CITATION: Gayle v. Cambridge Mercantile Corp, 2024 ONSC 1792
COURT FILE NO.: CV-18-3008-00
DATE: 2024 04 16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sharna Gayle and Wesley Kerr, Plaintiffs

AND:

Cambridge Mercantile Corp., Jason Squire, Lerners LLP, Mark Freiman, Rebecca Shoom, Jacques Feldman and Bernard Heitner, Defendants

BEFORE: M.T. Doi J.

COUNSEL: Luisa J. Ritacca and Olivia Eng, for the Moving Defendants

Michael B. Lesage, for the Responding Plaintiffs

HEARD: October 23 and 24, 2023

REASONS FOR DECISION

Overview

[1] On this motion for summary judgment, the Defendants Jason Squire, Rebecca Shoom, Mark Freiman and Lerners LLP (collectively, "Defendants"), seek a dismissal of the Plaintiffs' $20 million action against them for breach of contract, breach of fiduciary duty, and negligence.[i]

[2] The Defendants are the lawyers and law firm that previously acted for the Plaintiff, Sharna Gayle, in a wrongful dismissal action against Cambridge Mercantile Corporation ("Cambridge"). The Defendants also acted for the Plaintiff, Wesley Kerr, in defending Cambridge's counterclaim against him and Ms. Gayle for conspiracy, intentional interference with economic relations, and defamation due to tortious statements he allegedly made about Cambridge's principals. The claim and counterclaim (collectively, the "Cambridge Action") settled at mediation when the Plaintiffs accepted a $500,000.00 settlement which Cambridge paid to Ms. Gayle.

[3] Among other things, the Plaintiffs now assert that the Defendants had secretly worked with Cambridge's principals to undermine Ms. Gayle's claim for wrongful dismissal due to an alleged conspiracy. The Plaintiffs allege that this conspiracy led the Defendants to prefer the interests of Cambridge over their own by inducing them to accept an improvident settlement of the Cambridge

Action. In this action, the Plaintiffs claim that Mr. Freiman, and the other Defendant lawyers deliberately sabotaged and compromised the Plaintiffs' interests to protect Cambridge's principals from being embarrassed by having their "*religious transgressions*" revealed in the Cambridge Action. In addition, the Plaintiffs claim that the Defendants breached the terms of their retainer agreement by acting negligently.

[4] For the reasons that follow, the Defendants' motion for summary judgment is granted and this action is dismissed.

Background

a. Ms. Gayle's Employment at Cambridge

[5] On or about January 28, 2004, Ms. Gayle began to work at Cambridge which operates as a foreign exchange company. Her employment agreement with Cambridge entitled her to a lump-sum severance payment of 12 months salary on termination without cause after 3 years of service, plus a further 5-week "training period" if invoked by Cambridge, which required Ms. Gayle to help to train her replacement while being remunerated under the agreement, after which her lump-sum severance payment became payable forthwith. The termination provisions of her employment agreement read as follows:

> 3. Termination:
>
> (a) The employment of the Employee hereunder may be terminated at any time prior to the end of the term only in the following manner, in the specified circumstances:
>
> (i) by either party, without notice of payment in lieu thereof, for cause;
>
> (ii) by the Employer at its sole discretion and for any reason on giving the Employee written notice of termination effective, at Employer's option, either immediately or at the end of the 'training period' set out below, and payment at the effective date of a lump sum payment equivalent to the following salary as an agreed upon reasonable severance payment:

Length of Service with the Employer:	Severance Payment	Training Period
A. Less than 1 year	6 months salary equivalent	2 weeks
B. 1 year of more but less than 2 years	8 months salary equivalent	3 weeks
C. 2 years or more but less than 3 years	10 months salary equivalent	4 weeks
D. After 3 years	12 months salary equivalent	5 weeks

provided that, at the Employer's option, the Employee may be requested to remain for the above 'training period' in order to assist in training of and transition to her replacement for which period the Employee shall continue to be paid her remuneration under this agreement, and upon completion of the training, thereafter shall forthwith be paid the above lump sum severance payment.

(iii) by the Employee for any reason on giving the Employer 21 days' advance notice in writing.

(b) Upon the effective date of termination pursuant to this Section, this agreement and the employment of the Employee hereunder shall be wholly terminated, except in respect of Sections 8, 9 and 10, each of which shall continue in full force and effect. Upon any such termination, the Employee shall have no claim against the Employer for damages or otherwise except in respect of payment of remuneration earned, due and owing as provided for in this Section 3 and in Section 5, to the effective date of termination.[ii]

(c) The parties hereto acknowledge and agree that the payment referred to in sub-section 3(b) is a reasonable estimate of the damages that might be suffered by the Employee for termination of this Agreement, said amount being liquidated damages and not a penalty. [Emphasis added]

[6] Cambridge's principals, Bernard Heitner and Jacques Feldman, are Orthodox Jews whose religious observances prevent them from working on Jewish holidays. When Ms. Gayle began her employment at Cambridge, the business would close on Jewish holidays. If transactions had to occur on Jewish holidays, employees such as Ms. Gayle would cover them by working from home and being paid for this work on a per transaction basis.

