SUPREME COURT OF NOVA SCOTIA
Citation: *Park Place Centre Ltd. v. Manga Hotels (Dartmouth) Inc.*, 2022 NSSC 317

Date: 20221103
Docket: Hfx No. 489788
Registry: Halifax

Between:

Park Place Centre Ltd., a body corporate

Plaintiff

v.

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

Defendants

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 11 and 12, 2022, in Halifax, Nova Scotia
Written Decision:	November 03, 2022
Counsel:	Katherine Willyard, for the Plaintiff Nasha Nijhawan and Kelly McMillan, for the Defendant Manga Hotels (Dartmouth) Inc., c.o.b. as Doubletree Dartmouth

By the Court:

INTRODUCTION

[1] By consent Order dated April 1, 2022, the Plaintiff dismissed its claim against Kevin MacKie. They continued with their claim against the corporate Defendant and during the trial called Mr. Mackie and the General Manager of their Dartmouth hotel, Talha Khan. The Defendant elected not to call oral evidence. The parties consented to the admission of an affidavit with six attachments and a two-volume joint book of exhibits, albeit they agreed two of the tabbed documents (33 and 40) should be excised. Further, there was a difference of opinion as to how three other tabbed documents (34, 35 and 41) should be treated. I ultimately ruled that documents within theses tabs were unreliable and ought to be disregarded.

BACKGROUND

[2] This past spring the parties were before the Court sparring over document production and responses to Interrogatories (*Park Place Centre Limited v. MacKie*, 2022 NSSC 143). In her detailed motion decision, Justice Boudreau described the background of the litigation which I find to be an accurate, helpful summary and introduction to my merits decision:

> 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.
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> 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.
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> 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.

…

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.

POSITIONS OF THE PARTIES

Park Place

[3] Park Place alleges that Manga induced Mr. MacKie's breach of contract and that in concert with Mr. MacKie committed the tort of conspiracy. Park Place submits that Manga's breach caused significant damages including loss of corporate business at their Dartmouth hotel. They also seek punitive damages and an "accounting and disgorgement of any and all profits earned by the Defendant from the wrongful conduct …."

Manga

[4] Given the consent dismissal of the claim against Mr. MacKie, Manga sought a dismissal of the claims on the basis that they constitute an abuse of process. Alternatively, they argued that Park Place's claim should be dismissed on its merits, with costs.

ABUSE OF PROCESS MOTION

[5] Less than a month before the commencement of the trial, Manga counsel wrote to the Court advising of Manga's intention to bring a pre-trial motion "on the basis that non-disclosure of a settlement agreement between the Plaintiff Park Place and the Defendant, Mr. MacKie constituted an abuse of process and is grounds for dismissal or striking the claim." Park Place objected to the timing of the motion and

took the position that it should not be heard. During a September 26, 2022 pre-trial conference I permitted Manga to bring the motion following the merits trial, as part of closing submissions.

[6] On September 26th Manga filed a Notice of Motion, brief, authorities and affidavit (with six attachments) of their counsel's paralegal. On September 29th Park Place submitted a brief and one case.

[7] By way of background, on March 3, 2022, (then) counsel for Park Place and Mr. MacKie attempted to file a consent dismissal order. This was properly rejected by the Prothonotary pursuant to Rule 82.20, which only permits the issuance of such orders on the consent of all parties. In this instance, Manga had not signed the proposed order.

[8] On March 4th Manga counsel wrote counsel for the other parties as follows:

> I am writing to request disclosure of the settlement agreement between Park Place and Mr. MacKie.
>
> Given the nature of the claims against Manga, a dismissal of the claims against MacKie will fundamentally alter the litigation landscape and changes the adversarial orientation of the parties as set out in the pleadings. It will be Manga's position that any refusal to disclose the terms of the settlement so would result in an abuse of process.
>
> I look forward to receiving a copy of the settlement agreement promptly, and prior to any motion by your clients to seek an order dismissing the action against Mr. MacKie.

[9] After initial resistance, on March 16th Park Place's counsel provided Manga's lawyer with the Minutes of Settlement, albeit they were disclosed "without prejudice to Park Place's position about the impact of the settlement on the litigation landscape…"

[10] Manga submits that the settlement between Park Place and Mr. MacKie changed the adversarial orientation or litigation landscape between the parties. Prior to the settlement, Manga and Mr. MacKie defended the action jointly. Manga submits that the settlement transformed the adversarial orientation between Mr. MacKie and the Plaintiff to a cooperative one against the interests of Manga.

[11] Manga relies on Rule 88 and a number of cases, primarily from the Ontario Court of Appeal in asserting that the within circumstances give rise to a stay or

dismissal of the lawsuit against Manga for an abuse of process. Manga submits that a stay is warranted for two reasons:

> First, the settling parties' failure to immediately disclose the MacKie Settlement agreement constitutes an abuse of process which must be remedied by a permanent stay or dismissal of Park Place's action against Manga.
>
> Second, the dismissal of all of the allegations of contractual and common law breaches by MacKie renders the balance of the litigation against Manga baseless, and an abuse of process. The causes of action pled against Manga are dependent on breaches of contract and tortious conduct by MacKie. There can be no claim sustained against Manga where all claims against MacKie have been dismissed, as this would require re-litigation of issues that have been finally disposed of by a final order of the Court.

