See paras. 24, 26, 27

Case Name:

Air Canada v. WestJet Airlines Ltd.

Between
Air Canada and ZIP Air Inc., plaintiffs, and
WestJet Airlines Ltd., Mark Hill, Clive Beddoe, Scott Butler, Donald Bell, William Lamberton, Brenda Trockstad and Jeffrey Lafond, defendants
And between
WestJet Airlines Ltd. and Mark Hill, plaintiffs by counterclaim, and
Air Canada, ZIP Air Inc., Ipsa International Inc., Jasper Smith and David Wiggs, defendants by counterclaim

[2005] O.J. No. 5512

20 C.P.C. (6th) 141

144 A.C.W.S. (3d) 844

2005 CarswellOnt 7420

[2005] O.T.C. 1092

Court File No. 04-CV-266629CM2

Ontario Superior Court of Justice

I.V.B. Nordheimer J.

Heard: May 5-6, 2005.
Judgment: May 31, 2005.

(52 paras.)

Civil procedure -- Pleadings -- Striking out pleadings -- Grounds -- False, frivolous, vexatious or abuse of process -- Plaintiffs' motion for striking out parts of statements of defence allowed in part -- Pleadings that damages claimed were without particulars and that claim was made only to

attract public attention were irrelevant and struck out -- Pleadings as to what records were appropriate to assess plaintiff's losses were struck out as being improper.

Civil procedure -- Trials -- Severance of issues of parties -- Motion by plaintiffs for bifurcation of issues of liability and damages dismissed -- Plaintiffs sought disgorgement of profits and claimed that defendants had misused plaintiffs' confidential information -- Issues of liability and remedies were not clearly separate -- Although disgorgement was only remedy sought, court still had to determine whether disgorgement was appropriate remedy -- Unlikely that determination of liability issue would bring action to end.

Motion by plaintiffs to bifurcate trial into trial on issue of liability and trial on issue of damages -- Plaintiffs also sought order to strike out portions of statements of defence on ground that impugned paragraphs would prejudice or delay trial -- Plaintiffs alleged that defendant WestJet accessed a website operated by plaintiffs and that WestJet retrieved confidential information regarding passenger loads and route information from website -- Plaintiffs alleged WestJet used confidential information to compete more effectively with plaintiffs -- Plaintiffs sought disgorgement of any profits and value of any benefits acquired by WestJet as a result of using plaintiffs' confidential information -- Defendants alleged that damages suffered by plaintiffs did not arise from any misuse of confidential information by defendants -- HELD: Motion to bifurcate dismissed -- Motion to strike allowed in part -- Issues of liability and remedies were not clearly separate -- Detriment of some kind was necessary of plaintiffs' cause of action of breach of confidence -- WestJet entitled to dispute that alleged detriment suffered by plaintiffs resulted from breach of confidence -- Although WestJet's allegations greatly expanded scope of litigation, complications that naturally flowed from litigation could not be eliminated at expense of either side's right to fully prosecute or defend claim -- Dividing liability and damages issue into separate trials would thus not obviate need for some exploration of plaintiffs' and defendants' assertions respecting alleged detriment suffered -- Although plaintiffs only claimed relief of disgorgement, such relief was not the only remedy available if breach of confidence was found -- Court still had to determine whether disgorgement was appropriate remedy -- To make determination, trial judge must have some evidence respecting available remedies -- Unlikely that determination of liability issue would bring action to end -- Pleadings in defence respecting plaintiffs' financial affairs were relevant to issues of detriment and of commercial value of the information and its importance -- Pleadings that damages claimed were without particulars and that claim was made only to attract public attention were irrelevant and struck out -- Pleadings as to what records were appropriate to assess plaintiff's losses were struck out.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure Rule 25.11, Rule 77.02, Rule 77.11

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Michael Birley, for the defendant, Jeffrey Lafond

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1 **I.V.B. NORDHEIMER J.**:-- The plaintiffs bring this motion:

(i) to bifurcate the trial of the plaintiffs' action into first, a trial on the issue of liability and, second, if necessary, a trial on the issue of damages related to the plaintiffs' claim and all issues related to the defendants' counterclaims and that production and discovery on damage issues be deferred until after the decision on the liability issues, and;

(ii) to strike out certain paragraphs of the statements of defence of each of the defendants without leave to amend on the basis that the impugned paragraphs will prejudice or delay the fair trial of this action and/or are scandalous, frivolous and vexatious.