[7] On or about March 29, 2010, Ms. Gayle and Cambridge entered into a Memorandum of Agreement (the "MOA"). The purpose of the MOA was for Mr. Heitner and Mr. Feldman to preserve their religious observances while keeping Cambridge open on Jewish holidays by having Ms. Gayle, a non-Jewish person, run the business on these holidays. In turn, Ms. Gayle received one-hundred (100) Class X shares in Cambridge in exchange for a $2 million demand promissory note that she claims put Cambridge's ownership and/or operations in her hands on Jewish holidays. The MOA allowed Cambridge to redeem the shares by cancelling the promissory note. On March 26, 2010, Ms. Gayle emailed Cambridge staff to advise that Mr. Heitner and Mr. Feldman had entered into a "partnership" with her to change the way Cambridge would run on Jewish holidays. Under this new arrangement, Ms. Gayle announced that she would make all managerial decisions for operations and sales on those days. This was reflected in various corporate records.

[8] Pursuant to s. 3(c) of the MOA, the 100 Class X shares entitled Ms. Gayle to "*an aggregate annual dividend of up to 4.8% of the Net Earnings of Cambridge on a consolidated basis, as*

determined by the directors of Cambridge [with] the annual dividends [to] reflect the number of Jewish Holidays occurring within the working days in each year." [Emphasis added] Under the terms of the MOA, Cambridge's net earnings were calculated using its consolidated statement of income for the year ended February 28, 2010 that showed about $29 million in gross revenues and about $1.093 million in net income for that year.

[9] For the 5-year period when the above-noted dividend agreement was in place, Ms. Gayle claims that Cambridge never paid her a dividend.

[10] Under s. 6(b) of the MOA, Ms. Gayle was to pay the employees who worked on Jewish holidays from her own compensation, with Cambridge to pay her sufficient compensation to meet those expenses while also leaving her with a "profit component", as follows:

> [Ms. Gayle] agrees that for those employees who are required by her to attend at the Cambridge Group offices on Jewish Holidays, that she will compensate them on a per transaction basis out of the compensation which she receives. Accordingly, Cambridge agrees that the compensation package and dividends in respect of the Class X Shares payable to [Ms. Gayle] daily shall include in respect of Jewish Holidays an extra amount sufficient to provide her with the amount of the expenses to be incurred by her to the employees of the Cambridge Group on the Jewish Holidays <u>plus a profit component</u> for [Ms. Gayle]. [Emphasis added]

[11] In this action, Ms. Gayle claims that the "profit component" mentioned in the last sentence of s. 6(b) to the MOA means that she was entitled to *all* of the gross profits that Cambridge earned on each Jewish holiday, in addition to her entitlement to a dividend under s. 3(c) of the MOA. The Defendants disagree with her interpretation of this provision.

[12] On April 19, 2010, Ms. Gayle and Cambridge signed an addendum to the MOA by which the company agreed to: a) pay her $3,000.00 per Jewish holiday; b) let her take Jewish holidays as vacation days; and c) pay her an annual $20,000.00 bonus (the "Signed Addendum"). In addition to the Signed Addendum, Ms. Gayle gave Mr. Squire a different unsigned and undated version of the addendum (the "Unsigned Addendum") which does not include a reference to the bonus but states that Cambridge "*agrees to pay [Ms. Gayle] $5,000.00 gross or net $3,000.00 per day for each Jewish holiday*" and indicates that she could take Jewish holidays as vacation days.

[13] On September 8, 2010, Mr. Heitner and Mr. Feldman transferred the 100 Class X shares to Ms. Gayle, in exchange for the $2 million promissory note.

[14] On June 15, 2015, Cambridge terminated Ms. Gayle's employment without cause.

[15] Prior to Ms. Gayle's termination, Cambridge had earned an average of about $200,000.00 each Jewish holiday, with nine (9) such holidays in fiscal year 2013 and twelve (12) such holidays in 2014 and 2015, respectively.

[16] Before terminating Ms. Gayle's employment, Cambridge paid her a $3,000.00 *per diem* for each of twelve (12) Jewish holidays annually (i.e., $3,000.00 x 12 holidays) regardless of how many actual Jewish holidays fell on a working day each year, along with a $20,000.00 annual bonus in accordance with the Signed Addendum. Cambridge did not pay her a separate amount for dividends on each Jewish holiday. In December 2010, and sometime in 2012, Ms. Gayle asked Mr. Heitner and Mr. Feldman for the "profit component" under the MOA but they refused. By her own admission, Ms. Gayle knew by the end of 2010 that Cambridge would not by paying her any discreet profit component under the MOA.

