SUPREME COURT OF NOVA SCOTIA
Citation: *Park Place Centre Limited v. MacKie*, 2022 NSSC 143

Date: 20220530
Docket: Hfx No. 489788
Registry: Halifax

Between:

Park Place Centre Limited, a body corporate

Plaintiff

v.

Kevin MacKie and Manga Hotels (Dartmouth) Inc. c.o.b. as Doubletree Dartmouth

Defendants

Decision

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	April 29, May 4, 2022, in Halifax, Nova Scotia
Counsel:	Sean Kelly, for the Plaintiff Nasha Nijhawan, for the Defendant (Manga Hotels (Dartmouth) Inc. c.o.b. as Doubletree Dartmouth)

By the Court:

[1] The matter before the court is a motion by the defendant Manga Hotels (Dartmouth) Inc. c.o.b. as Doubletree Dartmouth ("Manga") seeking further disclosure from the plaintiff Park Place Centre Limited ("Park Place"). It is the contention of Manga that Park Place has failed to produce relevant documents and responses to interrogatories.

Background

[2] Park Place filed their Statement of Claim on July 3, 2019. Essentially the allegation they make is that the defendant Mr. MacKie, a previous employee of Park Place who resigned and commenced employment with Manga, breached his contractual and common law duties to Park Place by contacting some of Park Place's clients and encouraged them to take their business to his new employer, Manga.

[3] In relation to Manga, the allegations are that Manga facilitated the breaches of contract and common law duties of Mr. MacKie; interfered with contractual relations of Park Place; and that Mr. MacKie and Manga unlawfully conspired with the purpose of harming the economic and business interests of Park Place.

[4] The Statement of Claim further noted that Park Place suffered and continued to suffer irreparable harm and damages for which both defendants are liable; that full particulars of those damages are as yet unknown, are ongoing, and will be provided prior to trial.

[5] This matter was originally scheduled for trial in late May 2022, with a finish date of March 4, 2022. The present motion was filed on March 15, 2022. The evidence before the court is that the disclosure requests contained in this motion were made to Park Place starting in October 2021 through to March 2022, but that Manga is dissatisfied with the responses provided.

[6] The parties attended a trial readiness conference on April 1, 2022, at which time the outstanding disclosure motion was noted to the presiding Justice. The May trial dates were adjourned and rescheduled to October 2022. It was also confirmed to the court that the action against Mr. MacKie had been resolved, and that the only claims remaining are as against Manga.

[7] One of Manga's first concerns relates to documents attached to Park Place's Affidavit of Documents. There are three documents that are heavily redacted and Manga objects to those redactions. More recently, Park Place provided new versions of those documents, where it has "unredacted" certain parts, i.e., the parts

that they intend to rely upon and/or that are relevant to their claim. The rest of the documents remain redacted, but they are not relevant and are not intended to be relied upon or referenced by Park Place in its claim. Nothing further remains to be said about that issue.

[8] There remain essentially three groupings of information sought by Manga. First, requests made in a demand for production put forward by Manga on October 8, 2021 (the "October demand"); second, some answers to interrogatories put forward by Manga to Talha Khan (for Park Place) on January 20, 2022 (the "January Interrogatories"); and third, some answers to interrogatories put to Talha Khan (for Park Place) by the defendant Mr. MacKie on February 3, 2022 (while he was still a defendant) (the "MacKie Interrogatories").

[9] As to that last request, Manga acknowledges that those interrogatories were issued by Mr. MacKie (who is no longer a party), and not by Manga. However, they feel the answers to those questions are relevant to them as well in the interest of efficiency. They ask that the court order the answers produced in order to avoid the necessity of Manga having to re-do those requests.

[10] Park Place's response to this motion is that the information sought by Manga is irrelevant to the matter. Furthermore, that some of the information is of a

sensitive commercial nature in the context of these parties, who remain competitors in a highly competitive market, i.e., the hotel industry. Park Place says that it is not prepared to provide irrelevant but sensitive information to a direct competitor.

[11] Further, in relation to the interrogatories from Mr. MacKie, Park Place notes that Mr. MacKie is no longer a party and that Manga is not able to enforce interrogatories issued by another party. Also, and in any event, the information sought in those requests is either irrelevant or duplicative of other questions and answers already asked and answered, or asked and refused (as irrelevant).

Analysis

[12] I will get to the specifics of the actual requests in a moment. First, it is necessary to review the sections of the Civil Procedure Rules that are germane to this motion. I have reviewed the entirety of Rules 14 to 19, but the following sections are those that are the most helpful and / or relevant in the context before me.

> **14.01 Meaning of "relevant" in Part 5**
>
> (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:

(a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

(b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.

(2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

…

14.05 Privilege

(1) Nothing in Part 5 requires a person to waive privilege or disclose privileged information.

….

14.08 Presumption for full disclosure

(1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

(2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.

(3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:

(a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;

(b) the importance of the issues in the proceeding to the parties.

(4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

(5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12, Rule 15.07 of Rule 15 - Disclosure of Documents,

Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.

…

14.09 Demand for production of undisclosed copy

(1) After the time for making disclosure under Rule 15 - Disclosure of Documents, or Rule 16 - Disclosure of Electronic Information, a party who is satisfied another party has not disclosed a relevant document or electronic information required to be disclosed may demand that the other party deliver a copy of the document or electronic information.

(2) A party to whom a demand for a copy of a document or electronic information is delivered must respond to the demand in one of the following ways no more than fifteen days after the day the demand is delivered:

(a) accept the demand, and deliver a copy of the document or electronic information;

(b) refuse the demand on the ground that the document or electronic information is privileged, irrelevant, or not in the control of the party;

(c) make a motion to limit the party's obligation to produce the document or electronic information, and seek to rebut the presumption in favour of disclosure by establishing that compliance with the demand is disproportionate under Rule 14.08.