2 The background facts can be stated briefly. The plaintiffs allege that, over a period of one year from March 2003 to March 2004, WestJet accessed a website, that Air Canada operated for the benefit of its employees, and retrieved from it confidential information of the plaintiffs regarding passenger loads and route information. It is alleged that WestJet then used that confidential information to alter its business plans to more effectively compete with the plaintiffs and to get a head start on establishing new routes and other business decisions without facing the same risks with which it otherwise would have had to contend. It is further alleged that the individual defendants all participated, in one form or another, in this improper activity by WestJet and that they all personally benefited from this activity.

3 WestJet has counterclaimed in this action for damages for invasion of privacy, trespass to chattels and intentional interference with economic interests. In addition to the claim for damages,

there are also counterclaims for punitive damages, mandatory orders and an injunction. The counterclaim arises out of what WestJet alleges was the acquisition by Air Canada of confidential information belonging to WestJet that resulted from the work of IPSA and the two individual defendants by counterclaim, who are investigators employed by IPSA and hired by Air Canada to investigate the matters that form the basis of the allegations in the statement of claim. WestJet alleges that IPSA and the two individual defendants by counterclaim entered onto the property of a WestJet executive and obtained from his recycling material records of WestJet that had been shredded. They then sent this material to Air Canada who had a document reconstruction firm reconstruct the shredded materials and thereby obtained confidential and sensitive financial and business information belonging to WestJet.

A. The bifurcation issue

4 This action was commenced on April 6, 2004. Since the institution of the action, the statement of claim has been amended four times. The plaintiffs' claim, as it is currently framed, seeks injunctive relief, orders requiring the return of the confidential information, damages for spoliation, punitive damages and other relief. Of particular significance to the motion at hand is that, while prior versions of the statement of claim sought damages arising from the misuse of the confidential information as well as for intentional interference with economic relations, for breach of contract and for breach of fiduciary duty, the plaintiffs now seek, in paragraph 1(f) of the amended fresh as amended statement of claim:

> "disgorgement of any incremental revenue, profits and the value of any past, current or future benefits acquired by WestJet as a result of the defendants' misuse of the plaintiffs' confidential information, which the plaintiffs presently estimate at $170 million."

Paragraph 46 of the amended fresh as amended statement of claim asserts that it is just and equitable that the defendants account for and disgorge the value of any benefits, incremental revenue and profits that the defendants obtained through the use of the plaintiffs' confidential information.

5 Notwithstanding the change in the prayer for relief, however, other causes of action still appear in the statement of claim. In paragraph 34, it is alleged that Lafond breached his contractual obligations, fiduciary duties and general common law duties. In paragraph 35, it is alleged that WestJet, Hill and Butler encouraged and facilitated the breaches of duties and obligations by Lafond and that WestJet and the other defendants breached their own duties to the plaintiffs to not knowingly become a party to, and beneficiary of, any breaches of trust and contract by the plaintiffs' former employees. In addition, in paragraph 36, there is a plea of unjust enrichment and one of intentional interference with the plaintiffs' economic interests.

6 Further, in paragraph 47 of the amended fresh as amended statement of claim, it is asserted that the plaintiffs "presently estimate their entitlement to damages for the defendants' misuse of the

plaintiffs' confidential information, and the remedies referred to in paragraph 46, supra, [which asserts the disgorgement claim] at $170 million".

7 In their statements of defence, which are very similar in their content, the defendants plead that the information about which the plaintiffs complain is not confidential. The defendants also plead that the "detriment" and the "damages" alleged by the plaintiffs were caused, not by any actions of the defendants, but by other factors. The defendants plead a long list of instances of mismanagement by the plaintiffs in their handling of routes, of passengers, of fiscal matters and of competitive matters that they say actually caused the consequences that the plaintiffs now blame on the conduct of the defendants.