[17] At the time of termination, Ms. Gayle had been employed at Cambridge for 11½ years, was Vice President of Finance and Operations, and had an annual salary of $200,000.00. She also had the $20,000.00 annual bonus (i.e., pursuant to the Signed Addendum) which was paid to her through to 2014 (i.e., her last full year of employment). Although her employment contract entitled Ms. Gayle to a lump sum payment equal to 12 months of salary upon termination without cause, Cambridge only paid her $68,205.10 in salary continuance following her dismissal.

b. Ms. Gayle's Action for Wrongful Dismissal

[18] In June 2015, Ms. Gayle retained Mr. Squire, a partner at Lerners LLP, to bring a wrongful dismissal claim against Cambridge. Ms. Shoom, a first-year associate, worked on the case under Mr. Squire's supervision. On occasion, Mr. Squire consulted Mr. Freiman, another partner at the firm, about the case.

[19] On June 9, 2015, Mr. Squire sent a demand letter to Cambridge. Settlement discussions did not resolve the matter.

[20] On September 11, 2015, Cambridge redeemed Ms. Gayle's Class X shares by cancelling the promissory note to repurchase the shares from her.

[21] On September 14, 2015, Mr. Squire filed a notice of action against Cambridge to advance Ms. Gayle's wrongful dismissal claim for termination pay equal to twelve (12) months of salary plus an aggregate annual dividend up to 4.8% of Cambridge's net earnings on a consolidated basis

[22] Thereafter, Mr. Squire and Ms. Shoom prepared a draft statement of claim for $200,000.00 in wrongful dismissal damages, less amounts paid, and $6 million for unpaid dividends on the Class X shares from March 29, 2010 through to September 11, 2015. Mr. Freiman reviewed the draft for Mr. Squire as a courtesy without billing for his time. Ms. Gayle reviewed the draft and remarked that the promissory note and the Signed Addendum were not attached to the pleading. To address her comments, Ms. Squire revised the draft to include the attachments and finalized an approved version of the statement of claim that was issued on October 14, 2015. The pleading did not include a claim for the Jewish holiday *per diem* payments, the bonus, or moral damages.

[23] Cambridge retained Frank Cesario of Hicks Morley Hamilton Stewart Storie LLP to defend the Cambridge Action. Settlement discussions did not resolve the action. Following the delivery of Ms. Gayle's statement of claim on December 4, 2015, Cambridge delivered its statement of defence and counterclaim on December 17, 2015. Among other things, Cambridge's defence pleaded that Ms. Gayle was not entitled to 4.8% of its net earnings as a "dividend" under her Class X shares as s. 3(c) of the MOA only entitled her to a dividend of "*up to*" 4.8% of net earnings "*as determined by the directors of Cambridge*" (i.e., to preserve the Cambridge board's discretion over the payment of dividends and allow for flexibility as the number of Jewish holidays varied each year). Cambridge also pleaded that s. 5 of the MOA gave Mr. Heitner and Mr. Feldman ultimate discretion to adjust Ms. Gayle's total compensation by accounting for all factors and remuneration, including any dividends. To this end, s. 5 of the MOA provided as follows:

> It is acknowledged that [Ms. Gayle] currently is a Vice President of Operations for Cambridge and receives a compensation package in respect of her services. It is acknowledged that it is the intention of the parties that [Ms. Gayle] shall continue to receive her existing compensation package with such increases as may be negotiated from time to time so long as she remains an employee of Cambridge. It is further intended that [Ms. Gayle] shall receive, in addition, the dividends in respect of the Class X Shares purchased by her, but that depending on the size of the dividends, her compensation package may be adjusted on an annual basis to reflect an increase over her normal compensation package,

> but it is expressly acknowledged and agreed by all parties, including [Ms. Gayle], that the amount of the increase over her normal compensation package, shall be at the discretion of [Mr. Heitner] and [Mr. Feldman] and that if [Ms. Gayle] receives an amount of dividends in respect of the Class X Shares, that her salary may be reduced in any given year, so long as [Ms. Gayle] receives, in the aggregate, a mixture of her compensation package and dividends which are greater than what her normal compensation package would be. [Emphasis added]

[24] In its defence, Cambridge pleaded that the limiting terms under s.5 of the MOA were reasonable as the parties could not foresee how the business would grow and sensibly agreed on discretionary limits for Ms. Gayle's compensation. In addition, Cambridge pleaded that it paid her a $3,000.00 dividend for each Jewish holiday from 2010 to 2015 as agreed upon, which was consistent with their reasonable expectations under the MOA.