(3) A judge may order a party who fails to respond to a demand for production to indemnify the other party for the expenses of obtaining an order for production.

14.12 Order for production

(1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding if the moving party provides all of the following representations:

(a) the party is in compliance with Rule 15 - Disclosure of Documents and Rule 16 - Disclosure of Electronic Information;

(b) the party believes the delivery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief;

(c) the party will pay the reasonable costs of making the delivery, unless a judge directs otherwise.

(2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.

15.02 Duty to make disclosure of documents

(1) A party to a defended action or a contested application must do each of the following:

(a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;

(b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;

(c) acquire and disclose relevant documents the party controls but does not actually possess.

15.07 Directions for disclosure

(1) A judge may give directions for disclosure of documents, and the directions prevail over this Rule 15.

(2) A judge may not give directions limiting disclosure or production of a relevant document, unless the presumption in Rule 14.08, of Rule 14 - Disclosure and Discovery in General, is rebutted.

[13] I also note the Rule relating to interrogatories:

Rule 19 - Interrogatories

19.01 Scope of Rule 19

(1) This Rule allows a party to an action to question a person in writing, unless the question was answered by the witness on discovery.

(2) A party may demand answers in writing from any person and the person must provide the answers, in accordance with this Rule.

19.03 Demand for answers

(1) A party may deliver a demand for answers if the party is satisfied that obtaining the answers in that manner will promote the just, speedy, and inexpensive resolution of the proceeding.

(2) A party who decides to deliver a demand for answers must make best efforts to prepare clearly and plainly stated questions in a number and manner that promotes the just, speedy, and inexpensive resolution of the proceeding.

19.04 Questions that may be asked

A demand for answers must demand answers that are not privileged and are relevant or provide information that is likely to lead to relevant information.

…

19.07 Who must respond

A person whose answers are demanded must answer the questions….

19.08 Response

(1) A person to whom a demand for answers is delivered must deliver a response to each party no more than twenty days after the day the demand is delivered.

(2) The person must answer each question, unless the question is of one of the following kinds:

(a) the question calls for information that is irrelevant and will not lead to relevant evidence;

(b) it calls for privileged information;

(c) the question was fully answered on discovery;

(d) taken alone, or in combination with related questions, it is expressed with such complexity or elaboration that the person should not have to answer it.

(3) The response must contain the standard heading, be entitled "Response to Interrogatories", be sworn or affirmed by the person answering the questions, and provide a reference to each question and either of the following:

(a) the answer to the question;

(b) a refusal to answer the question and the reason for the refusal.

….

19.09 Enforcement and discretion to excuse

> (1) A judge may order a person to answer a question in a demand, or excuse a person from answering a question, absolutely or on conditions.
>
> (2) A judge may order a person who fails to respond to a demand or unreasonably refuses to answer a question to indemnify the party who made the demand for the expense of obtaining an answer.

[14] It is clear from Rule 14 that there is a presumption that full disclosure of relevant documents is necessary to achieve justice in a proceeding. This means, of course, that as a first step a party has a duty to find out what relevant documents exist and are in their control (Rule 14.08(2)).

[15] According to Civil Procedure Rule 14.08(3), a party seeking to rebut the presumption of full disclosure of relevant documents, and who wishes the court to order something other than full disclosure of relevant documents, must establish that what they propose is necessary to make cost, burden, and delay proportionate to two issues: first, the likely probative value of evidence that exists, and second, the importance of the issues in the proceeding to the parties. Also, a party who seeks to rebut the presumption of full disclosure of relevant documents must fully disclose that party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited (Rule 14.08(4)).

[16] In *Hatfield v. Intact Insurance Company*, 2014 NSSC 232, the court stated:

> [37] Confidentiality, sensitivity, privacy or lack of consent are not sufficient grounds, in and of themselves, to rebut the presumption of full disclosure. The

> general rule is that all relevant documents must be disclosed in a civil proceeding so long as they are not covered by privilege.

[17] The presumption, of course, only relates to "relevant" evidence. Therefore, while the obligations are stated clearly, the issue of relevance is entirely case-specific and can be prone to dispute, as in the present case.

[18] Further, the Rules (as they presently exist) tell us that the test to be applied when considering relevance is "trial relevance". Trial relevance is not always easy to determine at a pretrial stage. In *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, the court spelled out the test for relevance in the present Rules:

> [46] This examination of the legislative history, the recent jurisprudence, and the text of rule 14.01 leads to the following conclusions:
>
> - The semblance of relevancy test for disclosure and discovery has been abolished.
>
> - The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best it can be constructed.
>
> - The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The rule does not permit a watered-down version.
>
> - Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.

[19] I also note a subsequent *Saturley v. CIBC World Markets Inc.* case (2012 NSSC 57), wherein the court made the following comments:

> [9] In my view, the court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than they might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
>
> [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.

[20] An assessment of trial relevance, at this stage, would need to start by reference to the pleadings, and, in particular, the facts and allegations made against Manga (the moving party and the only remaining defendant). In the Statement of Claim, under the section entitled "Unfair competition by MacKie and breach of duty of loyalty", we find the following:

> 21. Park Place pleads that MacKie, while still employed with Park Place, breached his duty to act in the upmost (sic) good faith towards Park Place by contacting clients of Park Place and expressing an interest of taking their business to his new employer DoubleTree.
>
> 22. Park Place pleads that MacKie breached his contractual obligations including those set forth in the Employment Agreement and Internet Use Policy.
>
> 23. Park Place pleads that MacKie has breached his ongoing common law duties not to disclose or make use of confidential information to compete unfairly with Park Place.
>
> 24. Park Place pleads that MacKie breached his common-law obligation not to interfere with contractual relations.
>
> 25. Park Place pleads that MacKie breached his common-law obligation not to take advantage of corporate opportunities.

