See paras. 45, 55, 57, 719-720

Case Name:

GasTOPS Ltd. v. Forsyth

Between
GasTOPS Ltd., Plaintiff (Respondent), Appellant by way of cross-appeal, and
Bradley Forsyth, Douglas Brouse, Jeffrey Cass, Robert Vandenberg, and MxI Technologies Ltd. a.k.a. 1197543 Ontario Limited, Defendants (Appellants), Respondents by way of cross-appeal

[2012] O.J. No. 909

2012 ONCA 134

288 O.A.C. 201

[2012] CLLC para. 210-021

99 C.C.E.L. (3d) 62

2012 CarswellOnt 2539

Docket: C51170

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.G. Juriansz and P.S. Rouleau JJ.A.

Heard: September 19, 20, 21 and 22, 2011.
Judgment: March 1, 2012.

(97 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Appeal by employees from judgment finding them liable for breach of fiduciary duty, calculation of damages and finding of joint and several liability, and cross-appeal by employer from denial of permanent injunctive relief dismissed -- Appellants resigned and started competing company -- Trial judge

found that they appropriated confidential and proprietary information and trade secrets and usurped business relations, and ordered disgorgement of 10 years' profits -- Remedy was measured and proportional, and supported by evidence -- There was no basis for a permanent injunction given judge's determination, in setting 10-year period for an accounting, that misappropriated information would lose its value in that time.

Damages -- For torts -- Breach of fiduciary duty -- Relationship between parties -- Employment -- Interference with contractual relations -- Appeal by employees from judgment finding them liable for breach of fiduciary duty, calculation of damages and finding of joint and several liability, and cross-appeal by employer from denial of permanent injunctive relief dismissed -- Appellants resigned and started competing company -- Trial judge found that they appropriated confidential and proprietary information and trade secrets and usurped business relations, and ordered disgorgement of 10 years' profits -- Remedy was measured and proportional, and was supported by evidence -- No error in assessment of profits -- Appellants were fiduciaries based on roles -- There was no basis for a permanent injunction.

Employment law -- Implied duties of employee -- Fiduciary duties -- Appeal by employees from judgment finding them liable for breach of fiduciary duty, calculation of damages and finding of joint and several liability, and cross-appeal by employer from denial of permanent injunctive relief dismissed -- Appellants resigned and started competing company -- Trial judge found that they appropriated confidential and proprietary information and trade secrets and usurped business relations, and ordered disgorgement of 10 years' profits -- Remedy was measured and proportional, and was supported by evidence -- No error in assessment of profits -- Appellants were fiduciaries based on roles -- There was no basis for a permanent injunction.

Appeal by former employees from the judgment finding Cass and Vandenberg liable for breach of fiduciary duty, the calculation of damages and the finding of joint and several liability. Cross-appeal by the employer from the denial of permanent injunctive relief. GasTOPS was involved in the maintenance of marine and aviation gas turbine engines. It also provided engineering consulting services and developed related computer software programs. In October 1996, the individual appellants, who were designers of GasTOPS core programs, resigned from their senior management positions. One week later, Forsyth and Brouse incorporated MxI Technologies and Cass and Vandenberg immediately commenced employment with MxI. Within hours of the resignations, several employees met with the Forsyth and Brouse and subsequently became employed by MxI. After an attempt at negotiating a cooperation and subcontracting agreement between the companies fell through, GasTOPS commenced an action against Forsyth, Brouse, Cass, Vandenberg and MxI Technologies for damages and injunctive relief for breach of fiduciary duty and breach of contract. GasTOPS alleged that that the personal appellants failed to give reasonable notice of their intention to resign and that they breached their fiduciary duties and implied contractual obligations through misappropriation of confidential information, trade secrets and corporate opportunities, which the appellants denied. The trial judge found that the individual appellants breached their fiduciary

duties and implied contractual obligations to GasTOPS and that their two weeks' notice of resignation was insufficient. He found that Forsyth and Brouse were aware that their resignation would cause the majority of employees within their division to seek employment with their new company rather than remain with GasTOPS, which caused serious consequences for GasTOPS, as existing and potential customers looked to MxI for technical advice because GasTOPS was unable to meet its contractual obligations. In addition, he found that the appellants misused GasTOPS's confidential information by making its trade secrets and confidential business information available to MxI and using such information to develop and springboard the company's marketing strategy and competing products. The trial judge found that the appellants engaged in unfair competition by usurping business relationships and soliciting identical contractual opportunities they had either personally nurtured or became aware of in the course of employment with GasTOPS. He concluded that the length of time since the resignations militated against injunctive relief and that a disgorgement of profits earned by MxI, in the amount of $12,306,495 payable by the personal appellants, adequately redressed GasTOPS's loss. The appellants sought to appeal the finding that Cass and Vandenberg owed GasTOPS a fiduciary duty as former employees. In addition, they challenged the 10-year period the trial judge used to calculate the improper profits to be disgorged and the inclusion of certain amounts in the calculation of those profits. In addition, they argued there was no basis for joint and several liability.