[25] Cambridge further pleaded after-acquired cause by asserting that Ms. Gayle had overpaid its employees by $672,405.00 and herself by $67,076.92 for Jewish holidays from 2010 through to 2014, which it purportedly discovered after her dismissal. Cambridge characterized this as an abuse of her position of trust, and counterclaimed for these amounts along with the amount that it had paid to her following her dismissal.

[26] On February 12, 2016, Mr. Heitner called Ms. Gayle and left a voicemail to express an interest in settling the litigation.

[27] On February 23, 2016, Mr. Squire delivered a reply and defence to counterclaim to assert that the $3,000.00 *per diem* was not a dividend, that Ms. Gayle had appropriately paid herself and other Cambridge employees with the company's knowledge or approval, and that, in any event, Ms. Gayle had paid for work performed on Jewish holidays by exercising her sole discretion as expressly provided for under the terms of the MOA.

[28] On March 18, 2016, Cambridge delivered its reply to the defence to counterclaim which denied Ms. Gayle's various assertions.

c. Mr. Kerr Retains Lerners LLP

[29] On April 11, 2016, Cambridge served an amended statement of defence and counterclaim to add a further $2 million counterclaim against Ms. Gayle and Mr. Kerr for conspiracy, intentional

interference with economic relations, and defamation. The counterclaim alleged that Mr. Kerr made defamatory statements about Mr. Feldman and Mr. Heitner to several of their acquaintances, and that Mr. Kerr had posted disparaging comments on websites that he had created using domains named after Mr. Feldman and Mr. Heitner. The amended counterclaim claimed damages for Cambridge's lost revenue, loss of business opportunity, and loss of goodwill.

[30] Thereafter, Lerners LLP began to act for both Ms. Gayle and Mr. Kerr.

d. Mediation and Settlement of the Cambridge Action

[31] In letters to Mr. Cesario dated May 6, 2016, Mr. Squire raised concerns with Cambridge's amended counterclaim. Following Mr. Heitner's earlier message to Ms. Gayle about pursuing a resolution, and a communication from Mr. Cesario who also had suggested settlement discussions, Mr. Squire also expressed a willingness to negotiate a settlement of the litigation.

[32] In June 2016, the parties to the Cambridge Action all agreed to attend mediation with Linda Rothstein of Paliare Roland Rosenberg Rothstein LLP as mediator. Mr. Squire told Mr. Cesario that Ms. Gaye and Mr. Kerr would participate in the mediation provided that the parties exchanged productions beforehand. Ms. Gayle was particularly interested in receiving Cambridge's financial statements. Cambridge initially agreed to an exchange of productions before mediation, but later reneged on this and refused to produce a full affidavit of documents.

[33] On July 8, 2016, Mr. Squire sent Ms. Gayle and Mr. Kerr a draft mediation brief to review. Around this time, Mr. Squire advised them that Cambridge would not make full production as previously agreed. He also advised them against withdrawing from the mediation. Ms. Gayle and Mr. Kerr approved the brief and did not object to proceeding to mediation.

[34] Mr. Freiman reviewed the draft mediation brief and provided comments to Mr. Squire as a courtesy without billing for his time.

[35] On July 12, 2016, the parties to the Cambridge Action exchanged mediation briefs. The brief prepared by Mr. Squire and Ms. Shoom advanced Ms. Gayle's claims for $200,000.00 (i.e., 12 months of salary) and 5 weeks of salary continuance, less amounts paid, plus $878,788.54 in dividends in respect of her Class X shares (i.e., pursuant to s. 3(c) of the MOA), without advancing

a claim for any *per diem* amounts, bonuses, or profit entitlements under s. 6(b) of the MOA (i.e., as distinct from her dividend claim) over the notice period.[iii]

[36] For its part, Cambridge argued in its mediation brief that its after-acquired cause effectively extinguished Ms. Gayle's entitlement to pay in lieu of notice, and that it would seek to recoup its damages claim for alleged overpayments (i.e., to herself and other employees) on Jewish holidays and pursue its defamation and conspiracy claim arising from Mr. Kerr's alleged tortious comments to others. Cambridge also asserted that its payments to Ms. Gayle of $3,000.00 per Jewish holiday constituted her dividend payable under the MOA. Based on this, Cambridge argued that it owed no further amounts to her. Cambridge's brief included its audited financial statements from 2010 to 2016, which was the main production item that Lerners LLP had sought on Ms. Gayle's behalf. Based on these records and the number of Jewish holidays that fell on working days between 2010 and 2016, Mr. Squire and Ms. Shoom calculated Ms. Gayle's unpaid dividends to be $878,788.54, which was far less than the $6 million amount which had been pleaded in the statement of claim as a placeholder amount before any disclosure had been provided.