[12] In the leading case on abuse of process, *City of Toronto v. CUPE*, 2003 SCC 63, the Supreme Court of Canada explained at para. 35 that this doctrine reflects the Court's "inherent and residual discretion" to prevent an abuse of its own process. Litigation conduct that amounts to an abuse of process is described as "proceedings 'unfair to the point that they are contrary to the interest of justice'." The Court cited an earlier decision, R. v. Scott, [1990] 3 SCR 979, authored by McLachlin, J. (as she then was), which set out the conditions under which abuse of process maybe established, at para. 70 as follows:

> …abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[13] The common law doctrine of abuse of process as it relates to the disclosure of settlement agreements which impact the adversarial orientation of the parties has been developed and confirmed in five cases this year by the Ontario Court of Appeal: *Tallman Truck Centre Limited v. KSP Holdings Inc*., 2022 ONCA 66 (leave to appeal dismissed, October 20, 2022 – S.C.C. No. 40118); *Waxman v. Waxman*, 2022 ONCA 311; *Poirier v. Logan*, 2022 ONCA 350; *CHU de Québec-Université Laval v. Tree of Knowledge International Corp*, 2022 ONCA 467; *Hamilton-Wentworth District School Board v. Zizek*, 2022 ONCA 638.

[14] In *CHU de Québec-Université Laval* Justice Sossin summarized the principles at para. 55 as follows:

55 The following principles can be drawn from this court's decisions on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:

a) There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion: *Handley Estate*, at para. 45, citing *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488 ("*Aecon Judgment*"), at paras. 13 and 16, leave to appeal refused, [2011] S.C.C.A. No. 84; see also *Waxman*, at para. 24;

b) The disclosure obligation is not limited to pure *Mary Carter* or *Pierringer* agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;

c) The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure": *Tallman*, at paras. 18-20; *Waxman*, at para. 39;

d) Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier*, at paras. 26, 28, 73;

e) Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure: *Waxman*, at para. 35;

f) The standard is "immediate", not "eventually" or "when it is convenient": *Tallman*, at para. 26;

g) The absence of prejudice does not excuse a breach of the obligation of immediate disclosure: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and

h) Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences: *Handley Estate*, at para. 45; *Waxman*, at para. 24; *Poirier*, at para. 38. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.

[15] The most recent of the five decisions of the Ontario Court of Appeal, *Hamilton-Wentworth District School Board* is yet another example of that Court providing guidance on the "clear principle" established years earlier:

> 10 The principle established by *Aecon* has been confirmed in a number of subsequent decisions of this court. The principle itself is clear. The requirement that a settlement agreement must be disclosed immediately means exactly what it says. This is not a matter of discretion, nor is it a matter of "context", nor of factual analysis. More than three months passed before the existence of the settlement agreement was disclosed to the appellant. There was, thus, a clear failure to notify the appellant immediately. The motion judge failed to understand and apply that central principle and, thus, erred in her conclusion not to grant a stay.
>
> 11 Before concluding, we would add that part of the reason for a clear principle, or a "bright line", is to avoid the very interlocutory proceedings that have occurred in this case which only serve to increase the expense of the litigation for all parties.

[16] Taking the above guidance and applying it to the within case should simply result in a stay being granted, says Manga. To my mind, the within situation is not so straightforward and calls for more analysis and scrutiny. While not immediately disclosed, the emails attached to the filed affidavit confirm that the Minutes of Settlement were provided on March 16th. The Minutes of Settlement were signed by Mr. MacKie on March 2nd and by Park Place's corporate secretary on March 10th. Accordingly, they were not provided to Manga within the dictionary definition of immediate.

[17] Manga did not respond by filing a Rule 88 motion in a timely manner. Instead, they signed the consent dismissal order which was then issued on April 1, 2022. Although Manga put Park Place on notice that they might bring a motion, nothing was done about this until less than one month before the start of trial when their counsel wrote the Court. Manga proceeded in this manner notwithstanding their representations to the Court during the Trial Readiness Conference. As Justice Brothers noted in her August 12, 2022 Memorandum:

> 2. Were all pre-trial procedures completed by the finish date? Yes, all completed. All production related to previous motion complied with. Counsel may wish to bring a motion before the court (oral argument only) on first day of trial; if so, it will be brought to the trial judge's attention (the Honourable Justice James L. Chipman) immediately.

[18] Rather than immediately advising the Court that they wished to bring the motion, Manga waited over one further month (counsel wrote the Court on September 14, 2022) before advising that they wished to advance the motion. Rather than "oral argument only", the motion evolved into the filing of a detailed written submission with fifteen authorities and a comprehensive affidavit with several attachments.

[19] In any event, the failure of Manga to bring their motion when the issue came to the fore in spring of this year is highly relevant to my consideration of whether to grant a stay or dismissal for abuse of process. In this regard, I turn to guidance from our Court of Appeal. In *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47, Justice Saunders explored the doctrine of abuse of process, noting that the Court's jurisdiction to grant relief for abuse of process derives from s. 41(e) of the *Judicature Act*, RSNS 1989, c. 240, *Civil Procedure Rule* 88 and the Court's inherent jurisdiction.

[20] Saunders, JA held that abuse of process comes in many forms and is directed towards the reputation of the administration of justice. He noted at paras. 214 and 215:

> [214] My review of these and other leading authorities shows that abuse of process comes in many forms. Inordinate delay; vexatious litigation; multiple proceedings commenced in different jurisdictions claiming virtually the same relief on facts involving identical parties; bogus re-litigation; following previous judicial determinations of the same matters or issues; are all examples of situations where the courts have found an abuse of process. Other examples would include cases where the complaint was not so much directed towards the nature of the proceedings, but rather the conduct of the parties during the litigation. This case falls within the latter category.
>
> [215] But whatever the type, the focus of the court's inquiry will always be directed towards the reputation of the administration of justice. Justice Arbour put it best in *Toronto (City) v. CUPE, Local 79, supra*, when she said:
>
> > 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process.
> > ...