> 26. Despite the letter, MacKie continues to breach his ongoing obligations to Park Place.
>
> 27. Manga has facilitated the breach of contract and common law duties of MacKie and has interfered with contractual relations of Park Place.
>
> 28. Park Place pleads that by engaging in the course of actions described herein, the defendants have unlawfully conspired with the prominent purpose of harming the economic and business interests of Park Place including, but not limited to, Park places interests in maintaining its clients, revenue, and mark (sic) share.

[21] The allegations against Manga and Mr. MacKie are quite closely intertwined. Park Place alleges a conspiracy between them and, also, that Manga facilitated some or all of Mr. MacKie's breaches.

[22] It is clear from those allegations, and in particular paragraph 27, that although Mr. MacKie is no longer a formal party to this litigation, the breaches that are alleged against him remain highly relevant to the remaining claim against Manga. In other words, it is meaningless to say that Manga is alleged to have facilitated the breaches of Mr. MacKie unless we can understand what the breaches of Mr. MacKie are alleged to be.

[23] I also note as relevant the section in the Statement of Claim relating to damages. Although the claim indicates that "full particulars" will be provided later, it is made against both defendants, jointly and separately, for:

> 1. damages for breach of contract, including the Employment Agreement and Internet Use Policy, that applied to MacKie;
> 2. damages for breach of common-law duties including with interference with contractual relations, use of confidential information, and the duty to act in the upmost (sic) good faith towards Park Place;

3. general damages for breach of the duty of good faith in conspiracy;
4. aggravated damages;
5. punitive damages in the amount of $250,000;
6. accounting and disgorgement of any and all profits earned by the defendants or any one of them for the wrongful conduct set out herein;
7. an interim, interlocutory and permanent injunction….

[24] Two things are notable. First, some of the alleged breaches could only have been directly committed by Mr. MacKie (e.g., breach of contract), but the claim seeks damages for all breaches from both defendants. This follows, as I understand it, from the allegation that Manga facilitated Mr. MacKie's breaches. Second, Park Place seeks that Manga give back (or "disgorge") any and all profits earned due to their wrongful conduct. If, at a trial, a court found liability on the part of Manga, the quantum of that profit would obviously be a live issue.

[25] Since the time of this pleading, Park Place has stated that their allegations relate only to a very specific list of "relevant clients". Those clients have been specifically identified by name (by my count there appear to be 12 such clients). Park Place has confirmed that it claims no losses in relation to any other clients.

[26] The defence of Manga notes, among other things, that it owed no contractual or common law duties to Park Place, that it is not jointly liable for any alleged breaches of Mr. MacKie's contractual or common law duties, and that it had no knowledge of the contractual or common law relations between Mr. MacKie and

Park Place when Mr. MacKie joined Manga. Manga denies that it engaged in any unlawful conduct resulting in harm and/or damages to Park Place, and puts them "to the strict proof of the alleged losses". It is clear that both liability and quantum of damages are highly contested issues.

[27] As I said earlier, Park Place has argued that the disclosure requested by Manga within the present motion is not relevant, but, in addition, that it is material of a sensitive or private nature in a competitive industry. They have noted the case of *Scotia Innovators Inc. v. Bartlett Plastic and Precision Machining Ltd.*, 2004 NSSC 113, in support of their argument that in a case like this, where the parties to litigation are competitors in a highly competitive industry, the court should be mindful that the disclosure of certain information in support of a damages claim could be damaging to the claimant. In the *Scotia Innovators Inc.* case, the court made the following comments on this point:

> [14] The file materials that are requested may be relevant to the issue of damages. The court is concerned that the production of the requested information may well cause irreparable harm to the plaintiff. It is not enough the court rely in this case on the implied undertaking of confidentiality a party is subjected to as regards information disclosed during the discovery process. The file information requested in the present case would give the defendant all the plaintiff's information client lists, pricing, marketing strategies, etc. This is the type of information which is and must be guarded from competitors in the commercial world. There is nothing which this court could do to effectively prevent the defendants from using the information requested so as to gain an unfair competitive advantage as against the plaintiff. Pricing and marketing strategies for example, once disclosed to the defendant cannot be removed from the wealth of knowledge the defendant then is possessed of in terms of its own pricing and

> marketing strategy. It would be impossible for the plaintiff or court to subsequently determine if the defendant at a later date ever used that information to its advantage even if the court ordered that they must not.
>
> [15] … It would be a hollow victory if a plaintiff, in obtaining the assistance of the courts in enforcing contractual rights, had to forgo any competitive advantage enjoyed as a result of their own marketing strategies.
>
> [16] I am not convinced the plaintiff would be able to prove damages without providing some information as to profit per unit and lost sales opportunities. I am satisfied that at some point some of the information in Mr.Chishoom's files may have to be disclosed to the extent necessary to prove damages. In the same vein one would expect the defendant would have to disclose similar information so as to allow the plaintiff to recover damages if the plaintiff succeeds…

[28] That caution is a valid one. But that is not the only consideration. The Rules are clear that once litigation is commenced, the court has an overarching duty to ensure trial fairness. In the present case, Park Place has not claimed any actual privilege on any of the documents requested. The Rules are also very clear that if a document is relevant, then it is presumptively to be disclosed; which presumption can be displaced in certain circumstances, notably in reference to proportionality.

[29] Park Place has also put forward the case of *Laushway v. Messervey*, 2014 NSCA 7, wherein our Court of Appeal provided a list of considerations for a court facing a disclosure request.