8 In support of their motion to bifurcate, the plaintiffs say that a trial restricted to the issue of liability will involve discrete issues, be limited in terms of the necessary evidence, involve a much more restricted scope of discovery and production, involve different witnesses and will lead to significant savings in terms of time and expense. The plaintiffs say that, if the defendants are correct that the information complained of is not confidential, that will end the plaintiffs' claim or that, if the defendants can establish that WestJet did not use the information, even if confidential, that will also end the action. The plaintiffs further assert that if they are successful on the liability issues, then the trial judge can establish limits on the damages trial that will similarly save time and expense for the parties.

9 The defendants, on the other hand, say that bifurcation is simply a veiled attempt by the plaintiffs to avoid any examination of their conduct in order to keep the focus entirely on the defendants. The defendants also say that the liability issues cannot be addressed in isolation. They say that, in order to determine whether the information was confidential and, if so, the degree of confidentiality, there must be an examination of the importance of that information to the plaintiffs. The defendants also say that for there to be any finding of liability on the issue of misuse of confidential information, the plaintiffs must establish that they suffered a detriment and, therefore, the issue of detriment or loss to the plaintiffs is fundamental to the liability determination. Finally, the defendants say that for the appropriate remedy to be determined, assuming a misuse of confidential information is established, the trial judge must also know the extent of any harm occasioned to the plaintiffs. If this is not examined during the liability trial, then the trial judge will be unable to determine the appropriate remedy to be awarded so that the damages or remedy phase could proceed.

10 In response, the plaintiffs say that there is no need to examine the impact on them arising from the misuse of the confidential information because they are not now seeking compensation for any losses they have sustained arising from the improper actions of the defendants. Rather, the plaintiffs say that they have "elected" their remedy and that is the disgorgement by the defendants of what they have gained through their improper use of the plaintiffs' confidential information. Consequently, the plaintiffs assert that the effect that the misuse of the confidential information had on the plaintiffs has been rendered irrelevant to this proceeding.

Analysis

11 In order to determine this aspect of the motion, it is necessary to address at least two central issues regarding a claim for misuse of confidential information. One is whether the cause of action for breach of confidence requires a plaintiff to establish that it has suffered some detriment as a constituent element of the claim. The other is whether a plaintiff in such a claim has the right to elect the relief that it will seek or, put another way, is the selection of a remedy from amongst the possible remedies available in a breach of confidence action something that the plaintiff alone can determine.

12 The two leading cases in Canada that have dealt with claims for breach of confidence are LAC Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 and Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142. In LAC Minerals, Mr. Justice La Forest set out the test for whether there has been a breach of confidence, at p. 635:

> "It consists in establishing three elements: that the information conveyed was confidential, that is was communicated in confidence, and that it was misused by the party to whom it was communicated."

13 Directly after reciting that test, Mr. Justice La Forest refers to the decision in Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.) where Mr. Justice Megarry, in setting out the same three part test, stated the third part of the test in these words, at p. 47:

> "Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it."

14 The decision in Cadbury Schweppes also addresses the issue of detriment. Mr. Justice Binnie first summarized the test set out by Mr. Justice La Forest in LAC Minerals in the following terms, at para. 52:

> "La Forest J. said in Lac Minerals that if the plaintiff is able to establish that the defendant made an unauthorized use of the information to the detriment of the party communicating it, the cause of action is complete [citations omitted]." [original emphasis]

15 Mr. Justice Binnie then said, at para. 53:

> "While La Forest J. in Lac Minerals considered detriment to be an essential element of the breach of confidence action (Sopinka J. did not express a view on this point in his discussion of the applicable principles), it is clear that La Forest J. regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information [citation omitted]."

In the end result, however, in Cadbury Schweppes Mr. Justice Binnie concluded that the issue of detriment did not have to be fully explored because, in that case, the parties had agreed prior to trial that any evidence regarding losses suffered by the plaintiff would be deferred to a post-trial reference. It would logically flow from the agreement referred to that the parties must have also agreed that damages was the appropriate relief, if any, to be awarded.

16 The issue of detriment has been considered in other cases. In Ontex Resources Ltd. v. Metalore Resources Ltd. et al. (1993), 103 D.L.R. (4th) 158 (Ont. C.A.); leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 370, 107 D.L.R. (4th) vii, the court said, at p. 187:

> "The common feature of the two approaches is that the plaintiff must prove detriment or loss to it flowing from the breach of confidence before it may obtain any remedy."

