gentile left him "with the impression that he was going to be taking some considerable time off before deciding what to do". He concluded the conversation by saying "so enjoy not just the next few months", and Gentile did nothing to correct this misapprehension.

[60] It will be for the trial judge to make the necessary findings with respect to the plaintiff's representatives' credibility on this issue. The trial judge will presumably also make findings with respect to Gentile's conduct, both prior and subsequent to his departure from Marsh. This may include his statement in para. 13 of his own affidavit sworn July 26, 2013 (Affidavit #2), being:

By late June 2012, I knew that I was going to resign from Marsh but I did not have another job lined up to go to. My plan at that time was to give notice on July 3 of my resignation, work at Marsh during the notice period, and then have an easy summer, which would include my wedding on Pender Island, B.C. I always expected that I would return to the aviation insurance industry, but at a firm that allowed me the work/life balance I wanted.

[61] In addition, while I accept that both parties have a legitimate interest in keeping certain information confidential, this does not necessarily result in an order for severance. Both Marsh and BFL have valid business strategies they wish to pursue. Marsh wishes to keep its clients. BFL wants to develop its aviation insurance business. It is not unusual for confidentiality orders to be made as a means to address confidentiality concerns in cases such as this.

- [62] While I appreciate that the appropriate remedy is highly fact-specific, I am assisted by the reasoning of Macaulay J. in *ERSS Corp. v. CIBC and Kluge*, 2001 BCSC 266 at paras. 16-18:
- [16] Finally, the defendants say that the bank's legitimate commercial interest in keeping its financial information confidential provides a compelling reason for severance. The CIBC does not dispute the relevance of this information to the question of damages but says that it will be unduly prejudiced by disclosing it to ERSS, a direct competitor, before any finding of liability by the court. Although a confidentiality agreement or order is in place, the defendants say that this information might nonetheless be disseminated into the public marketplace.
- [17] It is, of course, not at all uncommon for sensitive financial information to be disclosed during the pre-trial process and referred to during public trial. I note that this is not a case where there is any reason to anticipate the information will never need to be referred to publicly if liability is established due to the probability of settlement. I do not see the sensitivity of financial information as a compelling reason that would justify a different approach.
- [18] Whether viewed alone or together, I am not persuaded that the reasons advanced for severance are compelling. Nor, in the circumstances, is the case extraordinary or exceptional. Justice does not require severance. If ERSS succeeds in establishing liability, severance would only lead to unnecessary delay and likely, at least, duplication of some expenses. In that event, the object of the Rules will be frustrated. The application for severance is denied.
- [63] Accordingly, the severance application is dismissed. There will be a confidentiality order, the terms of which I shall outline below.

IV: DOCUMENT PRODUCTION

A: The Legal Principles

- [64] The parties both rely on Rules 7-1(1), (10) and (11)-(14) of the Supreme Court Civil Rules (the "Rules") in support of their respective applications for document production.
- [65] The Rules provide a two-tier process for document disclosure:
- (a) Disclosure under Rule 7-1(1) requires "all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact". This standard of relevance is significantly narrower than *Peruvian Guano*, and presents a necessary limitation to the application of the 19th century test to 21st century records: *More Marine Ltd. v. Shearwater Marine Ltd.*, 2011 BCSC 166 at paras. 10-11.

- (b) Disclosure under Rule 7-1(11)-(14) requires documents that "relate to any or all matters in question in the action". This is substantially the Peruvian Guano test, identifying any document that relates to a matter in question in the action which not only would be evidence upon any issue, but also which contains information which may, not which must, either directly or indirectly, enable the party either to advance his own case or to damage the case of his adversary: *Kaladjian v. Jose*, 2012 BCSC 357 at paras. 44-45, citing with approval *Przybysz v. Crowe*, 2011 BCSC 731 at paras. 27-29.
- [66] Furthermore, by applying the proportionality principle embodied in Rule 1-3(2), an attempt is made to balance the burden of producing the documents in terms of time, cost and effort against their materiality and probative value. Proportionality does not only relate to monetary quantification, it also relates to the importance of the issue in question: *Isman v. The City of New Westminster*, 2011 BCSC 1066 at para. 14.
- [67] The following principles also apply:
- (a) Full and complete disclosure between or among litigants prior to trial is essential to the truth-seeking function of the litigation process and the proper administration of justice: *Nikolic v. Olson*, 2011 BCSC 125 at para. 93.
- (b) It is the pleadings that determine relevance: *Burgess v. Buell Distribution Corporation*, 2012 BCSC 1494 at paras. 16-17.
- (c) The interests of justice may require production of relevant documents, notwithstanding the high interest of a party in keeping it confidential: *A.M. v. Ryan*, [1997] 1 S.C.R. 157 at para. 37.
- (d) A party asserting that a document is privileged bears the onus of establishing the privilege: *Hamalainen v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.) at para. 19.
- (e) The removal of the Peruvian Guano "train of inquiry" test of relevance will generally require a party to provide some evidence to support an application for additional documents where a demand is made under Rule 7-1(11) or Rule 7-1(18): *Kaladjian v. Jose* at para. 62.
- [68] The plaintiff says that its demand for documentary disclosure relates to the first tier of disclosure in that what it now seeks should have been produced at first instance. Be that as it may, I will consider both the plaintiff's and defendants' applications from the broader second tier of the process referred to in para. 65(b) above.
- [69] The principles that apply in respect of the balance between disclosure and confidentiality were summarized in *Altec Design Group Ltd. v. Motion Works Inc.*, [1992] B.C.J. No. 2451 (S.C.):
1. The necessity for complete disclosure in litigation cases supersedes the fact that a party may lose a competitive advantage when disclosure is made.