[30] Manga submits that *Laushway* should be distinguished on its facts. That case involved a fairly unusual disclosure request (for an expert to review metadata from any entire hard drive). Manga points out that such a request clearly involved some fairly serious privacy interests that do not exist in the case at bar.

[31] I agree that the *Laushway* case does nothing to change the general rule, that the starting point for litigants remains full disclosure of relevant documents. However, in my view, the case does have some helpful comments for a motions judge facing a request for production in a case where production has been denied and the issues are relevance, allegations of "sensitive " material, and proportionality.

[32] At paragraph 86 of *Laushway*, the court provides ten considerations. The court specifically noted that this list can be refined/improved over time and adjusted to suit the circumstances of any given case:

1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production.
3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
5. Proportionality: Will the anticipated time and expense required to discover the sought-after information by reasonable having regard to the importance of the sought-after information to the issues in dispute?
6. Alternative measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?

8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?
10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the **Rules** which is to ensure the just, speedy and inexpensive determination of every proceeding?

[33] Obviously in the case before me, not all of these factors are useful or relevant. But some of them in my view are helpful to consider, in particular, items 1, 2, 3, 5, 8, and 10.

[34] Having reviewed the law applicable to this dispute, I now turn to the specific requests made here.

The October Demand

[35] Manga issued this Demand and submits that there are a number of requests that remain outstanding from it. I group the first three items together:

> **2. Financial records, sales reports, and other documents relating to Park Place's (Delta Dartmouth's) revenues from each of the clients/customers in respect of which Park Place claims damages or losses from Manga for each of 2017, 2018, 2019, 2020, and 2021 (to date).**
>
> **3. Financial records, sales reports, and other documents relating to the number of room nights sold by Park Place (Delta Dartmouth) to all clients/customers with respect to which Park Place claims damages from Manga, for each of 2017, 2018, 2019, 2020 and 2021 (to date).**
>
> **4. Financial records, sales reports, and other documents relating to meetings, conventions, or other group events sold by Park Place (Delta Dartmouth) to all**

> **clients/customers with respect to which Park Place claims damages from Manga, for each of 2017, 2018, 2019, 2020 and 2021 (to date).**

[36] In their response to these requests, counsel for Park Place offered the following comments (I have redacted information in paragraph 1 that, perhaps, is not meant for the public, but the response contained the actual numbers).

> 1. The ADR ("average daily rate") for Park Place in 2019 was $ **, $ ** in 2020, and year to date in 2021 is $ **;
>
> 2. Of the clients/accounts service by Mr. MacKie whom he contacted following his resignation, Park Place confirms:
>
> (a) loss of 327 rooms sold in 2019;
> (b) loss of 50 rooms sold in 2020; and
> (c) year to date loss of 218 rooms sold in 2021."

[37] The response from Park Place further noted that, in its view, requests 2 to 4 constituted "an attempt to seek sensitive, confidential and proprietary information through the litigation process". Having said that, during oral argument before me, counsel for Park Place advised that the true objection to these requests was relevance.

[38] In my view, there can be no valid objection to these particular requests on the basis of relevance. The information is clearly relevant. Park Place has claimed that it has suffered some loss due to the actions of Manga. It is obviously relevant to know, in specific terms, what loss they claim to have suffered.

[39] The response from counsel, noted hereinabove, is not document disclosure and is clearly not acceptable. It does not meet the requirements of the Civil Procedure Rules.

[40] It appears that Park Place have reviewed their records, whatever they might be, and provided a “summary” of what those records contain in a letter from counsel. That is not acceptable disclosure under the Rules, which clearly say that actual documents, assuming they are relevant and not privileged, are to be disclosed.

[41] There are, obviously, times when documents are provided in redacted form. Such redactions may or may not be acceptable, and may or may not be the subject of further litigation. But that does not change the fact that the actual document is to be provided.

[42] I do not have information about what documents actually exist in the possession of Park Place that would respond to this request. It is unclear to me whether Park Place has met its duties pursuant to 14.08 (2) (becoming knowledgeable of what relevant documents or electronic information exist, and are in the control of the party). Nor can I determine whether they have met the

requirements of Rule 14.08 (4) (to fully disclose the party's knowledge of what evidence is likely to be found or acquired).

[43] But clearly, documents exist. Park Place could not have pulled those numbers out of the air; they must have been based their conclusions on existing records of some kind. Manga is clearly entitled to see the actual documents that contain the information. That is not a special request or an unusual request. It is merely what the Rules call for.

[44] Park Place has raised the issue of proportionality. As I have already noted, a party can ask to rebut the presumption of full disclosure, in order to make the "cost, burden, and delay" of full disclosure more proportionate to the probative value of the material in question.

[45] However, in the present case, I have no evidence before me as to the cost, burden, and delay of full disclosure of this material. I have no evidence as to the volume of documents that would be involved in meeting this particular request, nor as to the time and expense that might be involved in collecting them and producing them. Without an evidentiary basis, I cannot find that the benefit of full disclosure would be outweighed by this unknown burden.

[46] Additionally, I would add that the provision of information as to the "ADR" (average daily (room) rate) in the context of this litigation, seems to be inadequate. As I understand it, that number merely represents what the average room rate was at any given time. I frankly fail to see the relevance of that.

[47] In putting forward its claim for special damages, the plaintiff will need to show actual losses. Assuming there actually was a loss of one or more rooms in respect of a certain client in the relevant time frame, and assuming that Manga is liable for that loss, the relevant question relating to damages is the amount lost. In that context, I fail to see the relevance of the "ADR". The difference between the "ADR" and any actual loss suffered might be slight or it might be significant; I have no way of knowing.

[48] In summary, it seems to me that the actual losses alleged by Park Place are obviously relevant. Manga should have that documentation.