17 I conclude, therefore, that detriment of some kind is a necessary element of the cause of action. At the same time, I note that while the cases speak of detriment, they also sometimes speak in terms of harm or losses, as was the case in Ontex Resources. I conclude, however, that when the cases do so, the intention is to use these terms synonymously and not to suggest that the necessary element of detriment must be restricted to monetary damage done to the plaintiff. This conclusion can be drawn from Mr. Justice Binnie's comment above in Cadbury Schweppes and from Attorney General v. Guardian Newspapers Ltd. and others (No. 2), [1988] 3 All E.R. 545 (Ch. D., C.A. & H.L.) (the Spycatcher case), where Lord Keith of Kinkel observed, at p. 256:

> "So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."

18 In other words, the concept of detriment is a broad concept that can mean different things to different people in different situations. In some cases, it may take the meaning of a financial loss. In commercial cases, such as this one, I suggest that would be the normal and expected meaning of the word. In other cases, such as the Spycatcher case, detriment may mean a public harm, such as damage to the security of a nation. In other cases, such as those involving the revelation of private information belonging to an individual, detriment may mean emotional or psychological distress. The fact that detriment may have a meaning that differs depending on the context of the case does not change the fact, however, that detriment must be established by the plaintiff to have a complete cause of action for breach of confidence.

19 This conclusion raises, of course, the question whether the plaintiffs would be entitled to pursue the defendants for misuse of their confidential information if no detriment of any kind had been occasioned to the plaintiffs. One can imagine situations where confidential information might be obtained and used without visiting direct harm on the party to whom the confidential information belongs. For example, suppose a person has a secret process that it does not intend to use or exploit. Can it nonetheless advance a claim when its confidential information is taken and used by another?

Suppose a business has confidential information that it uses to great advantage and that confidential information is taken and used by another but in a market that the owner of the information is not part of and has no intention of ever being part of. Can it nonetheless seek relief?

20 Fortunately, these are questions that I do not have to answer on this motion. It is evident that the plaintiffs consider that detriment is a necessary requirement as their statement of claim has, from the outset, alleged that they have suffered such detriment. By way of example, in its current version, the amended fresh as amended statement of claim asserts detriment directly in paragraph 31 and the equivalent of such a claim in paragraph 36 ("intentional interference with the plaintiffs' economic interests"), paragraph 38 ("WestJet still has an unfair competitive advantage"), paragraph 39 ("to enable WestJet to obtain a competitive advantage") and paragraph 48 ("the defendants will continue to receive an unjust competitive advantage"). It is also evident that the detriment to the plaintiffs from the misuse of their confidential information is very much a business and financial one, as opposed to an emotional or psychological one, although that result is not pleaded as directly as it was in the earlier versions of the claim.

21 In response to the plaintiffs' claim, the defendants have asserted that the detriment alleged by the plaintiffs did not arise from any misuse of confidential information by the defendants (assuming such misuse occurred) but rather from other factors. The defendants say that, if WestJet gained passengers and revenue and other advantages during the relevant period, those benefits accrued to WestJet as a result of a host of mistakes and mismanagement by the plaintiffs and not as a result of WestJet having access to Air Canada's information.

22 The question at this stage of the proceeding is, of course, not whether the defendants will ultimately be able to establish that contention. The point is that the defendants are entitled to make those allegations in response to the claims made against them and to canvass the available evidence in an effort to prove those allegations. The plaintiffs fairly complain that these allegations will greatly expand the scope of the litigation and, consequently, the amount of discovery and production as well as the likely length of the trial. That result cannot be seriously disputed. At the same time, however, complications that naturally flow from litigation cannot be eliminated at the expense of either side's right to fully prosecute or defend a claim.

23 The consequence of this conclusion is that dividing the proceeding into two parts, liability and damages, will not obviate the need for some exploration of the assertions made by the plaintiffs regarding the alleged detriment they have suffered or of the defendants' response to those assertions. As a result, the bright line that the plaintiffs would draw between the liability issues and the damages issues is, in fact, a great deal more faint.

24 There is, however, another reason why the separation of liability and damages cannot be easily made in this proceeding. As I earlier noted, the plaintiffs now seek in their prayer for relief only a claim for disgorgement of the benefits gained by WestJet arising from the misuse of the confidential information. Disgorgement is a remedy that could be awarded on a breach of confidence claim but it

is not the only remedy. There are a variety of remedies available in response to such a claim.