HELD: Appeal and cross-appeal dismissed. The trial judge's determination that a 10-year accounting period was appropriate was entitled to deference, as disgorgement of profits was an equitable remedy and the determination of the appropriate period was a very fact-driven exercise. The 10-year period resulted in a remedy that was measured and proportional, and was supported by the evidence. The trial judge made no error in his assessment of the profits made by the appellants over the accounting period. Given the roles of Cass and Vandenberg at GasTOPS and their responsibilities in the development of a significant commercial component of GasTOPS's business, the trial judge made no error in finding that they were fiduciaries. As the appellants engaged together in a joint enterprise that inflicted significant harm on GasTOPS in breach of their legal obligations, a finding of joint and several liability was within the trial judge's discretion. There was no basis for a permanent injunction given the trial judge's determination, in setting a 10-year period for an accounting, that the misappropriated information would lose its value in that time.

Appeal From:

On appeal from the judgment of Justice B. Thomas Granger of the Superior Court of Justice dated September 25, 2009, with reasons reported at 2009 CanLII 66153.

Counsel:

Catherine P. Coulter, David R. Elliott and K. Scott McLean for the appellants.

James L. Shields, John H. Yach and Thomas Finlay for the respondent.

The judgment of the Court was delivered by

S.T. GOUDGE J.A.:--

INTRODUCTION

1 After a trial lasting 295 days, Granger J. found the personal appellants, Bradley Forsyth, Douglas Brouse, Jeffrey Cass and Robert Vandenberg liable to the respondent GasTOPS Ltd. for breach of fiduciary duty, breach of confidence and breach of their contract of employment. He found the respondent MxI Technologies Ltd. liable for breach of confidence. He awarded damages against the personal appellants equivalent to the profits earned by MxI from military contracts in its first ten years of operation, and he ordered MxI to disgorge those profits. All appellants were ordered to pay this amount jointly and severally quantified at $12,306,495.00. The trial judge also awarded pre-judgment interest of $3,039,944.00 together with costs on a full indemnity basis of $4,252,920.24.

2 In this court, the appellants raise a narrow set of issues. The only issue of liability they contest is the finding that the appellants Cass and Vandenberg owed a fiduciary duty to the respondent. The principal issue argued by the appellants is the trial judge's use of ten years as the timeframe for the assessment of damages and for the disgorgement of MxI's profits. They also contest the inclusion of certain amounts in calculating the quantum and the finding of joint and several liability. Finally, they appeal the scale on which costs were awarded.

3 The respondent cross-appeals the use of ten years to limit its relief. It argues that MxI should be permanently enjoined from using the information taken in breach of confidence or should be required to disgorge its profits in perpetuity.

4 For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

THE FACTS

5 Despite the limited nature of this appeal, it is useful context to broadly sketch the background facts as found by the trial judge.

6 GasTOPS was incorporated in 1979 and has been engaged ever since in the design, development and application of computer software products that assess machinery conditions for maintenance purposes for operators of gas turbine engines (often referred to as "jet engines"). GasTOPS originally targeted military aviation markets, but grew its business to include the

commercial industrial market as well. In the 1990s, it also sought to enter the commercial aviation market.

7 From 1985 to 1993, GasTOPS developed its technology largely through contracts with the Department of National Defence (DND) and the Canadian Armed Forces (CAF). It continued to evolve its product line, including a major design revision that took place from 1993 to 1995. During 1996, GasTOPS was in the course of developing the next iteration of its technology.

8 The trial judge described the respondent's position in October 1996 in its specialized area of business in this way at para. 18:

> As of October 1996, GasTOPS was an industry leader in the area of engine condition-based maintenance, usage and life tracking of engine parts. None of the software programs developed by GasTOPS' competitors were as sophisticated or covered such a wide spectrum of engine maintenance elements as GasTOPS product line: ECMS; Flight Line Troubleshooting Systems ("FLTS"); Lube Analysis (Oil Prognostic System); and MAINSTAY.

9 As of the fall of 1996, GasTOPS' business plan for its family of technology products provided a good snapshot of its state of affairs at the time. Its biggest customer in the military aviation field was the CAF. Dofasco was its most important client in the industrial systems field. In general terms, both aspects of the respondent's business had a small number of customers. This was a highly specialized niche industry, with few clients, each of which generated significant revenues for the respondent.

10 The respondent's business plan also outlined the opportunities being pursued by the respondent at that time. There were a number, but the most important opportunity was with the U.S. Navy, which GasTOPS was vigorously pursuing.

11 Up until October 1996, the personal appellants were all employees of GasTOPS. Forsyth had been there nine years. He had served as manager of product development, but more recently had been promoted to head up the industrial systems group. Brouse was hired by GasTOPS in 1986. By the fall of 1996, he had been promoted to the head of the aerospace business unit, the largest business unit within the company. As early as 1994, Cass was the company's chief software developer and the key product development person from a technical standpoint. Vandenberg joined GasTOPS in 1993. He had held a number of positions, but in the fall of 1996 he was a project manager responsible for Dofasco.

12 These four were considered effectively the designers of the core programs within the family of GasTOPS' technology products. They set up MxI and they were all well aware of the business opportunities GasTOPS was pursuing and its proposals to potential customers. They had full knowledge of the design of GasTOPS' family of products. They were in possession of the 1997 GasTOPS' business plan and its strategic plan to acquire the U.S. Navy as a customer. On all the

evidence, as of the fall of 1996, the trial judge found them to be part of senior management at GasTOPS. Because of their responsibilities, the roles they played in the development of the respondent's product lines, and the information they possessed, the trial judge held that they were crucial to the direction and guidance of the company. He concluded at para. 270:

> They were responsible for developing a significant commercial component of GasTOPS' business, and achieved that through the use of sensitive technological information that they helped develop and which was at the very core of GasTOPS' corporate identity. In addition, they were privy to or had determined the customers' and potential customers' requirements.