[37] On July 19, 2016, the parties attended mediation. By the end of mediation, the parties had reached a settlement. The key settlement terms were for Cambridge to pay Ms. Gayle $500,000.00, structured as $425,000.00 in damages for the dividend claim and $75,000.00 for costs, in exchange for all of the parties, including Mr. Kerr, executing full releases. Mr. Squire advised Ms. Gayle and Mr. Kerr that the settlement was reasonable in light of the many risks or uncertainties with their case, which included the following:

a. Although Ms. Gayle was still owed about $132,000.00 of the $200,000.00 in termination payment that she was entitled to receive under her employment agreement, there was a risk that Cambridge's defence of after-acquired cause or its repayment counterclaim would undermine this aspect of her claim;

b. There was a substantial likelihood that Ms. Gayle's claims pre-dating September 2013 were statute-barred by the *Limitations Act, 2002*, SO 2002, c. 24, Sch. B;

c. There was a risk that a court might prefer Cambridge's position that the MOA gave Cambridge's directors unfettered discretion to decide the quantum of the dividends and/or that Cambridge's payment of $3,000.00 per Jewish holiday was

the agreed-upon dividend, in which case its obligations to her under the MOA would have been satisfied; and

d. Cambridge's intention to pursue claims of conspiracy, intentional interference with economic relations, and defamation against Mr. Kerr and Ms. Gayle would open up Mr. Kerr to potential liability and costs, and likely would have hindered Ms. Gayle's ability to settle her wrongful dismissal claim after examinations for discovery had occurred. Notably, Mr. Kerr had given Lerners LLP recordings of certain conversations in which he allegedly made the defamatory statements, that were unhelpful to his position and would have to be disclosed to Cambridge once productions were exchanged.

[38] At mediation, Mr. Squire had discussed with Ms. Gayle and Mr. Kerr the characterization of the settlement payment as damages for the dividend claim. Ms. Rothstein had conveyed that Cambridge would not issue a T5 for dividends but would agree to characterize the payment as damages for the dividend claim. Mr. Squire advised Ms. Gayle to get tax advice on characterizing the settlement payment as that advice fell beyond the scope of Lerners LLP's retainer. Ms. Gayle accepted this and indicated that she would obtain the recommended tax advice, which she later obtained from her accountant who communicated with Mr. Squire about the settlement.

[39] By the end of the mediation, Ms. Gayle and Mr. Kerr accepted the terms of the settlement agreement.

[40] Following the mediation, counsel endeavoured to finalize the mutual release. A point of contention arose when Cambridge sought to include a term in the release requiring Ms. Gayle to repay the settlement funds if she or Mr. Kerr breached the confidentiality or non-disparagement terms of the settlement. In response to Cambridge's position, Mr. Kerr sent Mr. Squire several messages in which he threatened to take Ms. Gayle's case to the media to expose the "*religious transgressions*" of Mr. Heitner and Mr. Feldman and to "*humiliate*" them in the Orthodox Jewish community. When Mr. Squire addressed Mr. Kerr's concerns over the terms of the mutual release, Mr. Kerr advised for the first time in an email exchange from August 5 to 7, 2016 that he was dissatisfied with the settlement and his representation at mediation. During a call on August 8, 2016, Mr. Squire reminded Ms. Gayle and Mr. Kerr that they had agreed to the non-disparagement

clause and advised that it was reasonable given Mr. Kerr's alleged defamatory statements about Cambridge and its principals. By the end of the call, Ms. Gayle and Mr. Kerr had agreed to have Mr. Squire continue to negotiate the terms of the mutual release and to oppose the inclusion of a penalty clause. Ultimately, Cambridge ceded to the Plaintiffs' position and agreed to have the clause omitted.

[41] By August 16, 2016, the parties to the Cambridge Action executed the mutual release.

[42] By September 9, 2016, Mr. Squire reconciled the settlement funds against amounts in his firm's trust account and the balance of the Plaintiffs' invoices, and paid Ms. Gayle the remaining amount of $487,714.88 under correspondence dated September 12, 2016.

e. Breakdown of the Relationship and Present Action

[43] After Ms. Gayle had received the settlement funds, she and Mr. Kerr emailed Mr. Squire on October 13 and 29, 2016 to ask how they could void or cancel the settlement. On October 31, 2016, Mr. Squire explained that they could not resile from the settlement unless they could show that Cambridge had told an egregious lie to vitiate the agreement.

[44] On May 23, 2017, the Plaintiffs emailed Mr. Squire to complain that the settlement funds were characterized as damages for dividend claims. In response, Mr. Squire recounted their discussion at mediation about how the funds would be characterized, as well as his advice about obtaining tax advice.

[45] On June 7, 2017 (i.e., about a year after the mediation), Ms. Gayle and Mr. Kerr emailed Mr. Squire to inquire about possibly cancelling the mutual release and indicated that Mr. Kerr might launch a website on "*what a non-Jew should expect or know when taking over an orthodox Jewish company on Jewish holidays*." Mr. Squire cautioned against this course of action, and asked to speak with Ms. Gayle (i.e., knowing that Mr. Kerr used her email) to ensure that both clearly understood how breaching the settlement would impact them individually. Mr. Kerr replied by emailing Mr. Squire repeatedly to express dissatisfaction with the representation that he and Ms. Gayle had received.

