Date: 20230217
Docket: CI 17-01-07824
(Winnipeg Centre)
Indexed as: *Prairie Risk Management Inc. v. Marsh Canada Ltd. et al.*
Cited as: 2023 MBKB 29

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

PRAIRIE RISK MANAGEMENT INC., C.O.B. AS PRAIRIE INSURANCE GROUP, AND PRM INVESTMENTS INC.,	)	Richard M. Beamish and James (Jesse) Rock for the plaintiffs
plaintiffs,	)	
- and -	)	Mark Veneziano and Aoife Quinn for the defendants
MARSH CANADA LTD., KEVIN McCREDIE, ANDREW ROSS, AND SYLVITE FINANCIAL SERVICES INC. C.O.B. AS RISK MANAGEMENT ALLIANCE INC.,	)	
defendants.	)	JUDGMENT DELIVERED: February 17, 2023

Corrected Judgment: *An Erratum was issued on February 28, 2023. The text of the initial judgment is reproduced here with corrections, and the Erratum is appended at the end of this Corrected Judgment.*

HARRIS J.

INTRODUCTION

[1] In this action, Prairie Risk Management Inc. carrying on business as Prairie Insurance Group and PRM Investments Inc. ("PRM") alleges that the defendants unlawfully accessed and used confidential information about PRM's clients in order to solicit those clients for the benefit of Marsh Canada Ltd. ("Marsh"). PRM says that it lost income and value because of the conduct of the defendants. It claims for damages based

on breach of contract, breach of fiduciary duty, breach of the duty of confidence, breach of the duty of honesty, wrongful interference in economic relations and breach of trust.

[2] The defendants deny that there was a relationship with PRM that prevented them from accessing and using information about PRM's clients and their businesses in order to solicit those clients. Marsh says that it engaged in competition and despite losses incurred by PRM, nothing that it did was unlawful.

[3] For the reasons that follow, I find that the defendants' actions were unlawful and that Marsh must compensate PRM for losses caused by those unlawful actions.

THE FACTS

[4] The essential facts in this litigation are not in dispute.

[5] In or about 1995, William (Bill) Duthoit ("Duthoit") started PRM, a business which specialized in arranging insurance for Manitoba businesses in the pork industry "from newborn piglets up to those ready to go to market".

[6] Duthoit described PRM as a "buy-in" group. PRM was the named insured on the policy and the individual businesses were listed on a schedule to that policy. Duthoit testified that smaller operators were limited in their options for buying insurance because of their size. Larger operators often had more negative loss histories, resulting in higher premiums. However, by putting several operators together, PRM was able to access the Lloyds market in London where the premiums were generally lower. This provided a saving to the smaller producer who would not normally be able to access this market. The larger operators would benefit because the loss histories of the smaller operators

were usually better, thus reducing the overall risk to the group. PRM was able to reduce premiums for its clients by as much as 50 percent.

[7] To serve his clients, Duthoit obtained detailed information from each regarding the nature of their operation, buildings and other infrastructure, values of the animals, equipment, business practices and business interruption values. This enabled him to determine the nature of the insurance coverage that would be needed to protect their interests. Duthoit would then assemble the information obtained from each client in a Statement of Value to enable PRM's broker to acquire the insurance policy. This information was updated annually.

[8] Initially, AON was PRM's broker, but in or about 2008, Marsh became its broker of record. As broker of record, Marsh negotiated with the underwriters for the insurance coverage for PRM and its clients. Marsh was paid a fee for its services.

[9] The account executive at Marsh who had managed the PRM account and the only one with whom Duthoit communicated regarding insurance issues was, up until his retirement in December 2016, Brian Tascona ("Tascona"), a Senior Vice-President. Tascona testified that he negotiated with Lloyd's in concert with Duthoit. No one at Marsh, including Tascona, had direct contact with PRM's clients.

[10] The relationship between PRM and Marsh was not reduced to writing, however, in 2010, Marsh sent a draft Client Services Agreement ("CSA") to PRM for review, comments and signature. The CSA was described by Marsh witnesses as standard to their business relationships.