13 As far back as May 1996, Brouse and Cass had attended a seminar on starting a software company, unbeknownst to GasTOPS. The two subsequently shared the material with Forsyth. On October 7, 1996, Forsyth and Brouse submitted separate, but identical, letters of resignation from GasTOPS. They gave two weeks' notice. In part those letters read as follows:

> I regret to inform you that I have decided to resign from GasTOPS Ltd. on Friday, October 18, 1996. While my future plans are somewhat uncertain, rest assured that I will NOT:
>
> 1. solicit business from any existing GasTOPS Ltd. clients or potential clients that GasTOPS Ltd. has been pursuing and counting on;
> 2. utilized [*sic*] or take with me any confidential company information or property; nor,
> 3. solicit any employees or [*sic*] GasTOPS Ltd.
>
> I hope that my departure will not be too disruptive to GasTOPS Ltd. and that the company will find a suitable replacement. However, if GasTOPS Ltd. should need my services to assist in the transition, I will be available on a sub-contract basis.

14 Three days later, Cass and Vandenberg resigned, giving the same length of notice. Forsyth and Brouse were aware beforehand that they would do so. The trial judge found that within hours of their resignation from GasTOPS, Forsyth, Brouse and Cass were meeting with GasTOPS employees and describing to them their plans to start up their own business, focused on aviation maintenance software. In short order, a number of other GasTOPS employees left to join with the four personal appellants.

15 The trial judge found that the notice the personal appellants gave was totally inadequate, that each of them knew it, and that they intended destroy GasTOPS' technology business. They were fully aware that these departures would leave the respondent unable to fulfill its existing contracts,

or continue to pursue the business opportunities it had been cultivating.

16 MxI was incorporated on October 15, 1996. The original entrepreneurs behind it were the four personal appellants. By November 1996, a number of the former GasTOPS employees had joined the company. This brought about what Forsyth and Brouse had been planning well before leaving GasTOPS, namely that they would resign and establish their own software development company, involving not just themselves but others, who would leave GasTOPS to work for the new company.

17 The immediate result for GasTOPS was that its customers, such as CAF and Dofasco, were caused to re-evaluate their existing business relationships with it. Prospective customers, such as the U.S. Navy, proceeded to re-evaluate their willingness to contract with GasTOPS.

18 Subsequent to the resignations of the four personal appellants, GasTOPS attempted to negotiate an arrangement with MxI to contain the damage. While the negotiations ultimately failed, in the course of these negotiations, correspondence was exchanged in which Forsyth made clear that all four personal appellants appreciated that they owed a fiduciary duty to GasTOPS as their former employer.

19 The trial judge found that, subsequent to their resignations, the appellants pursued virtually every existing and potential GasTOPS customer, including the CAF and the U.S. Navy. They used the confidential business information they had obtained while at GasTOPS to form their marketing strategy and develop their technology, the functionality of which was virtually identical to the technology they had designed and developed at GasTOPS. They used the technical information thus acquired at GasTOPS to do this. They simply offered GasTOPS' existing and prospective customers a virtually seamless transition to MxI and its products. The trial judge put it this way at para. 259:

> The defendants actively portrayed themselves as a "spin off" of GasTOPS that possessed all of the experience and knowledge necessary to meet existing and potential customers' needs. The defendants indicated that their product was the next iteration of the product they had developed at GasTOPS.

20 MxI's success and GasTOPS' corresponding damage was immediate and significant. It began by MxI successfully usurping the business opportunity GasTOPS had cultivated with the U.S. Navy. Indeed, in its first three years, over 80 per cent of MxI's substantial total income was derived from U.S. Navy contracts.

21 The harm to GasTOPS was significant in dollar terms. The lost and forgone profit was valued by expert evidence at approximately 13 million dollars over the ten-year period used by the trial judge. The trial judge found certain methodological difficulties with this evidence. However, he was comforted that this quantum was similar to that yielded by the method he did use to assess the damages suffered by GasTOPS, namely the value of the profits earned by MxI over that period of time. During this decade, MxI was marketing what it called the fourth iteration of GasTOPS technology to its customers, most of whom were former or targeted customers of the respondent

such as the CAF and the U.S. Navy.

22 In the end, the trial judge, having rejected the claim for injunctive relief, ordered MxI to disgorge profits of $12,306,495.00. He ordered damages against the four personal appellants in the same amount. Finally, he ordered pre-judgment interest of $3,039,944.00 and full indemnity costs of $4,252,920.24.

23 With this background, I turn to the issues raised in this court.

THE APPEAL

24 This was a very lengthy trial. It resulted in very lengthy reasons for judgment, addressing a number of issues. This appeal, however, is targeted at only a very few of these. Before turning to them, it is useful to sketch the range of conclusions reached by the trial judge on both liability and remedy, and to clarify which of these are at issue and which are not.

25 First, the trial judge found that all of the personal appellants, former employees, owed a fiduciary duty to GasTOPS. He held that they breached this duty in a number of ways, particularly in the way they left their employment and in the ways they continued to act after they did so. More particularly, they breached their fiduciary duty by leaving without giving reasonable notice knowing other employees would follow, with devastating effects on GasTOPS that left it unable to fulfill its contracts or pursue the business opportunities it planned for; they breached their fiduciary duty by soliciting the customers and prospective customers of their former employer; and they breached their fiduciary duty by using GasTOPS' confidential information to compete unfairly with their former employer.