[46] On June 9, 2017, Mr. Squire proposed that Ms. Gayle and Mr. Kerr meet with himself and Mr. Freiman, whom they had been copying on their email messages.

[47] On June 11, 2017, Ms. Gayle left Mr. Squire a voice message in which she agreed with Mr. Kerr's earlier messages and expressed her dissatisfaction with their representation in the case, both during and after mediation.

[48] After reviewing Ms. Gayle's voice message and subsequent email sent on June 12, 2017, Mr. Squire came to realize that both Plaintiffs had lost confidence in himself and the firm. In response, Mr. Squire offered to meet with the Plaintiffs and, if they wished, to help them find another lawyer.

[49] On June 21, 2017, Mr. Squire and Mr. Freiman met with Ms. Gayle and Mr. Kerr to discuss their concerns. This was the first and only time that Mr. Freiman met with the Plaintiffs. During the meeting, the Plaintiffs asserted their belief that the Defendant lawyers and firm, along with the mediator, Ms. Rothstein, had sided with Cambridge to benefit its principals by furthering a Jewish conspiracy at their expense. All present agreed that the solicitor-client relationship had broken down irreparably.

[50] The Defendants flatly deny the Plaintiffs' conspiracy allegations.

[51] Ms. Gayle and Mr. Kerr brought this action by notice of action issued on July 18, 2018, and by statement of claim on August 17, 2018. The statement of claim was amended before the close of pleadings, and later in 2023, to increase the claim for damages. Their claim now seeks $20 million in damages for breach of contract, negligence and/or breach of fiduciary duty, along with a disgorgement or restitution of fees paid to Lerners LLP for the Cambridge Action.

[52] This action has two (2) central aspects: 1) an allegation that Mr. Freiman was in a conflict of interest due to "religious and personal affiliations" to Mr. Heitner for which the Defendants deliberately preferred Cambridge's interests over those of their clients in the Cambridge Action; and 2) an allegation that the Defendants deliberately and/or negligently failed to advance an interpretation of the MOA to assert Ms. Gayle's entitlement to the "profit component" in addition to the dividend, which caused her to execute an improvident settlement.

[53] The parties exchanged documentary productions and Ms. Gayle, Mr. Squire, Ms. Shoom and Mr. Freiman were cross-examined on their affidavits for this summary judgement motion.

The Plaintiffs' Motion to Adduce Further Evidence Pursuant to Rule 39.02

[54] I am persuaded that leave should be granted under Rule 39.02(2) for the Plaintiffs to adduce the additional evidence in Ms. Gayle's supplementary affidavit sworn October 10, 2023 in response to this summary judgment motion. Ms. Gayle's supplementary affidavit generally includes the following records:

a. Cambridge corporate documents which the Plaintiffs emailed to Mr. Squire on June 17, 2015 (i.e., at the start of the retainer) as attachments to her message;

b. Ms. Gayle's T4A forms for 2010 to 2015 showing her income; and

c. Ms. Gayle's email to Mr. Squire of January 20, 2016 setting out her position that the *per diem* payments were not "dividends".

[55] Rule 39.02(2) provides:

> A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[56] In *Lockridge v. Ontario (Ministry of the Environment, Director)*, 2013 ONSC 6935 (Div Ct) at para 24, the Divisional Court applied the following test in considering whether to grant leave under Rule 39.02(2) to adduce further evidence:

1. Is the evidence relevant?

2. Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

3. Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

4. Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

[57] I am persuaded that all of the proposed additional records are relevant by showing actual amounts paid to Ms. Gayle over her salary, or by going to support her claim for entitlements including Cambridge's profit on Jewish holidays. In addition, I find that the text related to these records in the body of her supplementary affidavit is relevant by addressing her claims.

[58] With the exception of Ms. Gayle's T4A forms, questions regarding her entitlements and/or the Defendants' knowledge about them were raised on cross-examinations.

[59] I find that the Defendants would not be prejudiced by having the additional records and Ms. Gayle's evidence about them included in the record on this motion. All of these records were either provided to or authored by one or more of the Defendant lawyers, and all except for her T4A for 2015 were included in the Defendants' affidavit of documents. I add that Ms. Gayle's email to Mr. Squire of June 17, 2015 which forwarded most of these records to him was included in the Plaintiffs' responding record for this motion, although the actual attachments to her email were inadvertently omitted from the record. Apart from her T4A for 2015, I accept that the Defendants have been in possession of these records for some time, are not unfamiliar with them, and would not be unfairly surprised or prejudiced if the records are included in the record. I would add that Ms. Gayle's email to Mr. Squire on January 20, 2016 describes her position that challenges Cambridge's argument that its *per diem* payments to her on each Jewish holiday were dividends.