Forestral Automation Ltd. v. R.M.S. Industrial Controls Inc., Dunstan, Braun and Schroeder (1977), 4 B.C.L.R. 219, 80 D.L.R. (3d) 341, 35 C.P.R. (2d) 114.

2. In maintaining a balance between disclosure and confidentiality, the governing principal is to lean in favour of openness and disclosure.

Deveron-Hercules Inc. v. Gill et al, 21 C.P.C. (2d) 455.

3. The party viewing the confidential materials shall give an undertaking to the court and the opposite party, the terms of which may vary from case to case.

GEAC Canada Ltd. et al v. Prologic Computer Corp., 24 C.P.C. (3d) 566.

4. The party whose documents are being disclosed to be examined by an expert is entitled to have a representative present during the examination.

GEAC Canada Ltd.

5. An order preventing counsel from showing relevant documents to his client should only be granted in exceptional circumstances.

Deprenyl Research Ltd. et al v. Canguard Health Technologies Inc. et al, 41 C.P.R. (3d) 288.

6. The onus is on the party requesting the restriction to establish a legitimate reason for the restriction.

Deprenyl Research Ltd.

7. In matters that do not require technical expertise, the parties may be required to produce the documents to a third party for the examination and report to the court.

Webster v. Mastercraft Development Corporation, (1991) 55 B.C.L.R. (2d) 121.

8. In instances in which the probative value of the documents is not sufficiently great to outweigh the real and very considerable adverse affect of disclosing the trade secret, disclosure ought not to be ordered.

G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd. (1992), 70 B.C.L.R. (2d) 180.

B: The Confidentiality Order

[70] The plaintiff and defendants have raised legitimate confidentiality concerns. These are not unusual in cases such as this, and are to be dealt with as set out immediately above in para. 69.

[71] Accordingly, to the extent documents are to be produced as ordered below, this is to occur subject to an order of confidentiality which is to be accompanied by appropriate undertakings (the "Confidentiality Order").

[72] The Confidentiality Order is to be in the form set out in the plaintiff's draft order with the proviso that in paragraph 4 the "three designated representatives of their clients and to "experts" are to be identified by name.

C: The Plaintiff's Application for Document Disclosure

1. Documents regarding the recruitment and hiring of Gentile, and his departure from Marsh

[73] What remains outstanding are the internal BFL documents including emails, texts, memos, correspondence, and any other documents relating to the negotiation and decision to enter into the employment and indemnity agreements with Gentile.

[74] The plaintiff's position as set out in paras. 16-18 of the NOCC is that Gentile was not forthright about his reasons for leaving Marsh. It says the documents sought are necessary to the plaintiff's investigation of these issues as they will assist in establishing the circumstances surrounding Gentile's recruitment, hiring and departure from Marsh. They are also required to establish its claims for breach of contract, punitive damages, and inducing breach of contract.

[75] BFL's position is that the documents are not relevant.

[76] I accept the plaintiff's submission. It is the pleadings that determine relevance. These documents may assist the plaintiff in advancing its claim and satisfy the requirements for the second tier of documentary disclosure.

2. All documents regarding BFL's strategy for the development or expansion of its aviation insurance group in western Canada, including all business plans, strategy documents, etc. created in the 18 months before the commencement of Gentile's employment with BFL on July 19, 2012, up and to the present

[77] The plaintiff's position is that a material issue in this action is its allegation that BFL recruited Gentile as part of a broader strategy to hire employees from its competitors as a means of developing its aviation insurance practice by soliciting their competitors' clients. This is set out in paras. 24 and 26 of the NOCC.