26 Second, the trial judge found that all the appellants, including MxI, acquired information that was confidential to GasTOPS. This information was both commercial (such as strategic business plans and individual customer needs) and technical (such as the details of software product design and data models). They misused that information to advance their own business to the detriment of GasTOPS in breach of their duty of confidence to GasTOPS.

27 Third, the trial judge found the four personal appellants liable for breach of contract for leaving their employment with GasTOPS without giving reasonable notice.

28 The appellants do not contest any of these conclusions, save for the finding that two of the personal defendants, Cass and Vandenberg, owed GasTOPS a fiduciary duty as former employees. In other words, the appellants do not contest the finding that the other two personal appellants, Forsyth and Brouse, owed GasTOPS fiduciary obligations which they breached in these various ways. Nor do they contest that all five appellants breached their duty of confidence to GasTOPS as described. Finally, they do not contest that the four personal appellants breached their employment contracts by failing to give reasonable notice before leaving.

29 The trial judge then turned to the appropriate remedies for these breaches. He first considered and rejected GasTOPS' request for permanent injunctive relief. GasTOPS' challenge to that finding is the subject of the cross-appeal.

30 For the breach by MxI of its duty of confidence, the trial judge ordered it to account to GasTOPS for the resulting profits it made improperly, and to disgorge the same.

31 As against the four personal appellants, the trial judge ordered damages as the remedy for their breach of fiduciary duty, their breach of the duty of confidence, and their breach of contract. He made a single damage award to redress GasTOPS' loss from the combined effect of these causes of action. He did not assess the consequences of each separately. To do so would have been both impractical and unrealistic, given the closely intertwined facts that informed each breach.

32 Up to this point, the appellants do not quarrel with the trial judge's choice of remedies or his approach to each of them. They take no issue with MxI having to account for the profits it improperly made. Nor do they take issue with the order requiring the four personal appellants to pay damages. They do not contest that GasTOPS suffered loss because of their actions, nor that a single damage award for the combined consequences of their actions was appropriate.

33 It is the trial judge's quantification of these remedies that is the appellants' primary concern in this court. In particular, they challenge the "accounting period" used by the trial judge to calculate the number of years of improper profits that must be disgorged and over which GasTOPS' losses must be calculated and compensated.

34 The trial judge ordered that MxI account to GasTOPS for the improper profits it made over its first ten years and that the personal appellants compensate GasTOPS for the losses it suffered over the same ten years. He therefore ordered MxI to disgorge the profits it made between October 30, 1996 and November 1, 2006 from its military contracts. That amounted to $12,306,495.00. He also ordered that the personal appellants pay GasTOPS for the losses it suffered over the same period of time. He concluded that the best measure of these losses was the value of the profits MxI was required to disgorge.

35 The appellants do not challenge the trial judge's use of the disgorgement remedy or his use of MxI's profits to measure GasTOPS' damages for the breach of the appellants' fiduciary duty and their duty of confidence. However, they vehemently contest his choice of ten years to quantify those damages.

36 The appellants also raise a challenge to the calculation of the quantum ordered. They say that certain amounts should not have been included as a component of either MxI's improper profits or GasTOPS' damages.

37 Next, as I have indicated, the appellants challenge the finding that Cass and Vandenberg owed a fiduciary duty to GasTOPS.

38 The trial judge made all five appellants jointly and severally liable for the sum ordered. This too is contested by the appellants, who say that there was no basis for joint liability and that an individual assessment of responsibility should have been made for each of the personal appellants.

39 Finally the appellants challenge the scale on which trial costs were awarded to GasTOPS.

40 In summary, the issues raised in this court are very narrow. They are as follows:

(1) The use of ten years to quantify the accounting period;
(2) The inclusion of certain amounts in calculating the quantum;
(3) The finding that Cass and Vandenberg are fiduciaries;
(4) The finding of joint and several liability for all appellants;
(5) The awarding of trial costs on a full indemnity basis.

First Issue: The Ten-Year Accounting Period

41 In this court, the appellants' primary attack is on the trial judge's use of ten years in crafting the remedies of disgorgement and damages. The trial judge summarized his reasons for determining that ten years was appropriate as follows, at paras. 1544 and 1545:

> Taking into account that the MSD of GasTOPS was a highly technical based division; the state to which it had developed its software programs ECMS and its other suite of programs as of October 1996; and the time it took a software company to develop a program, develop potential customers, customize products or potential products; test products and then roll out the product, I am satisfied, that the fiduciary duty owed to GasTOPS by Forsyth, Brouse, Jeff Cass, Vandenberg and the prohibition against all defendants in using confidential business information/trade secrets belonging to GasTOPS *vis-à-vis* the existing customers of GasTOPS and potential business opportunities that GasTOPS was pursuing in October 1996 should last for a period of 10 years.
>
> It is also important to keep in mind, that after an organization such as the United States Navy or General Electric purchases and installs a software program such as ECMS, v.2 or Maintenix, it would be reluctant for many years to change the core products it was using. In this case there was no such reluctance as the MxI product was simply the next iteration of the GasTOPS' product ECMS.

42 As I read this summary, the trial judge found that ten years was the time over which MxI earned profits in breach of its duty of confidence which it must disgorge, and ten years was the duration of the losses suffered by GasTOPS due to the breach of fiduciary duty by the four personal appellants, for which they have to pay damages. This reflected the highly specialized nature of GasTOPS' business, the time required to develop and evolve its suite of products, and the useful life

of the confidential information taken from it.