[21] Justice Saunders explained the flexible nature of the doctrine, which focuses on fairness, the integrity of adjudicative functions and the administration of justice. At para. 235 he noted:

> [235] From all of this, certain general principles emerge, which seem to apply to all types of abuse of process claims. The doctrine enables the court to prevent the misuse of its own procedures, in cases where such violations have proven to be manifestly unfair to a party to the litigation before it, or have in some other way brought the administration of justice into disrepute (*C.U.P.E., Local 79*). In all of its applications, the primary focus of the doctrine is the integrity of the adjudicative functions of courts (*Nixon*). Abuse of process is a flexible doctrine, which exists to ensure that the administration of justice is not brought into disrepute (*Behn*). Successful reliance upon the doctrine will be extremely rare -- only a process that is tainted to such a degree that it amounts to one of the clearest of cases (*Power; Blencoe, Mahalingan*).

[22] After comprehensively reviewing the jurisprudence, our Court of Appeal confirmed that the remedy of abuse of process is one which is to be sparingly accessed and only in exceptional circumstances. Justice Saunders continued his analysis and at para. 240 noted:

> 240 That said, I would respectfully conclude that the approach this Court ought to take is to ask whether the Bank's conduct has tainted the case to such a degree as to be manifestly unfair to another party to the litigation, or has brought the administration of justice into disrepute by impairing the adjudicative function of the courts and undermining public confidence in the legal process.

[23] The Court of Appeal outlined the appropriateness of the Court reviewing all of the information available before rendering an abuse of process decision. In so doing, I am mindful of the entirety of the Court file, inclusive of the filed affidavit, Justice Boudreau's decision, the Trial Readiness and Date Assignment Conference memoranda. I have reviewed all of the material with the integrity of the adjudicative process foremost in mind. While cognizant of the Ontario Court of Appeal cases outlining the clear principle that settlement agreements must be disclosed immediately in these kinds of cases, I am mindful of the direction from our Court of Appeal that the remedy of a stay or dismissal for abuse of process should only be deployed in rare and exceptional cases.

[24] Once Mr. MacKie and Park Place settled, their counsel should have forthwith provided the Minutes of Settlement and proposed consent dismissal Order to Manga's counsel. Instead, it took repeated requests by Manga's lawyer before the Minutes were provided about a week and a half later. This was not optimal and not in keeping with the immediate disclosure requirement emphasized by the Ontario Court of Appeal. Nevertheless, I must decline Manga's last minute request to grant a stay or dismissal for abuse of process. In this regard I do not regard this situation as one of the rare and exceptional cases where a stay must be granted because there

has been conduct which has tainted the case to such a degree as to be manifestly unfair to Manga. Further, in all of the circumstances I cannot conclude that the failure to disclose the settlement immediately brings the administration of justice into disrepute by impairing the Court's adjudicative function and undermining public confidence in the legal process. Rather, I am of the view that fairness dictates that the evidence which has gone in must be considered and adjudicated on the merits. Accordingly, I dismiss Manga's abuse of process motion in its entirety.

VIVA VOCE EVIDENCE

Kevin MacKie

[25] Mr. MacKie testified that he was employed by Park Place for approximately 17 months ending with his resignation on May 22, 2019. He worked on a contractual basis in a sales capacity and then as an acting director of sales until taking on a permanent position as sales manager. On cross-examination he agreed that in his role as sales manager that he reported to the director of sales, who in turn reported to the General Manager, who reported to the Head Office. As such, he agreed that his position was "several layers away from management" and that he was a "worker bee."

[26] While with Park Place Mr. MacKie described his main job "to go out and find new business for the property." This work included marketing prospective clients as well as servicing existing clients, "to make sure they kept their business at the hotel."

[27] Once hired by Park Place, Mr. MacKie received and read his employment agreement, confidentiality undertaking and employee handbook. Throughout his time with Park Place he worked at their Dartmouth hotel located in the Burnside Industrial Park and branded as the Delta Dartmouth.

[28] Mr. MacKie was acquainted with Manga's Troy Dawson as they previously worked together at the Marriott Harbourfront Hotel in Halifax. In the spring of 2019 he bumped into Mr. Dawson "by happenstance" while Mr. Dawson was dining at the restaurant in the Delta Dartmouth. The upshot of their discussion was that Mr. MacKie would submit his resume as Manga had a director of sales position available. He subsequently spoke with Mr. Dawson and Manga's Jim Zareski and ultimately negotiated a position at Manga's Doubletree Dartmouth Hotel.

[29] After resigning with Park Place on May 22, 2019, Mr. MacKie started about a week later at the competitor hotel. Mr. MacKie received pay and benefits from

Park Place up until his notice period ended on June 12, 2019. On cross-examination Mr. MacKie confirmed that he was hired by Manga the day after he resigned from Park Place noting that he was "walked out" by the General Manager, Talha Khan. On cross-examination Mr. MacKie admitted that upon leaving Park Place he said, "I'm coming for your business", but that this comment was directed to (junior to him) employee Brent Martin. He described a "friendly, joking" relationship with Mr. Martin adding that he made the comment, "in banter, as a joke."