[11] Duthoit did not sign the CSA because he did not see how it would be helpful. He was concerned about "unforeseen implications if he signed it". Moreover, he would have to engage a lawyer, something that he was apparently reluctant to do. Marsh did not press the issue. As far as Duthoit was concerned, the fact that he did not sign the proposed CSA did not change the arrangement that he had with Marsh. There was no evidence of any further discussion about the CSA. According to Tascona, many of Marsh's clients did not sign a CSA.

[12] An appendix to the CSA contained a confidentiality clause which would protect client information from being used or disclosed to others. I will return to this clause later in these reasons.

[13] Later in 2016, Duthoit decided that he did not need Marsh's services going forward as he could engage directly with the Lloyd's broker, just as Marsh had been doing.

[14] Kevin McCredie ("McCredie") was the chairman of the agricultural practice at Marsh. McCredie became aware that Duthoit would not be renewing PRM's insurance with Marsh as of March 2017. While he did not have direct dealings with PRM or Duthoit before this time, upon learning of Duthoit's plans, McCredie arranged to meet with him for dinner in Winnipeg in November 2016 to talk about how the Risk Management Alliance ("RMA") could benefit his clients in the hope of convincing Duthoit to stay with Marsh. Duthoit believed that McCredie wanted to talk about Marsh purchasing PRM. While that was raised by McCredie, according to Duthoit, it was not discussed at any great length.

[15] Both McCredie and Duthoit testified that Duthoit had concerns about how the RMA program would impact his smaller clients because of a higher deductible. Following the dinner, Duthoit e-mailed McCredie and asked about deductibles and loss limits. McCredie responded by inviting him to Toronto for further discussions and to meet the new President/CEO. Duthoit said that he would pass on the Toronto invitation "for now", but asked McCredie for his thoughts and comments regarding Duthoit's concerns about the RMA program resulting in higher deductibles for smaller operations.

[16] Despite Duthoit's inquiry, McCredie concluded the relationship with PRM was over and he did not respond to Duthoit's e-mail. Instead, he forwarded it to Derek Devitt ("Devitt"), Managing Director, and Daniel Winstanley ("Winstanley"), Senior Vice President and National Agricultural Practice Leader, advising, "Time to launch a hog program. Ripe for the picking and in our wheel house…. Every opportunity has been provided to HyLife and Prairie Risk". McCredie had decided that it was time to recruit PRM's clients. Devitt responded, "I agree. Let's talk tomorrow." McCredie testified that "he [Duthoit] wasn't interested in working with us so it allowed us the opportunity to approach [his clients] and expand our hog business".

[17] A working group made up of McCredie, Winstanley, Andrew Ross ("Ross"), an account executive in the Winnipeg office, and Mike Hodge, a former Marsh employee, was created to bring PRM's clients over to Marsh. The working group operated under a "cone of silence" and away from "prying eyes" (Duthoit) and identified a period when they knew Duthoit was going to be out of the country as a good time to solicit his clients. Meetings with PRM's clients took place in December 2016 and January and February 2017

while PRM was still a client of Marsh. All of this done under secrecy because they knew that Duthoit would be upset by their actions.

[18] Ross testified that when they learned the RMA was declined by PRM, "they weren't going to get those clients walk out the door". He and McCredie were tasked with meeting with PRM's clients to convince them to join the RMA program. He said that they obtained the names of PRM clients off the PRM policy and used the policy information to assess the quality of the coverage.

[19] McCredie was friendly with Dickson Gould ("Gould") of the Progressive Group, one of PRM's largest clients, whom he engaged to assist in the working group's campaign. The working group obtained a schedule of PRM's clients and accessed the policy information to assess status and quality of coverage for the clients. McCredie testified that they used PRM's client information to show PRM's clients how Marsh could do a better job with the RMA program.