[49] I understand and appreciate Park Place's concerns about disclosing information to a competitor. This is one of those areas of information that they feel is sensitive and/or proprietary, i.e., what they were charging specific clients (perhaps as opposed to others). But I am bound by the Rules. There is simply no privilege in these documents and they are clearly relevant to their claim. Counsel

for Park Place confirmed during oral submissions that "relevance" was their objection; I find this particular material is relevant.

[50] I do note that the evidence sought is historical, i.e., relating to years past. It is unclear to me whether Park Place actually claims losses up to (and including) 2021 (as requested by Manga). Obviously Park Place would only need to produce that documentation encompassing the specific periods within which Park Place claims losses (along with a reasonable period of time prior to that, to determine the situation prior to any breach). I am presuming that there would be no disclosure of current pricing practices. Perhaps that assists in allaying Park Place's concerns.

[51] In summary, Park Place is to provide actual documentation or records showing the information relating to requests 2, 3, and 4 above, for those periods up to and including those periods for which they claim losses caused by Manga. The documentation must relate to their actual losses, not averages.

[52] I should note that in relation to item 4 (meetings, conventions, or other group events), counsel for Park Place advised during oral submissions that Park Place was claiming no such losses. This should be confirmed to Manga in writing.

> **5. Financial records, sales reports, and other documents demonstrating Park Place's (Delta Dartmouth's) total revenues for each of 2017, 2018, 2019, 2020 and 2021 (to date).**

[53] This is an enormously wide-ranging request, and clearly involves information not directly related to the claim before the court.

[54] Park Place takes the position that this information is irrelevant to their claim. It is their view that if they are able to show that the defendant Manga is liable as they have set out in the pleadings, and if they are able to show corresponding losses in terms of cancelled/unbooked rooms, the claim is made out. The issue of their "total" revenues across the board, they say, is irrelevant.

[55] Manga suggests that this information could be relevant to the issue of mitigation. They submit that even if the court finds that certain room bookings were lost, they would argue that Park Place may have mitigated its losses by filling those rooms with other clients. Manga would wish to make the case that there was no net loss to Park Place, and would wish to know this by looking at Park Place's total revenues for the relevant years.

[56] In response, Park Place submits that the issue of mitigation will not be applicable here. They say that their ability to fill rooms otherwise, for example by way of other marketing strategies, is entirely irrelevant to the question of whether Manga caused them a loss. Reference was made to *Apeco of Canada, Ltd. v. Windmill Place*, 1978 CarswellNS 106, where the issue before the court was the

breach of a lease by a tenant. It was held in that case that although the landlord had been successful in renting part of the space to a third party, such was entirely independent of the tenants breach.

[57] It is difficult to know, at the present time, whether the issue of mitigation will become a factor here and, if so, what material would be relevant to such an analysis. Park Place makes the arguable point that if it lost room bookings as it alleges, any unrelated room bookings made by others is of little relevance.

[58] I am also very conscious of the vast scope of this particular request. By that I do not mean that it is voluminous, but rather that it is quite intrusive in nature. In the context of this particular litigation, i.e., between two direct competitors, it seems to me that to order a party to disclose its entire profits/sales for a multiple year period would require a demonstration of relevance that would be much more obvious or clear than it is to me, in this case, at this time.

[59] I find this material to have little/no relevance at this time. Any presumption that might exist for its disclosure is displaced by Rules 14.08(3) and 15.07(2). It is a very wide ranging request. I accept that it would be an onerous one to respond to (if not in volume, then in “privacy” concerns). It is information that is, to a large extent, private and proprietary information. In my view, the cost, burden, and delay

of its production would not be proportionate to its probative value, at least at this time. I do not order production of this material at this time.

[60] I acknowledge, as did the court in the *Scotia Innovators Inc.* case at paragraph 16 (hereinabove), that it may become necessary at some point for Park Place to make disclosure of some or all of this type of information in order to prove their losses. Pursuant to Rule 14.01(2), a determination of relevancy or irrelevancy at this stage is not binding at the trial. I leave that for the trial judge to reassess this request at the relevant time, should it become appropriate or necessary.

[61] The next requests of Manga are:

> **6. Documents, including correspondence, relating to any cancellations related to COVID-19 (including associated public health guidelines, orders or restrictions), by clients/customers with respect to which Park Place claims damages from Manga, since February 2020.**
>
> **7. Financial records, reports, analyses, and other documents relevant to the impact of COVID-19 and associated public health guidelines, restrictions, or orders, on the overall revenues of Park Place (Delta Dartmouth) in 2020 and 2021.**

[62] While Park Place in its original response refused to answer these requests (again, citing their confidential and proprietary nature), they later provided a letter dated April 20, 2022, which stated as follows:

> In relation to room sales, Park Place has compiled the attached spreadsheet which sets forth room cancellations due to COVID-19 since March 2020 with respect to clients related to which it claims damages.
>
> Other than the event listed on the attached spreadsheet, Park Place had no event cancellations specifically related to COVID 19 with respect to clients related to which it claims damages.
>
> …
>
> Other than the document attached, Park Place has not completed any reports, analyses or other documents assessing the impact of COVID-19 on its overall revenues in 2020 and 2021. However, we are advised that, in general, Park Place had a …. decline in overall business as a result of COVID-19. (Again, I have removed the percentage here.)

[63] Attached was a chart listing the 12 relevant client names, along with a heading marked "COVID cancellations since March 2020". Each client is assigned a number under that heading.

[64] Again, these are not actual documents. They are a summary of information in the form of a letter from counsel, and a chart (created by an unknown person).

[65] At the risk of repeating myself, that is not what the Rules require from a party to litigation. Actual documents are to be produced. As I said earlier, the numbers and information in these summaries must have, somehow, been extracted from Park Place's records; they were presumably not pulled from the air. The Rules do not allow a party to review their own records and provide a summary of them; they require production of the records.