25 In Cadbury Schweppes, Mr. Justice Binnie said, at para. 48:

> "But equity, with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label (property') rather than a case-by-case balancing of the equities. In some cases, as Lord Denning showed in Seager v. Copydex Ltd. (No. 2), supra, the relevance of the specific quality of the information to a remedy will not be its property status but its commercial value."

Later in that decision, Mr. Justice Binnie said, at para. 61:

> "The objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach. To that end, the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation."

26 While I accept that the plaintiffs have the right to elect the relief that they will seek in their claim, in doing so they cannot constrain the defendants, or the court for that matter, from engaging in an inquiry as to whether the remedy being sought is indeed the appropriate remedy. The plaintiffs say that if they cannot achieve the remedy of disgorgement, then they accept that they will not receive any relief because they do not seek any other relief. Their resignation to that result cannot, however, bind the court. As Mr. Justice Farley said in Soulos v. Korkontzilas (1990), 1 O.R. (3d) 625 (Gen. Div.) at p. 627:

> "It does not appear to me that the plaintiff in dropping its claim for damages can say that in light of this claim being dropped, the court must award disgorgement - but rather that the court may award disgorgement if it feels the circumstances are such that damages are not an adequate remedy." [original emphasis]

27 The defendants have the right to demonstrate to the court that the remedy of disgorgement is inappropriate in the circumstances of this case. One of the ways that the defendants might show that is by establishing that the harm suffered by the plaintiffs from any misuse of the confidential information was minor and that, consequently, an award of disgorgement from WestJet would be inappropriate as it would result in a windfall to the plaintiffs. This is a legitimate consideration. As Mr. Justice Binnie noted in Cadbury Schweppes at para. 76:

> "Equity will avoid unjustly enriching the confider by overcompensating for nothing very special' information just as it will avoid unjustly enriching the confidee by awarding less than realistic compensation for financial losses genuinely suffered."

28 In my view, in order for a trial judge to engage in "a case-by-case balancing of the equities", he or she must have some level of evidence touching on the "gamut of available remedies" in order to make a determination as to whether the relief sought by the plaintiff, even if restricted to one form of relief, is nevertheless the appropriate relief to be awarded.

29 For both of these reasons, therefore, the division of this proceeding into liability and damages phases is not as neat and clean, or as simple, as the plaintiffs portray it to be.

30 In terms of the legal principles applicable to this aspect of the motion, the basic approach to the determination whether or not to grant bifurcation is set out in Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills (1986), 55 O.R. (2d) 56 (C.A.) where Morden J.A. said, at p. 59:

> "However, since it is a basic right of a litigant to have all issues in dispute resolved in one trial it must be regarded as a narrowly circumscribed power. This approach is supported by the familiar statutory admonition which is continued in s. 148 of the Courts of Justice Act, 1984 (Ont.), c. 11:
>
> 148. As far as possible, multiplicity of legal proceedings shall be avoided.
>
> There is also the judicial admonition of Meredith C.J.C.P. in Waller v. Independent Order of Foresters (1905), 5 O.W.R. 421 at p. 422: Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon ...'. The power should be exercised, in the interest of justice, only in the clearest cases. We would think that a court would give substantial weight to the fact that both parties consent to the splitting of a trial, if this be the case. On the other hand, a court should be slow to exercise the power if one of the parties, particularly, as in this case, the defendant (see Emma Silver Mining Co. v. Grant (1878), 11 Ch. D. 918 at p. 928), objects to its exercise."

Here, of course, all defendants object to the order being granted.

31 In Bourne v. Saunby (1993), 23 C.P.C. (3d) 333 (Ont. Gen. Div.), Mr. Justice Tobias identified fourteen factors to which a court might have reference in deciding whether to order bifurcation. With respect, I do not find such a large number of factors to be necessarily helpful in deciding the issue. In addition, some of the factors outlined by Mr. Justice Tobias appear to me to engage common considerations. I will also say that it seems to me to be preferable to refer to the second portion of the trial process as the remedies trial as opposed to the damages trial since, as this case points out, the relief to be granted may be broader than just a consideration of damages. In the end result, I would re-state those factors in a more limited form, as follows:

(i) Are the issues of liability clearly separate from the issues of remedies? Consideration might be given to whether the remedies issues are interconnected with, or dependent on, the liability issues; whether the same or different witnesses will be called on the liability and remedies trials and whether the judge hearing the remedies trial would benefit from having seen and heard the evidence from the liability trial.