[20] Winstanley acknowledged that PRM was Marsh's client and Marsh was its broker of record. He testified that Marsh was going after PRM clients because Marsh believed it could do a better job. As far as he was concerned, Marsh was competing for these clients because "we know we could provide a better option". He said that Marsh was "competing with Bill Duthoit … for his clients".

[21] Tascona was not involved with the working group or going after PRM's business. In fact, the working group operated to ensure that Tascona was not aware of what they were doing.

[22] Tascona was steadfast in his view that PRM was the client and that the information that PRM developed for Marsh to acquire insurance was PRM's information. The members of PRM who were covered by the policy purchased by PRM through Marsh were PRM's clients. When he learned that others within Marsh were going after PRM clients, he was "thunderstruck". He testified that Marsh's insurance business required "the utmost good faith and there's a level of integrity and ethics that go into play with dealing with a client and I just couldn't believe that Marsh had done that, doing the end run, I mean".

[23] I put significant weight on Tascona's evidence as he was, at all material times, the Senior Vice President of Marsh who dealt directly with Duthoit. He is no longer employed by Marsh having retired at the end of 2016. There is no evidence or suggestion that his retirement was at all connected to the issues in this litigation.

[24] No member of the working group was authorized to access PRM's client information. By the time they had finished, the Marsh working group had acquired approximately 45 percent of PRM's premium business for Marsh.

[25] Duthoit sold what was left of the business two years later at an amount which was significantly less than it would have been worth had Marsh not acquired PRM's clients. As well, PRM lost the income that it would have earned over those last two years.

[26] The plaintiff has pled several alternate causes of action and I will consider each in turn.

ANALYSIS

Breach of Contract

[27] In my opinion, there was a contract between PRM and Marsh. Its essential elements were not complicated. Marsh was appointed PRM's broker of record. As broker of record, Marsh worked with PRM to assess the insurance needs of PRM's clients and negotiated an insurance policy for PRM and its clients each year. PRM paid Marsh a fee for its services. Initially, it was a flat fee of $100,000, which evolved to a combination of a fee plus commission and finally, a straight commission.

[28] The evidence establishes that confidentiality was an implied, if not express, term of the contract.

[29] Terms of a contract may be implied:

- based on custom or usage;
- as the legal incidents of a particular class or kind of contract; or
- based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".

(***Canadian Pacific Hotels Ltd. v. Bank of Montreal***, [1987] 1 S.C.R. 711 per LeDain J. at p 775)

[30] The evidence establishes that the parties intended that PRM's client information be treated as confidential. Both Tascona, the executive who was responsible for the PRM file, and Duthoit clearly expressed this intention.

[31] In October 2008, when Duthoit was considering moving his business to Marsh, he received an e-mail from Steve Moreau ("Moreau"), Senior Vice President of Marsh, in which Moreau spoke to confidentiality with respect to clients' insurance information:

> Kevin McCredie is not copied on this email and that is simply due to the fact that as a member of the RMA, we have agreed that Kevin is not involved in confidential details regarding other member's insurance information.

[32] In an e-mail to Tascona on December 1, 2008, when forwarding information about property claims for members of the Progressive Group, Duthoit told Tascona to keep the information confidential.

[33] The CSA which Tascona sent to Duthoit in 2010 included a confidentiality clause. That clause acknowledged that PRM may provide certain proprietary and confidential information, referred to as "Confidential Information", "in connection with Services provided by Marsh under the Agreement. [and that] Neither Marsh nor any of its employees or agents directly or indirectly shall disclose to any third party of or use any Confidential Information furnished by or on behalf of the client for any purpose except in furtherance of the Services…"

[34] PRM's decision not to execute the CSA was not of concern to Tascona, who testified that many clients chose not to sign a CSA. In fact, rather than distancing Marsh from obligation to maintain confidentiality because of the decision not to sign the CSA, Tascona was adamant that PRM's client information always belonged to PRM. He testified that, "PRM developed the information, not Marsh." Confidentiality was not dependent upon signing the CSA, but the CSA was a recognition of the expectations between the parties. It is consistent with how the parties approached the issue of confidentiality.