[78] BFL's position is that this category of documents is not relevant to the issues as pleaded. In particular, they say that the plaintiff has not pleaded that Gentile was hired as part of a "broader strategy to hire employees from its competitor as a means of developing its aviation practice".

[79] I do not accept BFL's submission on this issue. The plaintiff has pleaded that the "purpose" of hiring Gentile was to solicit Marsh's clients. This is sufficient, in my view, to justify disclosure of the documents in question.

3. All documents regarding commissions, fees or other revenue generated by BFL after July 19, 2012, with respect to any former Marsh clients that were serviced by Gentile during his employment with Marsh

[80] The defendants' position is that this category of documents is relevant only to damages and should not be disclosed until the second stage of the severed trial.

[81] Since I have dismissed the defendants' application for severance, these documents are to be produced.

4. All documents or communications relating to budgeting or target-setting for BFL's Vancouver aviation group from 2011 to July 2013

[82] The essential ingredients of the tort of interference with contractual relations are:

- (1) the existence of a valid and enforceable contract;
- (2) awareness by the defendants of the existence of a contract;
- (3) breach of the contract procured by the defendants;
- (4) wrongful interference; and
- (5) damages suffered by the plaintiff.

See *Potter v. Rowe*, [1990] B.C.J. No. 2912 (S.C.) at para. 54, cited in *Willow v. Chong*, 2013 BCSC 1083 at para. 59.

[83] The plaintiff's position is the same as "2" in this section above. It says that a material issue in dispute is Marsh's allegation that Gentile was hired and encouraged by BFL to build its western aviation practice through the solicitation of Marsh's clients. These documents will disclose the extent to which BFL was relying on Gentile to build its business and are therefore necessary to Marsh's advancement of this aspect of its claim.

[84] The defendants adopt the same position as they did with respect to "2" above. In addition, they allege that proof of the tort of inducing breach of contract does not require proof of malicious intention or planning. They say the plaintiff must prove that BFL's actions, vis-à-vis Gentile, amounted to an encouragement for him to breach his contract with the plaintiff. Viewed from this perspective, the documents sought should not be produced.

[85] The plaintiff acknowledges that the communications between BFL and Gentile are a necessary ingredient of the tort, but submits that this alone is insufficient to establish liability. Marsh also needs to prove BFL's intention and requires production of the documents in question to do so.

[86] I accept the plaintiff's submission. BFL's position, in my view, draws an artificial distinction between what should and should not be produced. Furthermore, for the reasons outlined above, the plaintiff's claims as pleaded in the NOCC provide a sufficient basis for the production of these documents.

D: The Defendants' Application for Document Disclosure

1. Documents relating to communications between employees of Marsh other than Gentile and any of the "Departed Clients" or any other former Marsh clients that became clients of BFL since Gentile's resignation from Marsh

[87] The defendants' position includes:

- these documents are relevant with respect to the allegations in paras. 29 to 33 of the NOCC and the defendants' answer at paras. 44 and 45 of the Response, both of which pertain to which of the plaintiff's employees serviced the Departed Clients;
- the documents are relevant with respect to the plaintiff's duty to mitigate its alleged loss; and
- they are also relevant with respect to the question of the exclusivity of Gentile's relationship with the plaintiff's clients before his departure.

[88] The plaintiff's position is that the documents should not be produced. Whether or not other Marsh employees were involved in servicing the Departed Clients is not relevant to the issues of Gentile's alleged breaches of contract, breach of duty of confidentiality, and whether BFL induced Gentile to breach his agreements with Marsh.

[89] The plaintiff concedes that the documents sought are relevant to the issue of mitigation, but only for the timeframe after Gentile left Marsh in July 2012. Further, any disclosure of documents should only be produced pursuant to a confidentiality order.

[90] I accept the plaintiff's alternative argument. These documents are to be produced for the timeframe commencing as of the date of Gentile's departure from Marsh in July 2012.

2. Documents relating to the possibility of the termination of Gentile's employment and those relating to Marsh's plans to hire a replacement for Gentile

[91] The defendants submit that the plaintiff has disclosed documents that contain communications amongst Marsh management concerning the termination of Gentile's employment before he resigned. Devitt has also deposed that Marsh was particularly vulnerable to Gentile's alleged solicitation of its clients, given his "key" position. The plaintiff also claims that Marsh suffered losses and damages as a result of Gentile's solicitation of its clients, which is alleged to have occurred when he serviced or supervised the servicing of clients while he was an employee of Marsh.

[92] The plaintiff says it has produced all documents relating to the possibility of Gentile's termination. It submits that the steps Marsh was taking, if any, to hire a potential replacement for Gentile and the identity of that person have no bearing on the issues in dispute. At best, they relate to a peripheral issue and their production is not consistent with the principle of proportionality.