[30] While he was with Park Place, Mr. MacKie prepared a "sales call log with sales comments" and he was shown the largely redacted document at tab 8 of exhibit 1A. As the cover email attests, he sent this voluminous document from his work email to his personal account on December 3, 2018. He similarly emailed himself a "2019 BT Master Rate Sheet" on December 18, 2018. He testified that he created the first of these documents when he was doing "initial business development" for the Delta Dartmouth. He recalled that he also sent the sales call log to Delta's sales department. On cross-examination he clarified that when he prepared this document, he was not contemplating working for the Dartmouth Doubletree. He agreed that he may have sent the documents to himself as he would be working from home. He denied using this document while he worked for Manga. He similarly denied providing the document to anyone at Manga.

[31] On cross-examination Mr. MacKie denied taking any documents with him to Manga including client lists, contact information, sales results, negotiated rates and the like. He conceded that he maintained "potential target lists" but that this information was gleaned from open, publicly available source information. He elaborated that in his sales jobs at both hotels that "it was part of the process to find out what clients are paying at their current hotels and then decide how competitive you want to be." Mr. MacKie said that he would ask customers what rates they were getting from competitor hotels. In addition, he spoke of "silent shopper calls" whereby he would call competitors posing as an employee of a customer to see what the hotel would quote.

[32] Mr. MacKie was shown a series of emails he sent to about a dozen clients, the earliest dated May 22, 2019 (3:04 p.m.), which read:

> Just letting you know I resigned today. Will catch up soon.

He confirmed that the various emails were initiated by him and sent to several Park Place corporate clients in the wake of his resignation.

[33] On cross-examination he noted that while working with Park Place that he developed "personal relationships" with some of the hotel clients. He sent the emails because he wanted to inform these individuals that he was no longer working at the Delta Dartmouth. He was stepped through the various clients that he emailed noting for each one that they did not move their business to Manga while he worked there.

[34] By Mr. MacKie's estimation the Delta Dartmouth is a superior hotel when compared to the Doubletree Dartmouth. He explained that the basis for his opinion came down to location with the Delta situated in the Burnside business park versus the Doubletree "in the hood, a not attractive location, not safe." He noted that given its location that some clients did not want to stay at the Doubletree.

[35] On cross-examination Mr. MacKie explained the difference between locally negotiated rates ("LNR") and corporately negotiated rates ("CNR"). He noted that there was no moving from a CNR; "that's the rate". On the other hand there was flexibility with LNRs as they did not come from head office.

Talha Khan

[36] Mr. Khan is the General Manager of the Delta Dartmouth, a position he has held for nearly five years. In this job he oversees hotel operations including the sales department. He described the hotel with 174 guest rooms, meeting and banquet facilities as a "full-service hotel."

[37] In addition to the Doubletree Dartmouth, Mr. Khan noted that Delta Dartmouth competitor hotels are the nearby Best Western, Holiday Inn, Hampton Inn and Marriott Courtyard. He agreed that most of these hotels are relatively new. He described the hotel market as "highly competitive; very tight."

[38] Mr. Khan confirmed that Mr. MacKie worked at the Delta Dartmouth between January, 2018 and May, 2019 in the position described by Mr. MacKie. When he acted as director of sales Mr. Khan regarded Mr. MacKie as part of his management team.

[39] Mr. Khan stated that upon Mr. MacKie handing him his May 22, 2019 resignation letter he invited him into his office. They had a brief conversation. Mr. Khan reported the development to the hotel's owner and their human resources department. Soon thereafter he provided Mr. MacKie with a detailed letter dated May 22, 2019, authored by him "in collaboration with H.R." Mr. MacKie's resignation was accepted and the letter outlined Mr. MacKie's "further obligations"

(to Park Place). Mr. MacKie's final day as a Park Place employee was June 12, 2019, albeit he did not work there during this notice period and was "walked out" by Mr. Khan on May 22, 2019.

[40] Mr. Khan recalled that on May 22nd Mr. MacKie exhibited a "normal, calm" demeanor and that he appeared to understand the Park Place letter. Mr. MacKie complied with Mr. Khan's request to turn in corporate property.

[41] Mr. Khan noted that when he checked Mr. MacKie's office after he left that he could not find anything in the file folders. He was referred to Mr. MacKie's sales call log (tab 8) noting his view that the document was "to keep information together …strategies."

[42] Upon Mr. MacKie's termination Mr. Khan instructed Park Place's I.T. department to remove Mr. MacKie's passwords and to re-direct any email sent to him at his Delta Dartmouth account to Mr. Khan's corporate email address. Shortly thereafter, because a recipient responded to his former email address, Mr. Khan became privy to at least one of Mr. Khan's client emails advising that he had left.

[43] Mr. Khan was shown the same email exchanges Mr. MacKie testified about. He noted that the twelve recipients were "existing corporate clients" of the Delta Dartmouth. He noted his concern that "an employee in his notice period was reaching out, that he had left the Delta and would like to take their business." He was concerned that Mr. MacKie "was engaging in activity that could hurt Delta's business", elaborating that the clients could move to his new employer, the Dartmouth Doubletree. Mr. Khan added that he believed Mr. MacKie had the Delta's information and "rate sheets" from working there.

[44] Mr. Khan attempted to demonstrate the Delta Dartmouth's corporate bookings decline for eleven clients with the allegation that the drop off must be on account of Mr. MacKie's move and solicitation of these clients.

[45] On cross-examination he was stepped through the back-up documents found at tabs 34 and 35. Through the detailed questions it became readily apparent that the alleged foundational documents did not support the charts prepared by Mr. Khan which intended to show the corporate bookings decline. In this regard, Mr. Khan acknowledged several areas where the math did not support his figures. At first he speculated that "there's always a chance group rooms have been combined" to account for the discrepancies; however, when more errors were brought to his attention he acknowledged, "there are often miscalculations on how segments are

calculated." On further questioning he added that the chart at tab 34 "might or might not be accurate" and later he admitted, "I did not cross check at that time …clearly there are inaccuracies."