[35] An underwriting submission dated January 20, 2016 prepared by Marsh, with detailed information about PRM's clients, included a clause which stated that the "presentation contains confidential client information. In accepting this information, the recipient and/or the company agrees that they will not disclose, communicate or distribute the material to any third party".

[36] All the Marsh witnesses accepted the principles set out in the General Insurance Agent Code of Conduct of the General Insurance Council of Manitoba ("the Code"), which mandates that agents or brokers are required to hold in strict confidence all information concerning the business and affairs of a client and not to disclose same without consent of the client. According to the Code, the duty survives the termination of the relationship. Nowhere in the Code does it provide that this duty is dependent upon a written agreement. It flows because of the relationship.

[37] It is clear from the evidence of Duthoit that in the context of the work that Marsh was to do for PRM, confidentiality was important for PRM. Tascona understood this and testified accordingly. The fact that the CSA was not signed did not change that understanding. Moreover, had confidentiality not been a term of the relationship, Duthoit would not have done business with Marsh.

[38] In acting as they did, the defendants breached the contract, causing loss and damage to PRM.

Breach of Confidence

[39] PRM claims that Marsh misused confidential information which had been provided to it by PRM to solicit PRM's clients to move to Marsh. A claim for breach of confidence is based on the common law and does not rely on a contractual relationship.

[40] The elements required for a breach of confidence to succeed were set out in ***Lac Minerals Ltd v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574 ("***Lac Minerals***") where La Forest J. referred (at p 635) with approval to ***Coco v. A.N. Clark (Engineers) Ltd.***, [1969] R.P.C. 41 (Ch.) (p. 47) for the following:

> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on page 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it . . .

[41] A key question is whether the information had the "necessary quality of confidence" required to sustain this claim. In ***Lac Minerals***, Sopinka J. (dissenting in part, but not on this point) referred with approval to ***Saltman Engineering Co. v. Campbell Engineering Co. (1948)***, 65 R.P.C. 203 (C.A.) for the statement of principle as to what makes information confidential (at p 215):

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.
>
> [emphasis added]

[42] The plaintiff was successful in a breach of confidence claim where the defendants took virtually every existing and potential customer developed by the plaintiff as well as the confidential business information they had obtained while employed by the plaintiff 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 the plaintiff's business. They used the technical information developed by and acquired by the plaintiff to do this. The information was created through the ingenuity of the plaintiff. (***GasTOPS Ltd. v. Forsyth***, 2012 ONCA 134)

[43] The information here consisted of the list of PRM's clients, details regarding their operations as gathered and analyzed by Duthoit and the underwriting information developed from that information. This information was not in the public domain; it was not a mere list of clients. Duthoit had to "use his brain" to produce a result which could only be produced by somebody who went through the same process.

[44] As discussed earlier in these reasons, this information was conveyed in circumstances of confidentiality and Marsh's use of that information caused loss and damage to PRM.

Breach of the Duty to Act Honestly

[45] In ***Bhasin v. Hrynew***, 2014 SCC 71, [2014] 3 S.C.R. 494 ("***Bhasin***"), the court acknowledged that there is a general duty of honesty in contractual performance:

> [73] … I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing

> principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith … (references omitted) For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

[46] PRM says that the "obligations and duty of good faith not to take your client's customers while at the same time being paid by your client offends the sense of fair play, honesty and good faith as referenced in ***Bhasin***."

[47] The principle of good faith means that parties must perform contractual duties honestly and reasonably and not capriciously or arbitrarily. (***Bhasin*** at para 63) This organizing principle "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations." (***Bhasin*** at para 64) The organizing principle of good faith manifests itself through existing doctrines addressing the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. (***C.M. Callow Inc. v. Zollinger***, 2020 SCC 45 ("***Callow***") at para 2)

[48] The duty is directed to <u>honest performance</u> (emphasis added) of the contract:

> [130] First, the purpose of good faith is to "secur[e] the performance and enforcement of the contract made by the parties" (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457 (C.A.), at para. 53). It cannot be used as a device to "create new, unbargained-for rights and obligations", or "to alter the express terms of the contract reached by the parties" (*Transamerica*, at para. 53). Contracting parties cannot be held to a standard that is "contrary to the plain wording of the contract, or that involve[s] the imposition of subjective expectations" (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, at para. 45).