- [93] I accept the defendants' submission. These documents may be relevant with respect to the plaintiff's allegations concerning Gentile's importance to Marsh, and the defendants' response to those allegations as pleaded in the Response.
3. Documents relating to any efforts made by Marsh to retain clients following Gentile's departure, including internal communications, communications with clients, and documents regarding strategy
- [94] The plaintiff is prepared to produce these documents if they are subject to the Confidentiality Order and there is reciprocal production by the defendants.
- [95] The defendants submit that any order of confidentiality would allow the documents that they produce to be viewed by Devitt, "who has given false evidence in this proceeding".
- [96] For the reasons outlined above in relation to the severance application, I am unable to make any findings with respect to the integrity or credibility of Devitt, Scharfe or, for that matter, Gentile.
- [97] As I have noted, the Confidentiality Order will be accompanied by appropriate undertakings.
- [98] Accordingly, I order that there be production of these documents by the plaintiff, together with reciprocal production by BFL in relation to the Departed Clients.
4. An organizational chart or list of Marsh's Canadian operations and any other form which shows those employees with the title of "vice president"
- [99] The plaintiff opposes production of these documents on the basis that they appear not to be relevant to the issues in dispute. It says Marsh has not alleged that Gentile owed fiduciary duties to it, nor has it pleaded that he was pivotal to its operations. Accordingly, the frequency with which Marsh used the title "vice president" or the relative importance of Gentile's role within Marsh has no bearing on whether he breached these obligations.
- [100] I disagree. Although there has been no specific plea in the NOCC that Gentile was a "key" or "pivotal" Marsh employee, that allegation has been made in affidavits prepared and filed on the plaintiff's behalf. It is also implicit in the allegations set out in the NOCC. This is sufficient, in my view, considering the principles to which I referred above, to form the basis for the production of these documents subject to the Confidentiality Order. It is so ordered.
5. Documents showing the organizational structure of Marsh's Vancouver aviation group
- [101] The plaintiff submits these documents are confidential and BFL has not disclosed corresponding documents for its western Canadian or national aviation groups.

- [102] The defendants oppose reciprocal disclosure. They say there is no group of documents in their possession which is comparable to those sought. In addition, the parties have not pleaded that Gentile has a particular importance to BFL. Accordingly, the documents showing the relative importance of him to BFL are therefore irrelevant.
- [103] I disagree with the defendants' position. From the evidentiary record before me, there does appear to be an issue as to Gentile's importance to BFL and his role and position within BFL in the development of its aviation insurance practice.
- [104] Accordingly, to the extent BFL has documents in its possession which identify Gentile's position in its organizational structure, they are to be produced. Reciprocal disclosure is also ordered.
6. Documents containing instructions, training or a description of how Marsh's clients are to be managed, handled or maintained by its Vancouver aviation group
- [105] The defendants submit that the plaintiff has taken the position that Gentile was very important to it and Marsh was vulnerable to his actions. This has been denied by the defendants. Since the defendants have specifically pleaded that the aviation clients were managed by a team of Marsh employees, documents showing its standards or practices for client management are relevant to this issue. They are also relevant with respect to the documents set out in "1" and "4" in this section above.
- [106] The plaintiff's position is that simply because the defendants have pleaded that Marsh's aviation clients were serviced by a team of employees, does not make this a material fact.
- [107] I am of the view that the plaintiff's submission is overly technical and contrary to the overriding objectives governing documentary production as summarized above. These documents are relevant in the second tier of documentary production and should be produced.
7. Records of fees, commissions and revenues for any Marsh clients for whom the plaintiff is now seeking damages in this proceeding for the three year period prior to their departure from Marsh
- [108] The defendants submit that these documents are relevant to the quantification of the damages alleged to have been suffered by the plaintiff. They say it is appropriate for the court to place terms as to the disclosure of documents falling under this heading. This is consistent with their position in the severance application.
- [109] They also submit that the plaintiff's objection to disclosure of these documents on the basis that the defendants have refused to do likewise is not a valid reason for non-disclosure.
- [110] At paras. 80-81 above, I ordered that the defendants disclose this category of documents in relation to the Departed Clients.
- [111] I make a similar order with respect to the plaintiff's documents.

[112] I do not accept the defendants' alternative claim for relief, being that disclosure of these documents should be to a third party expert. That is because I have concluded that the confidentiality concerns raised by the parties are best addressed by the Confidentiality Order and appropriate undertakings.

V: COSTS

[113] Costs of these applications shall be in the cause.

"Abrioux J."

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