(ii) Is there an obvious advantage to all parties by having the liability issues tried first? This would include a consideration of whether there is a realistic prospect that the determination of the liability issues would put an end to the action.

(iii) Will there be a substantial saving of time and expense if bifurcation is granted? This would include consideration of whether the determination of the liability issues might shorten the remedies trial either by eliminating available remedies or narrowing the scope of relief that can be sought.

(iv) Will the overall timeframe of the proceeding be unduly lengthened by granting bifurcation? This would include a consideration not only of whether the liability and remedies trials taken separately would be longer in total court time than if done together, but also whether there is likely to be an inordinate delay in having both trials completed recognizing that appeals may be taken in the intervening period once the liability trial has been concluded.

(v) Do the parties agree that bifurcation is appropriate? The parties are in the best position to understand the advantages and disadvantages of bifurcating the proceeding and, as observed in Elcano Acceptance, considerable weight should be given to their views on the question.

32 If those factors are applied to this case, it is apparent from the conclusions I reached above that the issues of liability and remedies are not clearly separate. It may be that the witnesses on the liability trial and on the remedies trial will be different although I suspect that there is bound to be some overlap between the two. This is especially true given that the value of the information to the plaintiffs may be a relevant consideration in determining the degree of importance attached to the information. In addition, it seems to me that the judge on the remedies trial would likely benefit greatly from having seen and heard the evidence from the liability trial in terms of fashioning the appropriate remedy. I doubt that, in the circumstances of this case, a determination on the liability issues will bring this action to its end. I also doubt that there will be any savings if bifurcation is granted but, at the same time, I can see a significant lengthening of the overall action by having the issues dealt with in a fragmented manner. Finally, as I have already noted, all of the defendants oppose bifurcation.

33 It is clear that our justice system takes as its norm that cases will be tried in their entirety and at one time. There is a heavy burden on a party seeking to depart from that norm to demonstrate, in clear terms, the value to be derived from proceeding in a different manner. The plaintiffs have failed

to do so here. Indeed, I very much fear that, if I were to accede to the request for bifurcation, it would ultimately be shown to have impeded, rather than assisted, the fair and timely resolution of this action.

34 The request to bifurcate the proceeding is therefore refused.

B. The pleadings issue

35 The plaintiffs also seek to strike out, pursuant to rule 25.11 of the Rules of Civil Procedure, R.R.O. 1990, certain paragraphs from each of the statements of defence. The plaintiffs claim that the impugned paragraphs contain allegations that are irrelevant to the issues in the action and, if not struck out, will prejudice or delay the fair trial of the action and/or are scandalous, frivolous and vexatious. In considering this aspect of the motion, the principles underlying rule 25.11 must be kept in mind including that orders under rule 25.11 should only be granted in the "clearest of cases" (Wernikowski v. Kirkland, Murphy & Ain (2000), 181 D.L.R. (4th) 625 (Ont. C.A.)). At the same time, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous (George v. Harris, [2000] O.J. No. 1762 (S.C.J.)).

36 I would first observe that the outcome of the plaintiffs' challenge to some of the paragraphs of the statements of defence has been preordained by the conclusions I have reached above regarding the issue of detriment. Central to the plaintiffs' complaint against portions of the statements of defence is the assertion that the financial situation of the plaintiffs is irrelevant to the claim as pleaded. For the reasons I have already expressed, I do not accept that assertion in its broadest sense. Insofar as the plaintiffs, in their effort to demonstrate detriment, assert that they have lost customers to WestJet or that WestJet has unfairly obtained a competitive advantage, the plaintiffs have put in issue, to some extent, their manner of doing business including their overall operations. The practical reality of the plaintiffs' allegations that WestJet gained incremental revenue and profits, and/or that WestJet acquired an unfair competitive advantage, would most usually manifest itself in the acquisition by WestJet of customers who would otherwise have selected the plaintiffs for their air travel. Any analysis undertaken to determine whether that conclusion could be established would, of necessity, need to include a consideration of what the defendants have pleaded in terms of alternative reasons that would explain the choices made by the flying public.