(see ***Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 ("***Wastech***"))

[49] The court in ***Bhasin*** was clear that it was recognizing a new duty directed to ensuring the honest performance of the contract. The duty of honest performance demands that parties exercise or perform their rights and obligation under the contract having appropriate regard to the legitimate contractual interests of the contracting partner. (***Wastech*** at para 4)

[50] In ***Callow***, the defendant had a right to terminate the contract with 10 days' notice, which it provided to the plaintiff. However, the defendant knew well before it gave notice that it would be terminating the contract, but decided not to give that notice until it was legally required to do so. The plaintiff not only missed other opportunities on which it could have bid if it had notice when the defendant made its decision, it also would not have provided extra services at no cost to gain favour with the defendant. The plaintiff was actively deceived by the defendant, which was breach of the duty of honest performance.

[51] Wastech complained that the defendant exercised its discretion to allocate where waste would be allocated contrary to the requirement of good faith. The plaintiff complained that the defendant exercised its discretion in a manner which would make it impossible to earn the level of profit for which it said it bargained. There were no allegations of lies or deception, capriciousness or arbitrariness.

[52] The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably…in a manner unconnected to the purposes underlying the discretion. (***Wastech*** at para 4)

[53] PRM's complaint is not related to performance of the contract, but to a direct violation of a term of the contract, that is, not to take and use confidential client information. There is no allegation that Marsh was not honest in its performance of the contract.

[54] PRM has not established that Marsh's conduct was a breach of the duty to act honestly.

Breach of Fiduciary Duty

[55] Fiduciary duty is a doctrine originating in trust. It requires that one party, the fiduciary, act with absolute loyalty toward another party, the beneficiary or *cestui que trust*, in managing the latter's affairs. (***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 S.C.R. 261 ("***Alberta***") at para 22)

[56] A fiduciary relationship is recognized where one party can affect the interests of another party and that party is then obligated to act with absolute loyalty when managing the other's affairs. In ***Lac Minerals***, Sopinka J. noted that "there are some relationships which are generally recognized to give rise to fiduciary obligations: director-corporation, trustee-beneficiary, solicitor-client, partners, principal-agent, and the like." However, he further acknowledged that (at p 597):

> …the categories of relationships giving rise to fiduciary duties are not closed nor do the traditional relationships invariably give rise to fiduciary obligation.

[57] The hallmarks of a fiduciary relationship were identified by Wilson J. in ***Frame v. Smith***, 1987 SCC 74, [1987] 2 S.C.R. 99 ("***Frame***") as follows (at p 136):

(1) The fiduciary has scope for the exercise of some discretion or power;

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[58] McLachlin C.J. recognized that while the three "hallmarks" in ***Frame*** are useful in explaining the source of fiduciary duties, "they are not a complete code for identifying fiduciary duties":

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. (***Alberta*** at para. 36)

[59] Contractual obligations do not preclude the existence of fiduciary obligations between the parties. The 'end point' in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests". (***Hodgkinson v. Simms***, 1994 SCC 70, [1994] 3 S.C.R. 377 ("***Hodgkinson***") at para 28) However, "outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party." (***Hodgkinson*** at para 33)

[60] Here, PRM provided its confidential client information to Marsh on the understanding that it would not be used for any purpose other than placing insurance for PRM. The evidence establishes that Marsh accepted the information on that basis. PRM's

business interests could be and were affected by Marsh's decision to take and use its confidential information to secure PRM's clients for itself.

[61] In my opinion, Marsh was a fiduciary of PRM's and breached its duty when it used PRM's client information for its own purposes.