[46] Mr. Khan admitted that he did not speak with any former clients to ask them why their bookings at the Delta Dartmouth declined. He agreed that he was unaware if these clients had taken their business to the Dartmouth Doubletree. Further, he acknowledged that after Mr. MacKie's departure that his position was left unfilled for a few months.

[47] In terms of other factors – beyond Mr. MacKie leaving – Mr. Khan agreed that the Marriott Courtyard was opened during this time and that it is geographically closer to the Delta Dartmouth than the Dartmouth Doubletree. Further, he acknowledged that the Holiday Inn Express opened in November, 2019 and it is also nearer to the Delta than the Doubletree.

[48] Mr. Khan acknowledged that the COVID 19 pandemic had "a very severe impact on business." He noted that with the onset in the spring of 2020 that "business declined rapidly" noting that between March and June of that year that the Delta Dartmouth's occupancy was a mere ten percent.

ISSUES

[49] This action raises the following issues:

- Did Mr. MacKie owe a fiduciary duty to Park Place?
- What were Mr. MacKie's duties to Park Place?
- Did Manga induce a breach of contract or interference in contractual relations?
- Did Manga conspire with Mr. MacKie for the predominant purpose of injuring Park Place?
- If Manga is liable to Park Place, what are the appropriate remedies?

ANALYSIS AND DISPOSITION

Did Mr. MacKie Owe a Fiduciary Duty to Park Place?

[50] Park Place pleaded that Manga "facilitated the breach of contract and common law duties of MacKie." To determine the nature and scope of the duties that Mr. MacKie owed to Park Place, and whether he breached any of those duties, I must first assess whether Mr. MacKie was an ordinary employee or a fiduciary.

[51] For a fiduciary obligation to attach to an employee, the employee must occupy a position that contains the power and ability to direct and guide the affairs of the company, and be in a position to exert or exercise some independent power or discretion over the employer's business: see *R.W. Hamilton Ltd. v. Aeroquip Corp*. (1988), 65 O.R. (2d) 345 at paras. 20-21 (H.C.J.) and *GasTOPS Ltd. v. Forsyth*, 2009 CanLII 66153 at para. 80 (Ont. S.C.J.); aff'd 2012 ONCA 134.

[52] In *GasTOPS*, Justice Granger identified six criteria that could be used to determine whether a former employee could be classified as a key employee (see para. 83):

a. What were the employee's job duties with the former employer?

b. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?

c. Was the employee the primary contact with the customers and (or) suppliers?

d. To what extent was the employee responsible for sales or revenue?

e. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?

f. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?

[53] Justice Granger then stated the following at para. 84:

> After identifying an employee as "key", further determining whether that employee is a "fiduciary" is a difficult endeavour. According to James D'Andrea, "generally, a fiduciary is one who is empowered to act on behalf of and for the benefit of another with the ability to affect that other's interest through the use of discretion" (*Employment Obligations in Canada*, looseleaf (Aurora Ont.; Canada Law Book 2006)).

[54] In *Imperial Sheet Metal v. Landry*, 2007 NBCA 51, Justice Robertson provided helpful guidance to assess whether an employee owes fiduciary duties, noting at para. 63:

> 63 While I make no attempt to set out a comprehensive code as to how one goes about deciding who is a fiduciary or key employee, the following provides some specificity. A "key" employee is: (1) an integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer; (2) necessarily involved in the decision-making process; and (3), therefore, has broad access to confidential information that if disclosed would significantly impair the competitive advantages that the former employer enjoyed. These employees fall within the categories: "top management", "senior management" or "key management".

[55] In *Trimar Promotional Products Ltd. v. Milner*, 2021 NSSC 98, Justice Warner adopted the above approach of the New Brunswick Court of Appeal in *Imperial Sheet Metal* (see paras. 23 – 24) and I similarly adopt and endorse the approach.

[56] At the outset it is important to determine on the evidence whether Mr. MacKie was a fiduciary employee of Park Place. Whereas it may be open for debate that when he acted as director of sales he was in a fiduciary role, I am of the emphatic view that while sales manager he was not in a fiduciary position. In this regard it is important to move beyond Mr. MacKie's title and consider his true role. In my view he was considerably far down the chain of command. I make this observation having regard to, among other evidence, his cross-examination concession that he was several layers away from management. Furthermore, I note that he held a non-management position for at least his last six months with Park Place.

[57] When I consider the six criteria outlined by Justice Granger along with the approach of Robertson, J.A. and apply the evidence here, I find no basis whatsoever to support Park Place's contention that Mr. MacKie was a key employee. Accordingly, I find on a balance of probabilities at all material times that Mr. MacKie was a non-fiduciary employee while with Park Place.

Given That Mr. MacKie Was A Non-Fiduciary, What Were His Duties of Good Faith, Loyalty and Fidelity?