37 In addition, and as I have already mentioned, the plaintiffs have asserted that they have suffered detriment as a consequence of the defendants' actions. Their allegations of detriment, however, are not as narrowly focussed as the plaintiffs suggest them to be. In their amended fresh as amended statement of claim, the plaintiffs either plead detriment as such without further details (e.g. paragraphs 27 & 31) or the plaintiffs refer to WestJet having obtained an "unfair competitive advantage" (paragraph 38). The plaintiffs say that this competitive advantage allowed WestJet to gain incremental revenue without the associated risk. The plaintiffs then seek the disgorgement of the "value of any benefits, incremental revenue and profits" (paragraph 46) that the defendants

obtained through the use of the plaintiffs' confidential information. Notwithstanding those allegations, however, the plaintiffs go on to claim (paragraph 47) that, insofar as the relief sought does not overlap with the claims already made, the defendants have been unjustly enriched, that the plaintiffs' valuable information has been appropriated without compensation and that the plaintiffs "estimate their entitlement to damages for the defendants' misuse of the plaintiffs' confidential information, and the remedies referred to in paragraph 46, supra, at $170 million".

38 As I have also already mentioned, the plaintiffs, in their prayer for relief, only claim disgorgement of the benefits acquired by WestJet as a result of the misuse of the plaintiffs' confidential information. However, in light of the paragraphs that follow, the defendants can fairly say that the precise nature of the relief being sought by the plaintiffs is unclear. It is generally accepted that the prayer for relief governs the remedies that a plaintiff is seeking. Nevertheless, it is also true that it is not a difficult task to obtain an amendment to the prayer for relief especially where it can be said that the body of the claim clearly reveals the presence of other relief being sought, and that is something that could certainly be said here. This concern is heightened by the conclusion that I reached earlier that the court is not restricted solely to the form of relief that the plaintiffs seek. Given the imprecision by which the claim is made, in my view, the defendants are entitled to defend not only against the prayer for relief but also against any other claim that appears to be advanced, and therefore make allegations in response to those claims, regardless of whether those claims are reflected in the prayer for relief.

39 Further, if, as Mr. Justice Binnie pointed out in Cadbury Schweppes, the relevance of the specific quality of the information to a remedy is its commercial value, an aspect of commercial value may be the value of the information to its owner. The defendants must again be allowed to explore that avenue.

40 In the final analysis, the plaintiffs cannot put a wall around their financial affairs and assert that the defendants must be kept on the opposite side of that wall. The plaintiffs' financial affairs have relevance, not only to the issue of detriment, given the manner in which it is pleaded, but also to the issue of the commercial value of the information and its importance. Put another way, the relationship of the information to the business operations of the plaintiffs is of some relevance to any determination whether the information is "not very special, somewhat special or very special indeed" to borrow the language from Seager v. Copydex Ltd. (No. 2), [1969] 2 All E.R. 718 (C.A.).

41 I accept that the manner in which some of the allegations are made in the statements of defence, and in particular the breadth of those allegations, causes legitimate concern regarding the extent to which the parties may engage in discovery and production on the issues raised. There are two responses to that concern. First, the importance of producing relevant information generally trumps arguments that the production of the information will be oppressive. As observed by Madam Justice Swinton in Lee v. Globe & Mail, [2001] O.J. No. 317 (S.C.J.) at para. 14:

> "It is true that the facts alleged in this paragraph will entail a wide-ranging

> factual inquiry. Nevertheless, as MacFarland J. has observed in Asper, a pleading should not be struck just because it is oppressive to the plaintiff; rather, there must be a consideration of both prejudice and relevance. Here, given the relevance to a number of aspects of the defendants' case, the pleading should not be struck, even if it appears burdensome to the plaintiff."

42 Second, the court retains an overall supervisory jurisdiction regarding the discovery process. It has the right and the authority to limit that process as necessary to ensure that discovery does not become unfair or unreasonable or oppressive. In particular, the court has the right under rule 77.11 to make orders and give directions as necessary to carry out the purpose of the case management system so that the process, as stated in rule 77.02:

> "... reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding."