Unlawful Interference with Economic Relations

[62] The tort of unlawful interference with economic relations has been described as a "parasitic tort" in the sense that it stretches liability for unlawful conduct in a three-party situation. (***Latifi v. The TDL Group Corp.***, 2021 BCSC 2183 at para 117) It is available to a plaintiff in a three-party situation where the defendant commits an unlawful act against a third party to intentionally cause economic harm to the plaintiff. Conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it (***A.I. Enterprises Ltd. v. Bram Enterprises Ltd.,*** 2014 SCC 12, [2014] 1 S.C.R. 177 at para 5).

[63] The plaintiff has not demonstrated how the evidence gives rise to this tort and therefore, I dismiss this claim.

Breach of Trust

[64] In ***Soulos v. Korkontzilas***, [1997] 2 SCR 217, the court identified the four conditions which generally should be satisfied for a court to impose a constructive trust (at pp 218-19):

> (1) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

> (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case.

[65] These prerequisites are grounded in the notion that the defendants are in possession of assets that have been created under an equitable obligation the defendants have to the plaintiff. (***Li v. Zhu***, 2023 ONSC 17 at para 53)

[66] The plaintiff has not demonstrated how the evidence relates to the four conditions above, and therefore, I dismiss this claim as well.

Liability of the McCredie, Winstanley, Ross and Sylvite Financial Services

[67] Counsel for PRM informed the court in his closing that PRM is not seeking a finding of liability as against the defendants other than Marsh. While I have serious concerns about the conduct of the individual defendants leading to the damage to PRM, I am not satisfied that they were acting outside of the scope of their employment with Marsh and will dismiss the claims against these defendants.

DAMAGES

[68] Marsh has been found liable to PRM for breach of contract, breach of confidence and breach of fiduciary duty. Given that Marsh's conduct gave rise to more than one cause of action both in common law and in equity, the court should consider which will provide the more appropriate remedy to PRM and give PRM the benefit of that remedy. (***Lac Minerals***, per Wilson J. at p 580)

[69] In this case, equity provides the tools to ensure that PRM is appropriately compensated for the egregious conduct of Marsh and its employees. The goal is to place PRM in the place that it would have been in had it not been for that conduct.

[70] Grant Thornton provided the court with two reports (December 11, 2019 and November 7, 2022) assessing the loss to PRM. Heather Drybrough ("Drybrough"), the author of the Grant Thornton reports, testified that in assessing damages, she considered two separate but related methodologies: the loss of revenues from March 2017 to February 2019 and the reduction in the sale price to BFL. PRM's revenue had been steadily increasing from 2012. Drybrough determined that based on income earned by PRM in 2016, the loss of clients resulted in a loss of income of $305,058.00 in 2017 and $311,159.00 in 2018, for a total of $616,217.00. The 2018 income loss was adjusted for an inflationary increase of two percent over 2017.

[71] With respect to the sale to BFL, she determined that the price paid by BFL was based on a multiplier of three times income. Applying that same multiplier to the income lost, she determined that loss on the sale was $917,525.00, resulting in a total loss to PRM of $1,534,000.00.

[72] In my opinion, this amount would place PRM where it would have been had it not been for the unlawful and reprehensible conduct of Marsh and its employees.

[73] Marsh retained PricewaterhouseCoopers Inc. ("PWC") to assess damages. The approach used by PWC relies on assumptions that may be appropriate in a breach of contract, but which, in my view, are inconsistent with equity's flexibility in fashioning a

remedy which addresses the harm caused by the conduct of the defendants. I place no weight on this report.

[74] In the result, PRM will have judgment in the amount of $1,534,000.00 plus pre- and post-judgment interest and costs, which may be spoken to if not agreed upon.

_____ J.

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HARRIS J.

ERRATUM

I have made the following correction to the judgment delivered on February 17, 2023:

[40] The elements required for a breach of confidence to succeed were set out in ***Lac Minerals Ltd v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574 ("***Lac Minerals***") where La Forest J. referred (at p 635) with approval

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Please replace page 11 of the judgment with the attached page, as amended.

DATED: February 28, 2023

_____ J.