[66] I assume that by providing this information (even in summary fashion), Park Place acknowledges the relevance of the information. In any event, the information does seem relevant from the point of view of other possible causes for any losses suffered by Park Place.

[67] Again, since Park Place has not provided me with the information noted in Rule 14.08, I have no idea as to the volume of documents involved. Once again, in respect of this request I cannot say if it is an onerous request, or that the records would be voluminous, or that full disclosure would be somehow disproportionate to the probative value of the information. I simply do not know and I cannot reach any conclusion based on what is before me.

[68] Park Place is therefore required to produce the actual documents that contain the information sought in item 6 and item 7 above.

[69] The last request in the October demand is as follows:

> **8. Financial records, reports, analyses, and other documents relevant to the impact on the overall revenues of Park Place (Delta Dartmouth) of any hotel, meeting space, or convention centre that opened in Dartmouth, Nova Scotia, since May 2019.**

[70] This strikes me as an unusual request.

[71] Manga submits that this information, if it exists, might possibly be relevant as another "possible" explanation for any losses experienced by the plaintiff. Park Place takes the position that this is too remote and not relevant to the issues raised in the pleadings.

[72] I agree that this question seems to be somewhat speculative on the part of Manga. I see precious little probative value to such information, if it even exists.

[73] This concludes my decision in respect of the October Demand.

[74] I note that some of the documents I have ordered produced may very well be in electronic form; perhaps most or all of them are. The parties did not make argument before me as to whether this affects their submissions in any way, or whether Rule 16 has any application or effect here. I have reviewed that Rule and I see nothing therein which needs to be specifically addressed here.

[75] Having said that, if the parties, as they work through production as ordered in this decision, feel that Rule 16 is somehow engaged, they should discuss this. If they cannot resolve the issue, I will permit them to make further submissions to me in that one respect only: to deal with any issues that arise in the application of Rule 16 to the present decision.

The January Interrogatories

[76] Again, Manga submits that certain of the questions posed in these Interrogatories have not been satisfactorily responded to by Park Place.

[77] I am guided in these requests by Rule 19, and in particular Rule 19.08(2). In general a party is to provide answers to interrogatories unless the information is irrelevant, privileged, already fully answered, or is too complex.

[78] The following questions were contained in the January Interrogatories and, according to the defendant, remain unanswered:

> **21. What were the total revenues generated by Park Place in each of 2017, 2018, 2019, 2020 and 2021 (to date) in respect of each of the following:**
>
> **a. SBM Offshore;**
>
> **b. Brinks;**
>
> **c. Toromont Cat;**
>
> **d. Atlantic Policy Congress;**
>
> **e. Charm Diamond Centres;**
>
> **f. General Dynamics;**
>
> **g. Credit Union Atlantic;**
>
> **h. Downeast DMC;**
>
> **i. CPRPS (cob, Conseil Scolaire Acadien Provincial);**
>
> **j. UAP;**
>
> **k. Graybar Canada; and**
>
> **l. any other clients/customers in respect of which Park Place claims losses from the Defendants.**

[79] This is a question that essentially seeks the same information requested in items number 2 and 3 of the October Demand. In my view, it is a legitimate question that requires an answer.

[80] I have already ordered the documentation/records produced in relation to items 2 and 3 of the October Demand. I suspect those documents, once produced, will answer this question.

23. What were Park Place's total revenues for all customers in each of 2017, 2018, 2019, 2020, and 2021 (to date)?

[81] I have already determined that, in my view, Park Place's total revenues are of questionable relevance at this time. This question does not require an answer at this time. I leave it to the trial judge to address further issues of relevance of this material at trial, should that become appropriate or necessary.

24. What were Park Place's total room nights sold in each of 2017, 2018, 2019, 2020, and 2021 (to date)?

[82] I repeat my response to question 23.

25. What were Park Place's total revenues in respect of conventions, meetings, and corporate and group events in each of 2017, 2018, 2019, 2020, and 2021 (to date)?

[83] Once again, I repeat my response to question 23. Additionally, I note that Park Place claims no losses for conventions, meetings, or corporate events.

26. Have there been any changes to the size or composition of Park Place's sales team since May 2019 (as outlined in Tab 21 of Talha Khans Affidavit Disclosing Documents)? If so,

a. What are the particulars of all of the changes?

[84] Manga claims that the answer to this question might inform the actions of Park Place since the departure of Mr. MacKie, and specifically, whether they have changed their practices relating to their sales team's focus or efforts.

[85] I find this submission/request to be speculative. No response is required.

The MacKie Interrogatories

[86] Manga acknowledges that, strictly speaking, these interrogatories would only be enforceable by Mr. MacKie; they seek answers to those same questions. They ask this court to order the questions answered on the basis of my jurisdiction over disclosure under the Civil Procedure Rules; failing which they intend to issue a new set of Interrogatories containing these very same questions.

[87] Park Place argues that these interrogatories were issued by Mr. MacKie who is no longer a party, and Manga cannot seek enforcement. Having said that, Park Place has also addressed each question in turn, and in their submission, they are all either irrelevant or duplicative of previous requests.

[88] Rule 19.09 makes it clear that a court is empowered to enforce interrogatories and order that questions be answered. Given the history of the parties thus far on the issue of disclosure, in my view, this issue will not likely resolve itself. I will address these questions now in order to move this matter forward in a meaningful way, and to avoid the need for further motions and court time.