43 In their factum, the appellants variously describe the finding of ten years as "staggering", "remarkable", and "extraordinary". Such rhetoric is unhelpful. They go so far as to say that the finding "was motivated in large part by a desire to punish" the appellants, an assertion I find to be completely unwarranted.

44 Beyond this, the appellants raise a number of particular arguments in challenging the ten-year accounting period. They must be considered in the context of the appropriate standard of appellate review.

45 In my view, two reasons point to the need for appellate deference. First, the ten-year accounting period is an integral component of the remedy ordered by the trial judge for breach of confidence and breach of fiduciary duty. Both these causes of action require the exercise of equitable principles. So does the remedy for each. Here the trial judge ordered both disgorgement of improper profits by MxI and equitable compensation payable by the four personal appellants. Both are equitable remedies. As Binnie J. said in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 74: "This Court has repeatedly stated that '[e]quitable remedies are always subject to the discretion of the court'." The exercise of judicial discretion at trial deserves deference in this court.

46 Second, it is clear from the trial judge's reasons that the selection of ten years for the accounting period was a very fact-driven exercise. That too suggests appellate deference, at least so far as the challenges to this aspect of the trial judge's decision are concerned.

47 Thus unless the trial judge has made a palpable and overriding fact-finding error, or proceeded on a wrong principle of law, or reached a conclusion that is so clearly wrong or unreasonable as to amount to an injustice, appellate interference with his exercise of discretion in fixing a ten-year accounting period is unwarranted: see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18.

48 With this in mind, I turn to the appellants' case against the accounting period chosen by the trial judge. They make a number of specific arguments, but the overall theme is that it resulted in a remedy that was not "measured and proportional", but was used by the trial judge as a vehicle for punishing them.

49 The answer to the latter allegation is that there is simply no basis for suggesting that the trial judge chose ten years in order to punish the appellants. He explained in detail why he selected ten years, and summarized his reasons in the passage quoted above. They have nothing to do with an attempt to punish the appellants.

50 The allegation that it resulted in a remedy that was not "measured and proportional", so far as it is anything more than unhelpfully conclusory, is entirely fact-dependent. That is, whether a

remedy is balanced and proportional depends entirely on the facts of the case. In the passage quoted above from his reasons, the trial judge summarized the findings of fact on which he based his conclusion. As of October 1996, GasTOPS was an industry leader in a highly technical and specialized business with a small number of very large customers. Its suite of programs, its existing customers, its customized products, its potential business opportunities and its related confidential and technical business information all had taken some considerable years to develop. MxI could and did use all this to portray their product as simply the next iteration of the GasTOPS suite of products, making it easy to attract large customers away from GasTOPS into long-term relationships. All this was amply demonstrated by the evidence. The trial judge's conclusion was that on these facts the damages for breach of the fiduciary duty imposed on the four personal appellants and the duty of confidence imposed on all of the appellants lasted ten years. That conclusion deserves deference. In my view, it cannot be said to be unreasonable. In the particular circumstances of this case, the appellants' assertion that the accounting period is not measured and proportional cannot be sustained.

51 Turning to their more focused arguments, the appellants say that the ten-year accounting period is well in excess of the temporal limits set by the case law, whether for breach of fiduciary duty, or for breach of confidence, or for failure to give notice.

52 I reject this argument. The trial judge did not assess the accounting period required for each cause of action separately. He decided upon the accounting period as an integral part of the remedy for the harm caused by the combined effect of all these breaches. The appellants cannot properly look for comparison to case law dealing with only one breach, such as the breach of fiduciary duty.

53 Even if each cause of action were viewed separately, however, the appellants' argument could not be sustained. They suggest that the temporal limit at law for damages for breach of fiduciary duty averages between one and two years with five years being "an outlier". However, the appellants rely largely on cases that deal only with the fiduciary's duty not to compete with a former employer until the employer has had the chance to contact its customers and try to retain their loyalty. The driving principle was to ensure fair competition. If all that was necessary to ensure fair competition between the appellants and GasTOPS in the circumstances here was the opportunity to contact customers and try to retain their loyalty, those cases might have some application. However, on the facts, the unfair competition stems from much more than seeking to attract customers of a former employer. Of importance is the small and highly specialized market, the confidential business and technical information that the appellants misappropriated and continued to use, and the resulting product they sold as the next iteration of the GasTOPS suite of products. Fair competition could not have been assured simply by according GasTOPS the time to contact its customers to attempt to maintain their loyalty. The appellants engaged in much more that constituted unfair competition. The cases relied on by the appellants provide a clearly inadequate comparison in these circumstances.

54 Of much more assistance is *Strother*. The Supreme Court of Canada was required to fix an

accounting period for which Strother was required to account for monies received from a client in breach of his fiduciary duty to avoid a conflict between his own interest and that of his client. The court did not look to other cases each with its own facts. Rather it determined that the accounting period should last until the conflict (and therefore the damage from the fiduciary breach) was spent. In assessing how long that should be in that case, the court in *Strother* said this at para. 90:

> In my view, a "cut off" is appropriate in this case as well. At some point, intervention of other events and actors (as well as the behaviour of the claimant) dissipates the effect of the breach.