[60] In my view, the Plaintiffs have sufficiently explained how the foregoing evidence was inadvertently omitted from their initial responding materials for the motion (i.e., during a period in which they were self-represented before retaining counsel to argue their response to the motion).

[61] Taking everything into account, and to allow the Plaintiffs a fair opportunity to respond to the Defendants' motion for summary judgment, I find that it would be just and reasonable to grant leave under Rule 39.02(2) for the Plaintiffs to adduce the above-mentioned additional evidence.[iv]

[62] The balance of Ms. Gayle's supplementary affidavit essentially addresses the evidence from the Plaintiffs' cross-examinations of the Defendant lawyers.[v] More specifically, it essentially seeks to summarize or highlight parts of the examination transcripts, or otherwise argue how the transcript evidence should be considered. Although this content is not evidence *per se*, it is also not prejudicial to the Defendants who are well acquainted with the record on this motion. In any

event, Plaintiffs' counsel essentially gave the same summary or highlights along with the same submissions when the motion was heard. Accordingly, I find that this content in the supplementary affidavit should be construed as argument which I have done in considering the record.[vi]

Principles for Summary Judgment

[63] The motion judge shall grant summary judgment if satisfied that there is no genuine issue requiring a trial with respect to claim or defence: Rule 20.04(2)(a).

[64] There will be no genuine issue requiring a trial where the court is able to reach a fair and just determination on the merits of a motion for summary judgment, which will be the case where the process: a) allows the judge to make the necessary findings of fact, b) allows the judge to apply the law to the facts, and c) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin,* 2014 SCC 7 at para 49.

[65] A summary judgment motion entails a two-step approach. The court must first determine whether there is a genuine issue requiring a trial based only on the evidence in the record without using its fact-finding powers. Summary judgment must be granted if there is no genuine issue requiring a trial. If there seems be a genuine issue for trial, the court must then decide whether a trial may be avoided by having recourse to its fact-finding powers under Rules 20.04 (2.1) and (2.2) to weigh evidence, evaluate credibility, and draw inferences: *Hryniak* at para 66. These fact-finding powers should only be used where doing so leads to, "*a fair process and just adjudication*": *Hryniak* at para 33; *Mason v. Perras Mongenais,* 2018 ONCA 978 at para 44; *Eastwood Square Kitchener Inc. v. Value Village Stores, Inc.,* 2017 ONSC 832 at paras 3-6.

[66] The moving party on a motion for summary judgment has the initial onus of proving that there is no genuine issue for trial, and must file some affidavit evidence to support that position: *Sanzone v. Schechter,* 2016 ONCA 566 at paras 30-32, leave to appeal denied 2017 CanLII 8582 (SCC). Once the moving party has discharged its evidentiary burden of proving there is no genuine issue requiring a trial, the burden shifts to the responding party to prove that its claim has a real chance of success: *Ibid*. To defeat a motion for summary judgment, the responding party must refute or counter the moving party's evidence to show a genuine issue for trial or risk a summary judgment. The responding party cannot rest solely on allegations or denials in its pleadings: *Riha v. A. Wilford Professional Corporation,* 2022 ONSC 1110 at para 5; *Mercedes-Benz v. Janosh*

Chandrakularajah, 2021 ONSC 296 at para 7. Each side to a summary judgment motion must put its "*best foot forward*" as to the existence or non-existence of a genuine issue requiring a trial: *Mazza v. Ornge Corporate Services Inc.*, 2016 ONCA 753 at para 9; *Chernet v RBC General Insurance Company*, 2017 ONCA 337 at para 12. On a summary judgment motion, the court may presume that the evidentiary record is complete and that no further evidence would be adduced at trial: *Tim Ludwig Professional Corporation v. BDO Canada LLP*, 2017 ONCA 292 at para 54; *Broadgrain Commodities Inc. v. Continental Casualty Company*, 2018 ONCA 438 at para 7; *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447 at para 141. A party cannot argue that further evidence may be forthcoming to justify the necessity of proceeding to trial: *James v. Chedli*, 2021 ONCA 593 at para 31. The record on a summary judgment motion is often sufficient to resolve material issues fairly and justly: *Hyrniak* at para 57.