[58] *Trimar Promotional Products Ltd.* involved a somewhat similar fact pattern, as the Court considered the case of a sales representative who left his employer to work with a supplier of his former employer. Trimar claimed that Mr. Milner

breached both an implied duty of good faith, loyalty and fidelity as well as a fiduciary duty by conspiring with Atlantic to move and by taking and using Trimar's confidential information to compete with Trimar. Trimar also claimed that Atlantic knowingly assisted and conspired with Milner in his breaches. In discussing Mr. Milner's duty to Trimar, Justice Warner reviewed authorities at paras. 22 – 26 which I find apposite and of assistance:

> 22 At trial, the Court advised the parties that it had reviewed the text by Gregory K. Steele, and Kenneth Wm. Thornicroft, *Employment Obligations and Confidential Information*, Third Edition (Toronto: LexisNexis, 2015) and, in particular, Chapter 1 (Overview), Chapter 3 (Implied Duty of Fidelity), Chapter 4 (Confidential Information), Chapter 5 (Fiduciary Duties), Chapter 9 (Post-Employment Obligations), and, Chapter 12 (Damages and Other Remedies). The Court relies upon the thorough and the helpful analysis of the relevant legal principles and the case law cited in that text:
>
> > THE DUTIES OF GOOD FAITH, LOYALTY AND FIDELTY
> >
> > Employees serve their employers with good faith, loyalty and fidelity ... The duty of good faith is not dependent upon the level or character of the employment. It is a duty owed by all employees ...
> >
> > The duty of good faith is owed throughout the duration of the employment but, for the most part, ceases when the employment relationship ends, although non-fiduciary employees still have continuing obligations not to disclose trade secrets or other confidential information. During the continuance of the employment relationship, the employee must not engage in conduct that is incompatible with the faithful discharge of the employee's duty ... the employee's duty of good faith continues even though the employee has tendered, or has received, notice that their employment will be terminated. ...
> >
> > The employee's duty of good faith is not, however, equivalent to the fiduciary duty owed by directors and senior employees. The latter are more extensive and survive the termination of the employment relationship ... They are not, however, completely distinct. The nature and scope of an employee's fiduciary duty depends on all of the relevant circumstances. ...
> >
> > The employee's duty of good faith is multifaceted, and there is no precise list regarding permissible and prohibited activities. Each case depends on its particular facts. ...
>
> 23 The New Brunswick Court of Appeal in *Imperial Sheet Metal v. Landry*, 2007 NBCA 51 ("*Imperial Sheet Metal*"), wrote: at paragraph 33:
>
> > [33] A non-fiduciary employee owes the employer a general duty of good faith and fidelity during the currency of the employment relationship. This translates into a duty not to compete with the employer, either directly or

> indirectly, during the currency of the employment relationship. It also translated into a duty not to disclose "trade secrets" and other "confidential information". Once the employment relationship ends, the duty of non-disclosure persists. However, confidential information does not include the general skills and knowledge acquired by the employee while working for the former employer. This is true so long as the skill and knowledge is committed to memory and not dependent on the employer's documentation. Undoubtedly, employees who depart with suitcases of documents, computer files or even a solitary customer list are in breach of their post-employment obligations. Employees who leave with only their personal possessions are better able to defend lawsuits alleging breaches of confidences. In sum, a former employee is entitled to exploit freely the general skills and knowledge acquired as a result of the employment relationship, so long as that knowledge is a product of his or her memory and unaided by the employer's documentation.
>
> [34] . . . Once the employment relationship ends, the non-fiduciary employee is permitted to engage in fair competition with a former employer. Fair completion has traditionally meant that the employee may, without fear of legal consequences, establish a business that competes directly or indirectly with the business of the former employer. A correlative right is the right of the employee to work for a competitor of the former employer. As well, in both instances, the employee may bring to that business the knowledge and skill acquired while working for the former employer. The right to compete includes the right to solicit customers of the former employer "whose name and addresses he has learned during the period of his service". . . .

24 The Court in *Imperial Sheet Metal* made other observations directly relevant to the first issue. In paragraph 5, it notes that courts have divided on whether the definition of a fiduciary should be broad or narrow, and in paragraph 6, the Court of Appeal agrees with the motions judge that the broad approach should be rejected. From paragraphs 33 to 37, the Court clearly differentiates between employees who simply owe a duty to act in good faith from employees who owe a fiduciary duty, and adds that courts are hesitant to impose more onerous fiduciary duties upon any former employees who are not restrained by restrictive covenants.

25 The *Steele-Thornicroft* text reads at pages 55 to 56:

> The duty of good faith does not require an employee to remain in service of their employer for as long as their employer wishes. The freedom to change jobs would be meaningless if the duty of good faith prohibited a person from taking steps to obtain new employment until their present employment ended or until they had at least tendered their resignation. While employees are not strictly prohibited from undertaking preparatory activities while still employed, certain actions may constitute a breach of the employee's duty of good faith. Although it is not possible to provide an exhaustive list of all

> permissible and impermissible activities, a review of the cases illustrates the types of actions that are either permitted or prohibited.
>
> Although non-fiduciary former employees may solicit the business of their former employers' customers, these employees cannot, while still employed, make customer lists or otherwise photocopy or download electronic files identifying the employer's customers.
>
> 26 In *Fleming v. Calyniuk Restaurants Inc.*, 2007 SKCA 85 ("*Fleming*"), the Court noted that merely taking "preparatory steps of an embryonic nature" to determine what employment alternatives might exist will generally not constitute a breach of the duty of fidelity.

Did Manga Induce a Breach of Contract or Interference in Contractual Relations?

[59] Based on all of the evidence I find that Manga had no intention to cause a breach of the employment agreement between Mr. MacKie and Manga when it hired Mr. MacKie to work at the Dartmouth Doubletree.

[60] I find that Park Place has failed to prove the existence of an agreement, either written or oral, on confidentiality and non-competition. In short, there was no evidence – documentary or *viva voce* – to support this on a balance of probabilities.

[61] As for Park Place's claim against Mr. MacKie for breach of contract (and all other duties arising from his employment) this was dismissed, pursuant to the April 1, 2022, dismissal Order.