55 In this case the trial judge found a multi-faceted breach of fiduciary duty by the four personal appellants. He assessed the effects in the context of the relevant facts and found that they would not have dissipated for ten years. As I have said, that is a reasonable conclusion in the circumstances that were before him.

56 The appellants used the same approach to argue that the temporal limit at law for the misuse of confidential information is also capped at one to two years. Here too, in seeking to rely on time limits from other cases, the appellants ignore the importance of the facts in each particular case. In *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1991] 1 S.C.R. 142, at para. 24, the Supreme Court of Canada makes clear the central importance of the facts of the case in devising the remedy for breach of confidence. In this case, the trial judge paid careful attention to the facts in settling on a ten-year accounting period. That approach cannot be faulted.

57 The nature of the confidential information that is misappropriated is also important: see *Cadbury*, at para. 65. Here both the confidential business plans with their information about particular customer needs and, even more importantly, the confidential technical information at the core of GasTOPS' suite of computer programs, were "very special indeed" in the language of Lord Denning in *Seager v. Copydex Ltd., (No. 2)*, [1969] 1 W.L.R. 809, at p. 813. This information allowed the appellants to market their product to GasTOPS' customers and potential customers as merely a seamless next step in the evolution of GasTOPS' programs. Confidential information of this nature provides strong support for the ten-year accounting period.

58 Assessing the extent to which the appropriated confidential information provided the appellants with a "springboard" or a "head-start" is also important. The appellants argue that a ten-year accounting period greatly exceeds the time limits prescribed by the "springboard" case law. However, here too the facts of each case are most important. In this case, those facts made clear that the advantage gained from the information misappropriated by the appellants is not measured simply by the time they would have had to take to themselves develop the last iteration of the GasTOPS suite of programs. It must take account of the many years that went into bringing these programs from inception to where they were in the fall of 1996. That supports a longer accounting period.

59 The appellants say that the case law also looks to how soon the misappropriated confidential

information would cease to have value to them. While that may be so, that too depends on the facts of the particular case. In this case, the very commercial success of the appellants (which was based on the use of this information) is supportive of a multi-year accounting period.

60 Thus, I would conclude that the choice of an accounting period in a breach of confidence case depends very much on its particular facts. As I have said, on the facts found here, the trial judge's conclusion of ten years was entirely reasonable.

61 The appellants complete their argument about the temporal limit that the case law permits for a remedy by addressing the personal appellants' failure to provide reasonable notice of resignation. They say that the proper length of notice could not possibly provide a rational basis for an award of ten years. While that is so, the trial judge does not purport to do so. Rather, it is clear that the trial judge does not treat the lack of notice as a separate basis for justifying the accounting period. Rather, it is relevant to the timeline over which the remedy had to be calculated because of the harm caused by the appellants' breach of fiduciary duty. He described the contribution of the breach of contract by the four personal appellants as follows at para. 1447:

> The personal defendants' failure to provide GasTOPS with reasonable notice of their intention to resign positioned the defendants as an alternative to GasTOPS' existing and prospective customers' software needs. It is important to keep in mind the extremely vulnerable position of the plaintiff as a result of the failure of the defendants to provide GasTOPS with reasonable notice. If the defendants had provided GasTOPS with 10-12 months notice, it could have, and in my view in all probability would have, made arrangements to replace these defendants and to have fulfilled its goal of converting its products to a Windows environment. If GasTOPS had been able to do so and hired new personnel in a timely manner to replace the defendants, the new personnel could have been introduced to its existing customers and potential customers and become familiar with its products. In such circumstances, the effect of the defendants' breach of their fiduciary duty to GasTOPS would have been lessened greatly.

62 Given that the trial judge did not separately assess and quantify the damage award flowing from the failure by the four personal appellants to give reasonable notice, it is unnecessary to consider the length of notice that should have been given. Suffice it to say that we should not be taken to agree with the 10-12 months suggested by the trial judge or the factors he considered in reaching that period. His assertion that the appropriate notice could require this length of time played no part in his calculation of the accounting period.

63 The appellants also advance a number of discrete arguments described as errors that they say impacted upon and undermined the trial judge's choice of a ten-year accounting period.

64 First, they argue that the trial judge made adverse credibility findings against them based on their late disclosure of certain productions. They argue that these late disclosures were no more

noteworthy than similar deficiencies by GasTOPS, but were nonetheless influential in the determination of the accounting period.

65 I do not agree. The trial judge's main concern was not just the lateness of the appellants' productions, but what those productions disclosed about the misleading evidence the appellants had already given. The same could not be said of GasTOPS. The trial judge put his concern this way at para. 626:

> I find it extremely distressing that Forsyth and Brouse whom I consider to be the main founding principals of MxI attempted for months on end in this trial to deny that MxI was targeting the military market place or improperly using the business and marketing strategy developed by Muir while they were employed by GasTOPS. Again, as I stated earlier, I am driven to the conclusion, that Forsyth and Brouse, deliberately attempted to mislead this Court in their *viva voce* evidence and by failing to produce documents which they had in their possession which contradicted their *viva voce* evidence.

66 It is clear that the trial judge had ample basis for his credibility findings. It is also clear that the appellants can point to nothing linking those findings to the determination of the accounting period. The credibility findings are nothing more than the trial judge doing his job.

67 Second, the appellants argue that the trial judge failed to consider or give any weight to evidence from witness Turner, an employee of GasTOPS. They say that his evidence about GasTOPS' suite of products at the time the four personal appellants left was inconsistent with the conclusion that the misappropriated confidential information had much value to GasTOPS or a value that would last ten years.