43 Consequently, if the defendants are allowed to maintain the allegations contained in their statements of defence but then attempt to use those allegations to engage in "a royal commission into the affairs of Air Canada", as the plaintiffs repeatedly complained was the case during the hearing, the court has the necessary authority to rein in any such efforts.

44 Having said that, however, there are nonetheless some paragraphs in the statements of defence that transcend the rules of proper pleading. Even taking a liberal and generous approach to what the defendants should be allowed to plead in light of the somewhat overlapping or blurred claims being advanced by the plaintiffs, and recognizing the right of the court to curtail the discovery process to what is reasonably necessary, there nonetheless remain limits to what is proper pleading.

45 Turning then to the specific pleadings that are of concern, in the statement of defence of WestJet, in paragraph 55, it is pleaded that the damages claimed are without particulars or support. It is further alleged that the claim is made solely to attract public attention. None of these allegations are relevant to any issue in the proceeding. They appear to have been included simply for colour and ought, therefore, to be struck out.

46 In paragraph 62, WestJet pleads that the plaintiffs' business records are the only method by which the full extent of the actual losses of the plaintiffs can be ascertained. What records are or are not necessary in any proceeding is a matter for the discovery process. It is not a matter that ought to be pleaded and to do so engages in argument rather than a pleading of material fact relevant to the claims advanced. This paragraph must also be struck out.

47 Perhaps the most difficult paragraph to address is paragraph 59 where WestJet pleads that if any losses have been sustained by the plaintiffs they are due, not to any actions of the defendants, but because of the plaintiffs' mismanagement of their business. That pleading itself would not be so problematic if it were not then followed by a list of fourteen separate allegations of specific

examples of mismanagement engaged in by the plaintiffs that might, on the surface, appear to open up a review of every facet of the plaintiffs' operations. I was initially inclined to strike most of those particulars for that reason. However, to do so runs afoul of two basic principles of pleading. One is that anything that is relevant may be pleaded and, in light of the problems with the plaintiffs' pleading, it cannot be categorically established that many of these matters are not relevant. Further, if the general denial is appropriate, then it becomes difficult to find that particulars of the general denial are not appropriate. In the end result, therefore, I have concluded that it is better to leave this paragraph as it is and deal with any consequences of these allegations in relation to the discovery process when, and if, any difficulties arise.

48 As far as the other challenged paragraphs of the WestJet statement of defence are concerned, I consider those allegations to be relevant either as denials of the plaintiffs' allegations or as a failure to mitigate damages or to the issue of whether the actions of the plaintiffs have disentitled them to equitable relief. Again, the depth to which some of these allegations may be explored during the discovery process is best left to be determined at that time.

49 Having reached those conclusions, the issues regarding the other statements of defence are more briefly dealt with. Paragraph 33 of the Hill statement of defence, paragraph 17 of the Lafond statement of defence and paragraphs 56 and 67 of the Beddoe statement of defence mirror paragraph 62 of the WestJet statement of defence and must be struck for the same reasons. In addition, paragraph 57 of the Beddoe statement of defence is the same as paragraph 55 of the WestJet statement of defence and must be struck for the same reasons. Lastly, paragraph 59 of the Beddoe statement of defence pleads an excerpt from a newspaper article and is, in my view, a pleading of evidence and not material fact and therefore must also be struck.

50 The motion to strike the paragraphs of the statements of defence is otherwise dismissed.

Summary

51 The plaintiffs' motion to bifurcate the proceeding is dismissed. The plaintiffs' motion to strike paragraphs 55 and 62 of the statement of defence of WestJet, paragraph 33 of the statement of defence of Hill, paragraph 17 of the statement of defence of Lafond, and paragraphs 56, 57, 59 and 67 of the statement of defence of Beddoe is granted. The motion is otherwise dismissed.

52 If the parties cannot resolve the issue of costs, they may make written submissions on the appropriate disposition. The defendants' submissions are to be filed within 15 days of the release of these reasons and the plaintiffs' response is to be delivered within 15 days thereafter. No reply submissions are to be filed without leave. The submissions should include the necessary bills of costs or equivalent information that will allow me to fix the costs of the motion should I decide that costs are to be awarded.

I.V.B. NORDHEIMER J.