Elements of the Tort of Inducement to Breach of Contract

[62] The law recognizes the tort of inducing breach of contract, which has also been referred to as the tort of interference with contractual relations (see *Canada (Attorney General) v. Geophysical Services Inc.*, 2022 NSCA 41). Park Place submits that Manga induced Mr. MacKie to breach his employment contract and subsidiary agreements. They rely on *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322 and Justice Rouleau's comments regarding the four elements of the tort at para. 26:

> [26] I will turn now to the tort of inducing breach of contract. To succeed on this basis, *Drouillard* must prove the four elements of the tort which are as follows:
>
> (1) Drouillard had a valid and enforceable contract with Mastec;
>
> (2) Cogeco was aware of the existence of this contract;

(3) Cogeco intended to and did procure the breach of the contract; and

(4) As a result of the breach, Drouillard suffered damages.

If the four elements of the tort have been made out, I need then to consider whether the defence of justification is available to Cogeco. See *Posluns v. Toronto Stock Exchange and Gardiner*, [1964] 2 O.R. 547, [1964] O.J. No. 792 (H.C.J.), affd [1966] 1 O.R. 285, [1965] O.J. No. 1091 (C.A.), affd [1968] S.C.R. 330, [1968] S.C.J. No. 19. See also *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 486.

[63] From the evidence it is not in dispute that there existed an employment agreement between Park Place and Mr. MacKie. Having said this, Park Place has not established that Manga knew any of the specific terms of the contract between Mr. MacKie and Park Place. In support of this statement I reference the discovery testimony of (former) Dartmouth Doubletree Manager, Troy Dawson (exhibit 1B, tab 44).

[64] On all of the evidence I find that Park Place has failed to prove the existence of an agreement, either written or oral, on confidentiality and non-competition. Further, Park Place did not establish that Mr. MacKie in fact breached his duty of loyalty to Park Place under his employment agreement. In short, there was no evidence – documentary or *viva voce* – to support this on a balance of probabilities.

[65] I would add that an essential element of the tort of inducing breach of contract is that an actual breach of contract has occurred. It is not enough for the impugned conduct merely to hinder full performance of the contract (see *Correia et al. v. Canac Kitchens et al* (2008), 91 OR (3d) 353 (ONCA) at para. 99).

[66] While the evidence is clear that Mr. MacKie resigned, Park Place must prove a breach of the employment contract. There is no dispute in this case that Mr. MacKie gave Park Place three weeks' notice of resignation as required by the termination provisions of his employment agreement. Park Place must accordingly identify another breach of MacKie's contract that was induced by Manga, which they have failed to do.

[67] Even without a written or oral agreement, there are confidentiality and non-competition obligations imposed by common law. If an employee occupied a fiduciary position, then there is a continuing obligation post-employment to keep confidences, and not to actively solicit the customers of the former employer for a reasonable period. Even when an employee occupied a non-fiduciary position (as I have found here), then there are lesser obligations, and these are balanced (or perhaps

conflicting) with the common law right of former employees to compete with their former employers. In any event, a non-fiduciary employee still has an obligation not to copy and carry away confidential documentation for the use and benefit of a new employer (see *Imperial Sheet Metal Ltd.*, at para. 33 as quoted by Warner, J., herein at para. 57).

[68] The employment agreement between Mr. MacKie and Park Place contained an express confidentiality provision, which prohibited Mr. MacKie from using or disclosing "confidential information" except in the course of carrying out authorized activities on behalf of Park Place. The agreement (exhibit book, tab 7) defined "confidential information" (section 10) as follows:

> "Confidential Information" includes all material, business plans, financial information, projections, correspondence, contact lists and any other documents or information related to the business of the Employer, its affiliates, subsidiaries or other related parties or any information, process, idea or trade secret that is not generally and publicly known and for greater certainty, it will include all Intellectual Property (as defined below).
>
> "Intellectual Property" means intangible property developed by the Employer and its contractors, officers and employees in the course of their respective duties for the Employer on real estate and ancillary projects, including but not limited to those ideas, concepts, outlines, strategies, policies, business plans, and other materials related to real estate, regardless of form or media on which it is stored, some or all of which property may be protected by copyrights, patents, business processes, trade secrets and trademarks.

[69] I find that Mr. MacKie did not breach his common law and contractual duties of confidentiality by communicating with former customers of Park Place. The evidence discloses that Mr. MacKie relied only on his general skills and knowledge, as well as information that was otherwise generally and publicly known. Overall, I find the emails he sent out to be benign and I accept his evidence to the effect that they were to inform Park Place clients with whom he had a friendly relationship that he was no longer working at the Delta Dartmouth.

[70] I find that Mr. MacKie did not breach any obligation of confidentiality and non-competition. Park Place has failed to prove that Mr. MacKie appropriated any trade secrets or customer lists of Park Place, and failed to prove that Mr. MacKie was engaged in the enticement of Park Place customers. I accept Mr. Dawson's discovery evidence that he did not receive any documents from Mr. MacKie, and was not aware of any documentation in Mr. MacKie possession, that originated with Park Place. I would add that my acceptance of Mr. Dawson's evidence is based on

my review of all of the transcript excerpts provided coupled with Mr. MacKie's consistent evidence that he did not furnish the material to Manga.

[71] Although Mr. MacKie retained documents from his work with Park Place which he had sent to his personal email address in December, 2018, Park Place has not demonstrated that Mr. MacKie ever disclosed this documentation to Manga, or used it for Manga's benefit, in breach of his employment obligations. Further, the evidence does not support an inference that Manga's sales strategies or proposals were informed by any pricing information of Park Place.