68 I reject this argument. The appellants made extensive reference to Turner's evidence in their written argument, which the trial judge made clear he reviewed in detail. He was free to review that evidence in his reasons or not. Moreover, as GasTOPS pointed out in argument, that evidence was of little help in accurately describing the state of GasTOPS' programs in October 1996, because it was based not on Turner's recollection but in large measure on the reconstruction of incomplete design documentation. There was good reason for the trial judge not to put weight on it.

69 Third, the appellants argue that the trial judge must have decided that GasTOPS not the Crown owned the software it designed under contract with the Crown, that he erred in doing so without analysis and without the Crown being a party, and that this conclusion was nonetheless important in deciding the accounting period.

70 I disagree. The trial judge made no finding of ownership of the misappropriated information, nor did he base the accounting period on it. GasTOPS was not required to show ownership, but only that it held the information in confidence see *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.* (2006), 215 O.A.C. 230 (ON C.A.). Moreover, the trial judge, in deciding upon a

ten-year accounting period, placed greater reliance on the appellants' misappropriation of GasTOPS' proprietary data model than on the misappropriation of the software design.

71 Fourth, the appellants argue that the trial judge erred in not treating the efforts of the parties after October 1996 to reach a cooperation agreement as a factor mitigating the length of the accounting period. In argument, the appellants expressly withdrew their attack on the trial judge's finding that the parties never concluded such an agreement.

72 I reject this argument. The simple answer is that the trial judge found that the cooperation agreement was never concluded. It had no legal effect and required no further attention by the trial judge.

73 Finally, the appellants argue that the trial judge's finding that the accounting period should be ten years is undermined because so much of his reasons for judgment was lifted verbatim and without attribution from GasTOPS' written submissions. The appellants expressly do not argue bias, but say that this nonetheless makes the trial judge's reasoning not his own.

74 I would dismiss this argument. It is true that lengthy passages were taken from GasTOPS' written argument. That does not dictate the conclusion that the trial judge's reasoning is not his own. There is nothing here that in my view permits such a conclusion. However, I have no hesitation in saying that where such lifting is done extensively, full recognition should be given. This contributes positively to transparency, minimizes the risk of arguments such as the one made here, and avoids the impression of judicial laziness.

75 To summarize, I conclude that all the appellants' arguments on this first issue fail. I see no basis for interfering with the trial judge's determination of an accounting period lasting ten years.

Second Issue: Inclusion of Certain Amounts in Calculating the Quantum

76 The trial judge used as his measure of GasTOPS' damages the profits made by the appellants over the time that the effects of their breaches of their fiduciary duty and duty of confidence lasted. As I have noted, this methodology is not an issue in this appeal.

77 The appellants do contest the inclusion of certain amounts in quantifying those damages. For example, they say the trial judge erred by including profits from the Canadian Air Force (the CAF) over the entire ten years since GasTOPS continued to do considerable business with the CAF over that period of time. They say the same about the inclusion of profits from the U.S. Navy, because many of the profits came from opportunities that were not "ripe" in the fall of 1996. Finally they say that the trial judge wrongly included a number of accounts with entities with which GasTOPS never had any dealings.

78 I would reject these arguments. The trial judge's task in fixing damages was to assess the profits made by the appellants from military contracts. That he did. His task was properly

unaffected by whatever continuing business GasTOPS was able to preserve, or by the fact that some of the opportunities that the appellants realized on were not "ripe" in the fall of 1996, but matured only later in the ten-year accounting period, or by the fact that some of these opportunities were with entities with which GasTOPS had not had contact. They were all profits that the appellants made from military contracts over the accounting period, as a result of the breach of their fiduciary duty and their duty of confidence, and therefore they were properly included in the damage calculation.

Third Issue: Cass and Vandenberg as Fiduciaries

79 The trial judge found that all four personal appellants were fiduciaries who owed a fiduciary duty to GasTOPS, their former employer. The appellants dispute this finding with regard to Cass and Vandenberg.

80 Before turning to the merits of this issue, it should be noted that the court was advised that all appellants received independent legal advice on the conflict of interest issue, which was raised by having counsel for all of them raise this issue on behalf of two of them. All have consented to proceeding in this way.

81 The finding that Cass and Vandenberg owed a fiduciary duty is one that must be given significant deference in this court. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426, La Forest J. adopted the following statement describing that approach:

> [T]he Supreme Court of Canada has said that when a trial judge has reached the conclusion, on all the evidence, either that there was, or there was not a duty of care, and that there was or there was not a breach of that duty of care, a Court of Appeal should not substitute its own view for the view of the trial judge unless it is satisfied that the trial judge made a material and identifiable error of law or a clear and identifiable error of fact in his appreciation of the evidence. *In our opinion, the same principles apply in the case of a trial judge's finding that there was or there was not a fiduciary duty, and that there was or there not [sic] a breach of that fiduciary duty.* [Emphasis in original.]

82 The trial judge reached his conclusion that Cass and Vandenberg were fiduciaries after a detailed review of their roles at GasTOPS. He found that along with the other two personal appellants "[t]hey were responsible for developing a significant commercial component of GasTOPS' business, and achieved that through the use of sensitive technological information that they helped develop and which was at the very core of GasTOPS' corporate identity": see para. 270. They worked with little if any supervision but with a high degree of responsibility. They had integral knowledge of and involvement with the design, development and future of GasTOPS' family of products. GasTOPS was in essence a technology company. In this respect, Cass and Vandenberg were crucial to its direction and guidance. The trial judge specifically concluded that all four personal appellants were part of GasTOPS' senior management.