[89] The questions in those interrogatories which Manga seeks answered are as follows:

> **6. The Statement of Claim describes the Business Travel – Sales Manager position as "a key management position". Would you please identify the alleged key management duties of this position?**
>
> **7. Which of the duties listed in the employment agreement at TAB 9 are tasks of key management at Park Place?**
>
> **8. Referring to the employment agreement at TAB 9, specifically Article 8(b), which of Mr. MacKie's services and duties to Park Place were "special", "unique" and/or "extraordinary"?**

[90] In my view, questions 6, 7 and 8 would be of little to no probative value to Manga. They are in possession of Mr. MacKie's employment contract which is the information they need. There is no need for Park Place to respond.

> **13. Where, if anywhere, in your letter of May 22, 2019 at TAB 17 does it state Mr. MacKie would remain an employee during the notice period?**

[91] The letter, as with any written document, speaks for itself. Nothing further is required.

12.What did you say to Mr. MacKie when you advised him that he would not be required to work the period of notice?

14. Why did you waive the requirement that Mr. MacKie work during his notice period?

15. On what basis or how did you come to take the position that the company could waive Mr. MacKie's right to work during this period?

16. Why did you decide to walk Mr. MacKie off the property?

17. Why did you require Mr. MacKie return his keys and any laptops or cellphones or company property at that time?

18. Why did you require Mr. MacKie to collect his belongings immediately?

[92] Question 12, and questions 14, 15, 16, 17 and 18, in my view, do have some relevance to Manga and should be answered. The allegations against Manga are intimately tied to Mr. MacKie, and evidence relating to his resignation and the circumstances surrounding that event would be, at least on their face, relevant to Manga.

19. Name each client to which this paragraph [Statement of Claim, paragraph 21] refers, and identify when Mr. MacKie allegedly contacted each one.

[93] This is part of Park Place's claim against both defendants and should be answered.

20. Please provide full particulars of as well as any documentation not yet disclosed which relates to this pleading [Statement of Claim, paragraph 21]. For example: letters, emails, text messages, phone records, and in the instance of oral communications, identify to the best of the Plaintiff's ability and knowledge the date and time and specific source of oral information received by the Plaintiff from clients or others.

[94] As to the letter/emails/text messages, this would be part of Park Place's general disclosure obligations, i.e., to search its records in relation to communication, electronic and otherwise, and provide anything relevant. If there are documents that meet this description that have not yet been produced, they should be.

[95] The representative of Park Place, Talha Khan, should respond as to any knowledge he has of any oral communications that would be relevant to the claim against Manga.

> **21. Which contractual obligations did Mr. MacKie allegedly breach?**
>
> **22. Please provide the particulars of these alleged breaches:**
>
> > **a. What was the nature of each breach?**
> >
> > **b. When did each breach occur?**
> >
> > **c. What attempts did Park Place make to put Mr. MacKie on notice of each breach?**
> >
> > **d. What damages did Park Place suffer as a result of each breach?**
>
> **23. In what manner does Park Place allege Mr. MacKie disclosed or used this confidential information? [Statement of Claim, paragraphs 9, 10, 11, 21, 22, 23, 24, 25, 26]**
>
> **24. What records, documents (including correspondence), and other evidence does Park Place rely upon in support of its claim that Mr. MacKie disclosed or used this confidential information?**

[96] All of questions 21, 22, 23 and 24 specifically relate to Mr. MacKie's actions. Park Place argues that these issues are not relevant to Manga. However, the alleged breaches of Manga are intimately tied to Mr. MacKie (i.e., a conspiracy

with him and/or "facilitating" a breach on his part), and so it seems that the allegations/evidence against Mr. MacKie are of relevance. At the very least, it cannot be said that they are entirely without relevance.

[97] In other words, if Manga is expected to defend against the claim of facilitating" Mr. MacKie's breaches, they should know exactly what those breaches are alleged to be. These questions should be answered.

> **25. With respect to the Confidential Information covenants copied at paragraph 10 of the Statement of Claim and at TAB 9 of the Khan Affidavit, what fresh consideration (for example, payment) was provided to Mr. MacKie in exchange for these covenants?**

[98] Question 25 seems entirely and solely relevant to Mr. MacKie. I see no relevance to Manga. There is no need to answer this question.

> **28. This pleading [Statement of Claim, paragraph 18] states "he had sent solicitation e-mails to clients of Park Place". Please provide the full particulars of the Plaintiff's knowledge of each client receiving such alleged emails and please provide copies of these email messages.**
>
> **33. Please provide the full particulars of the contractual relations or, if they exist, copies of the contracts that Mr. MacKie is alleged to have interfered with. [Statement of Claim, paragraphs 24 and 27]**
>
> **34. Which, if any, of these contractual relations included arrangements for the exclusive provision of hotel services by Park Place? Please provide copies of any such exclusivity agreements, contractual clauses, or communications relating to an exclusivity arrangement. [Statement of Claim, paragraphs 24 and 27]**
>
> **35. In what manner did Mr. MacKie allegedly interfere with these relations? [Statement of Claim, paragraphs 24 and 27].**
>
> **36. Further:**
>
> > **a. When did this interference occur?**

b. Where did this interference occur?

c. What records, documents (including correspondence), or other evidence does Park Place rely upon as evidence of this conduct? If any of this documentation has not yet been disclosed, please provide it now. [Statement of Claim, paragraphs 24 and 27]

[99] These questions (28, 33, 34, 35 and 36), or very similar ones, were posed by Manga in the January Interrogatories. Answers have already been provided.

37. What efforts did Park Place undertake, prior to Mr. MacKie's departure, to inform him of his alleged common law duties to Park Place?

[100] Question 37 relates to Mr. MacKie solely. There is need for Park Place to answer.

38. What efforts did Park Place undertake, prior to Mr. MacKie's departure, to inform him of his alleged fiduciary relationship with Park Place?

[101] Question 38 relates to Mr. MacKie solely. Again, there is no need for an answer.