[72] Mr. MacKie's employment agreement with Park Place did not include any clause prohibiting post-employment competition or solicitation. Therefore, as a non-fiduciary employee, his duty of loyalty was limited to not competing with Park Place during the currency of his employment relationship. Non-fiduciary employees may compete with a former employer as soon as the employment relationship ends (see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, at para. 40 (Abella J. dissenting, not on this point)). The authorities are clear that the right of an employee to compete with a former employer includes the right to solicit customers of the former employer whose name and addresses the employee has learned during the period of his service.

[73] Mr. MacKie was no longer an employee of Park Place after May 22, 2019, and had no ongoing duty not to complete with Park Place after that date. I say this because I am of the view that Mr. MacKie's employment terminated when Park Place exercised its right under the employment agreement to waive his three-week notice of resignation. I find that Mr. Khan walked Mr. MacKie out on May 22, 2019. Thus, Mr. MacKie was prevented from working at the Delta Dartmouth after May 22, 2019. The evidence confirms that he was directed to return his keys and other property, and Mr. MacKie's disability benefits were terminated. In the result, I find that Park Place brought the employment agreement to an end effective May 22, 2019. In my view, the payments by Park Place to Mr. MacKie until June 12, 2019, constituted payments in lieu of reasonable notice of the termination of his employment.

[74] In *RBC Dominion Securities Inc.*, the Supreme Court of Canada accepted that non-fiduciary employees who leave their employ without notice remain free to compete against a former employer during their notice period. The employer is confined to damages for failure to give reasonable notice (paras. 18 – 19). An employee is similarly free to compete where an employer has terminated the

employment relationship and provides payment to the employee in lieu of working notice.

[75] In the result, I find that Mr. MacKie was free to enter into competition with Park Place after his employment ended on May 22, 2019, including by making contact with customers of Park Place whose names he had remembered. Mr. MacKie's emails to his client contacts did not breach any contractual or common law obligations that he had.

[76] In *Trimar* Justice Warner held it is not a breach of the duty of loyalty for an employee to explore alternative employment options or to prepare plans to leave his employer while still employed (see paras. 162 – 164). With this in mind, I find that Mr. MacKie did not breach his duty of loyalty by engaging in discussions with Manga about potential employment opportunities while still employed by Park Place.

[77] To the extent that Park Place has experienced a decline in sales, on the evidence I have determined that its' losses are not attributable to any wrongful act by Manga. The evidence demonstrates that none of the identified Park Place customers in fact diverted their business from the Delta to the Doubletree following Mr. MacKie's hiring. On Mr. Khan's evidence it is clear that the decline in Delta Dartmouth's sales in the period after Mr. MacKie's departure was caused by other market factors, including new competitors in the same area and the impact of the COVID 19 pandemic on conference and business travel.

Did Manga Conspire with Mr. MacKie for the Predominant Purpose of Injuring Park Place?

[78] With respect to the actions of Manga, there was scant *viva voce* evidence of what they may or may not have done to lead to the alleged conspiracy. Accordingly, both parties asked the Court to scrutinize the October 14, 2020, discovery testimony of (former) Doubletree Dartmouth General Manager, Troy Dawson (exhibit 1B, tab 44). Upon doing so, I have made the determination that Manga did very little to promote any active solicitation of former clients by Mr. MacKie.

[79] Park Place has not established that it suffered damage as a result of any alleged conspiracy involving Manga. Proof that the acts in furtherance of the conspiracy actually caused damage to the plaintiff is an essential element of this tort (see *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452, paras. 13-14).

[80] Once again, the evidence shows that no sales of Park Place were diverted to Manga. In *LaFarge*, the Supreme Court found that the tort of conspiracy had not been made out in part because there was "no causal connection between the unlawful activities of the appellants and the commercial demise of the respondent." The Court found that the respondent's losses were caused by other market factors and I have made a similar finding in this case.

If Manga is Liable to Park Place, What are the Appropriate Remedies?

[81] Park Place claimed in their pre-trial brief special damages of nearly $55,000, punitive damages and an accounting and disgorgement of any and all profits earned by Manga. Given my liability findings none of these damages are warranted. I make the additional observation that had any breach of Mr. MacKie's duties to Park Place and losses on the part of Park Place been established, the Court would have to consider that Park Place recovered payment of $5,000 from Mr. MacKie as part of the Minutes of Settlement. As such, Park Place would not be entitled to double recovery.

[82] With respect to punitive damages, these damages were originally plead in the amount of $250,000. To obtain an award of punitive damages, a plaintiff must meet two basic requirements. First, the plaintiff must show that the defendant's conduct was reprehensible. Second, the plaintiff must show that a punitive damages award, when added to any compensatory award, is rationally required to punish the defendant and to meet the objectives of retribution, deterrence and denunciation. When the claim against the defendant is for breach of contract, as it is here, the plaintiff must meet a third requirement: the plaintiff must show that the defendant committed an actionable wrong independent of the underlying claim for damages for breach of contract (see *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 at paras. 79-80).

[83] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94, the Supreme Court of Canada stated, among other things, that punitive damages are very much the exception rather than the rule, and they can be imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.

[84] I find it unnecessary to engage into a detailed analysis of the issue of punitive damages because, in my view, Mr. MacKie's and/or Manga's conduct - as established by the evidence - was in no way reprehensible and high-handed so as to

justify the imposition of an award of punitive damages. On all of the evidence I find that this is not one of the exceptional cases where punitive damages should be awarded.

[85] In the result I dismiss all of Park Place's claims in their entirety and award costs to Manga. If the parties cannot agree on costs I will receive written submissions within 30 days.

Chipman, J.