83 The appellants have not established that the trial judge made any palpable and overriding error in making these findings of fact.

84 His conclusion that in these circumstances Cass and Vandenberg owed a fiduciary duty to GasTOPS deserves significant deference in this court. I would not interfere with it.

Fourth Issue: The Joint and Several Liability Finding

85 The appellants contest the finding that all appellants are jointly and severally liable to GasTOPS for the quantum ordered. They baldly argue that there was no basis for this.

86 The simple answer is that the appellants together engaged in a joint enterprise that inflicted significant harm on GasTOPS in breach of their legal obligations. The quantum was ordered as remedy for the harm caused by them collectively. In all the circumstances, including the absence of evidence about the relative shareholding of the personal appellants in MxI, the trial judge's imposition of joint and several liability for the damage caused by a joint enterprise was within his discretion in fashioning an appropriate remedy. This argument fails.

Fifth Issue: The Trial Costs

87 The trial judge awarded costs of the trial to the appellants on a full indemnity basis in the amount of $4,252,920.24. He did so because of the appellants' conduct during the trial. At para. 27 of his reasons for costs, he put it this way:

> Applying the criteria set out in *Gerula v. Flores, supra*, [1995] O.J. No. 300, the defendants' acts were a deliberate attempt to frustrate the plaintiff's claim by fraud and/or deception. The defendants actions were deliberate and intended to financially harm GasTOPS both in this action and in the military aviation field. The defendants deliberately intended to frustrate these proceedings through deception and as a result of their actions increased the complexity and length of these proceedings. The actions of the defendants are proper grounds upon which order [*sic*] the defendants to completely indemnify the plaintiff for its legal fees at the maximum possible rate.

88 The appellants argue that the trial judge erred in imposing costs on a full indemnity basis. They say there is no evidence that they acted intentionally in failing to disclose documents in a timely way, or in giving incorrect evidence.

89 I cannot agree. The award of costs is an act of judicial discretion to be set aside only if the trial judge has made an error in principle or if the award is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. In this case, the trial judge had ample evidence on which to base his conclusion that the appellants intended to mislead the court. The juxtaposition of the late productions that the appellants clearly knew about and prepared, and their

prior trial testimony that these productions demonstrated to be false is more than enough. The appellants' conduct clearly warranted the scale of the costs order made at trial.

90 To conclude, I am of the view that none of the appellants' five arguments succeed. The appeal must be dismissed.

THE CROSS-APPEAL

91 The respondent GasTOPS cross-appeals from the dismissal by the trial judge of its request for a permanent injunction enjoining the appellants from using the misappropriated confidential information in any way. It asks this court to make such an order, or in the alternative, an order that the appellants disgorge all future profits derived from its use.

92 I would dismiss this request. The trial judge declined to grant permanent injunctive relief on two bases. First, he held that a permanent injunction was inappropriate given the length of time that had passed between October 1996, when MxI began, and the trial judgment in September 2009. Second, he found that the profits he ordered to be disgorged and the damages he ordered together provided the respondent with adequate redress.

93 The trial judge's exercise of discretion in declining the equitable remedy of injunctive relief deserves deference in this court. Both reasons offered by the trial judge carry validity in the circumstances of this case. The lengthy delay, particularly in the context of the significant ongoing commercial activity of MxI to which this information was central, argues strongly against a permanent injunction. So does the view of the trial judge that the remedies he ordered provided adequate redress. His dismissal of the permanent injunction request was reasonable.

94 The respondent's request for permanent disgorgement of profits must also be rejected. It essentially would be a monetized version of a permanent injunction and faces the same objections. It also is contrary to the ten-year limit put on the accounting period by the trial judge. That limit recognizes the reality that in the rapidly changing world of technology, information such as that misappropriated here gradually loses its value and utility. At some point, it ceases to have the characteristics that require that it be cloaked in confidence. The trial judge, in setting a ten-year accounting period, determined that this point would likely be reached in approximately that period of time. That was a reasonable conclusion on the facts before him. There is no basis for an order for permanent disgorgement.

CONCLUSION

95 For these reasons, the appeal and the cross-appeal are both dismissed. As the court indicated at the end of oral argument, the parties can both make written submissions on the costs of the appeal. They must be exchanged and filed within 30 days of the release of these reasons and cannot exceed ten pages in each case.

96 I wish to conclude with an expression of concern about the length of time that this proceeding took. There is no doubt that it involved significant stakes, and some issues that were not easy. But it took seven years. The evidentiary portion of the trial took three and a half years. There were 295 days of evidence and 70,000 pages of exhibits. Written submissions occupied more than 3,000 pages and took a further year and a half. The reasons for judgment took another two years, and ran to 668 pages.

97 It is important to reiterate that the principle of proportionality is a vital prerequisite to an efficient and effective justice system. Counsel and especially the trial judge have a responsibility to manage the processes with this in mind. It is difficult to conclude that a trial of this length and a record of this magnitude were necessary to resolve the issues in this case.

S.T. GOUDGE J.A.
R.G. JURIANSZ J.A.:-- I agree.
P.S. ROULEAU J.A.:-- I agree.