44. Please provide the room booking details for Q1 2019. These are missing from the documentation provided. If Park Place does not have these details, please provide an explanation.

45. Please also provide room booking details for Q1 2018. These are missing from the document "Copy of Quarterly Sales".

[102] The information sought in response to questions 44 and 45 is part of Park Place's document disclosure obligations. They appear to have provided other similar records, and so I would assume they are able to provide these records, or in the alternative, an explanation as to why they are missing.

48. Did each of these clients have its own rate?

49. If so, please provide the exact rate applicable to each of the clients relevant to Park Place's claim for damages and provide particulars of any changes to these rates and the periods for which the rates would have applied.

50. Please provide full particulars of the calculations used to determine the losses of rooms sold for each of 2019, 2020, and 2021.

51. Please provide the loss of rooms sold claimed specifically for the period May 22, 2019 to May 22, 2020.

[103] Questions 48, 49, 50 and 51 relate to Park Place's claim and, more particularly, its claim for damages. It is obvious that in calculating any loss suffered by Park Place, that information is relevant and will need to be provided. According to the Rules, I see no legitimate reason to exclude it from being produced. These questions should be answered.

52. With regard to the Quarterly Sales documents disclosed with this correspondence:

a. Please confirm whether the clients listed in these documents are the only clients in respect of which Park Place claims damages from the Defendants.

b. If not, provide the full particulars of any other relevant clients, including their room rate, number of alleged lost bookings, and total loss claimed for each.

c. For each of the clients listed in these documents, please provide the total loss, in dollars, claimed for each.

d. Why did room bookings for the clients listed increase from Q2 compared to Q3 2019?

e. Why did room bookings for these same clients increase from Q3 2018 to Q3 2019?

f. Specifically, why did the rooms sold to SBM Offshore increase from Q2 2019 to Q3 2019?

g. And what was the reason for the increase from 2 rooms sold to SBM Offshore in Q3 2018 to 43 rooms sold in Q3 2019?

> **h. Why did Toromont Cat's room sales increase so significantly in Q1 2020 as compared to the previous three quarters?**
>
> **i. Why did Credit Union Atlantic's room sales increase so significantly in Q1 2020 as compared to the previous three quarters?**
>
> **j. Why did the bookings from Atlantic Policy Congress and General Dynamics decline from Q3 to Q4 2019?**
>
> **k. Why did Charm Diamond Centre room sales decline from 156 to 9 as between Q3 2018 and Q3 2019?**
>
> **l. Why did the rooms sold to Atlantic Policy Congress decline from 263 in Q4 2018 to 175 in Q4 2019?**

[104] As to questions 52. a. and 52. b., Park Place has already answered them. Question 52. c. has been sought elsewhere and I have dealt with it.

[105] The rest of this particular question represents a significant "deep dive" into the documents that Manga would already have/will receive. Any document speaks for itself in respect of the numbers contained therein. The significance of this very long list of "why" requests has not been made clear to me.

[106] Park Place's claim is that they incurred losses for which Manga is responsible in some fashion; it will need to prove those allegations, otherwise its claim will fail. In light of that, are these questions relevant to mitigation (i.e., by adjusting room rates for the identified clients, or other clients)? Or are they seeking whether other, unrelated factors were at play?

[107] I cannot determine the relevance of these questions or the usefulness of any answers. Significant time and effort would be required in responding to all of these

questions, and I am unpersuaded that such would result in any useful, additional or probative information. I do not order these questions answered.

> **53. When did Park Place's business begin to be affected by the COVID-19 pandemic?**
>
> **54. How much or by what percentage did room sales at Park Place, across all clients, decline (if at all) from 2019 to 2020?**
>
> **55. In comparing 2021 to 2019 sales, how much or by what percentage did room sales at Park Place, across all clients, decline (if at all)?**
>
> **56. How much, if any, of the loss of rooms sold stated that response #2 for the years 2020 and 2021 are attributable to the COVID-19 pandemic?**

[108] As to questions 53, 54, 55 and 56, I have already ordered documentation to be produced about the effect of COVID-19 on Park Place's business. I presume that documentation will answer this question fully.

> **57. How much, if any, of the loss of rooms sold stated that response #2 are attributable to increased competition from other hotels in Dartmouth?**

[109] I have already responded to a request relating to "other" competitor hotels in Dartmouth. I find question 57 is not relevant nor probative.

> **58. Which, if any of these clients, to your knowledge, conduct business at any of the hotels which have opened in Dartmouth since 2019?**

[110] I see no relevance nor probative value to question 58.

> **59. Which, if any, of the clients or accounts serviced by Mr. MacKie ceased doing business with Park Place? And when did they cease doing business?**

[111] I am not sure what question 59 is addressing. If it relates to business during the relevant times, presumably that has/will be answered by the documents I have

ordered produced. If it addresses future business with the identified clients (i.e., business after the claim period), in my view that would not be relevant nor probative, at least at this time.

[112] That concludes the court's ruling of the disclosure requests presented to it.

[113] I ask counsel for Manga to draft a form of Order for consideration by counsel for Park Place, and then for submission to the court.

Costs

[114] The parties provided written submissions on costs prior to the hearing of this motion. However, I did not hear the parties on costs. I advised that I would first give a decision on the substantive issues, and that the parties would then be better placed to make more informed submissions on costs.

[115] With this decision in hand, I request that counsel discuss and see if agreement can be reached on costs. To be frank, given the parties' original submissions on costs, I am doubtful of an agreement, but it is my practice to always ask that efforts be made.

[116] If agreement cannot be reached, I ask that counsel provide me with updated written submissions on costs within 30 days of today's date. If you wish to stand

by your original written submissions, simply advise in writing. I will consider your submissions and provide a decision in due course.

Boudreau, J.