Analysis

a. This Case is Appropriate for Summary Judgment

[67] In my view, this case is appropriate for summary judgment. The parties filed detailed and comprehensive evidence on the motion, including affidavits from each of the Defendant lawyers. Given this fulsome evidence, I am satisfied that the record is more than adequate for the court to properly appreciate the facts without requiring a trial: *Hyrniak* at paras 56-58. On a motion for summary judgment, the parties are expected to put their best foot forward and the court may presume that the evidentiary record is complete with nothing further to be adduced if the case went to trial: *Tim Ludwig* at para 54; *Carmichael* at para 141. The court need not use its fact-finding powers to remedy evidentiary shortcomings: *Broadgrain* at para 7. Moreover, the legal issues are not unique. Taking everything into account, I am satisfied that the summary judgment process affords the evidence needed to decide this case in a timely, affordable and proportionate manner, and results in a fair process and just adjudication: *Hyrniak* at paras 33 and 66.

b. No Genuine Issue for Trial in respect of the Plaintiffs' Breach of Contract and Breach of Fiduciary Duty Claims against the Defendants

[68] I am satisfied that the Plaintiffs' breach of contract and breach of fiduciary duty claims against the Defendants raise no genuine issues for trial.

[69] The Plaintiffs claim that the Defendants breached their fiduciary duty, and thus breached the legal services contract under their retainer, by taking deliberate steps to advance the interests of Cambridge's principals at the Plaintiffs' expense without disclosing the conflict of interest. Specifically, Ms. Gayle and Mr. Kerr claim that Mr. Freiman had a conflict of interest due to his religious and personal affiliations with Mr. Heitner, who is one of Cambridge's principals.

[70] A breach of fiduciary duty in respect of a solicitor-client relationship will occur when the relationship of trust and loyalty between the lawyer and the client has broken down in situations where the lawyer has been dishonest, is in a position of conflict of interest, or has divided loyalties: *Frumusa v. Ungaro*, 2006 CanLII 5138 (ONCA) at para 2. A breach of fiduciary duty will not otherwise extend to situations in which the quality of advice or representation is at issue: *Ibid.*

[71] The Plaintiffs' breach of fiduciary duty claim is based on a premise that Mr. Freiman, who is Jewish, and the other Defendants, worked to sabotage the Plaintiffs' interests by preferring the interests of Cambridge's principals to avoid having them embarrassed in the Jewish community. However, neither Mr. Freiman, Mr. Squire, nor Ms. Shoom had ever met or heard of Mr. Heitner, Mr. Feldman or Cambridge before Ms. Gayle retained Lerners LLP to act in the Cambridge Action. The mere fact that Mr. Freiman and Mr. Heitner share a religious faith is insufficient to establish a conflict of interest or breach of fiduciary duty as the Plaintiffs have alleged in this proceeding.

[72] A party seeking to establish a conflict of interest must show a "*substantial risk*" that the lawyer's representation of the party would be materially and adversely affected by the lawyer's own interests or duties to another current client, former client, or third person: *R. v. Neil*, 2002 SCC 70 at para 31; *Flexpark Inc. v. Ercolani*, 2024 ONSC 260 at para 48; *P&J Contracting Inc. v. Singer*, 2017 ONSC 3783 at para 33. The substantial risk needed to show a conflict of interest must be "*significant and plausible*" and "*more than a mere possibility*": *Singer* at para 38. The mere fact of a personal relationship with a litigant does not automatically give rise to a conflict of interest as the impugned relationship must be "*intimate and emotional*" in some way to trigger a conflict: *Judson v. Mitchele*, 2011 ONSC 6004 at para 27; *Scarlett v. Farrell*, 2014 ONCJ 194 at paras 45-48. In my view, the Plaintiffs have not established the kind of risk necessary to show a conflict of interest that would meet this test.

[73] The only evidence of Mr. Freiman's alleged conflict of interest arose from a conversation that Ms. Gayle and Mr. Kerr purportedly had in June 2017 when she apparently came to realize that Mr. Freiman was a "friend" of Mr. Heitner. From this alleged conversation, Ms. Gayle claims to have recalled Mr. Heitner telling her at some unspecified point between 2004 and 2013 that an unnamed person she now believes to be Mr. Freiman attended parties that Mr. Heitner had hosted. Her claim is based entirely on hearsay. Importantly, Ms. Gayle did not explain how or why the unnamed person that Mr. Heitner alluded to is actually Mr. Freiman. This alleged connection is based on a bald assertion that Mr. Freiman had attended Mr. Heitner's parties, which Mr. Freiman categorically denies. Even Ms. Gayle concedes that Mr. Heitner may have exaggerated this alleged relationship by bragging about prominent people who had attended his parties. Ms. Gayle offered no evidence to show whether the alleged relationship was a close one, or whether it had continued into 2015 when she retained Lerners LLP to act for her.

[74] The Plaintiffs were obliged to put their best foot forward on this motion for summary judgment: *Carmichael* at para 141. It was not open for them to rely on the prospect that further evidence of the alleged conflict of interest may be forthcoming to argue the necessity of having the litigation proceed to trial: *James* at para 31

[75] From the record, I find that Mr. Freiman's alleged connection to Mr. Heitner, even if true, would not give rise to a substantial risk of a materially adverse impact to the Plaintiffs' retainer with Lerners LLP. Having considered all of the evidence on this point, such as it is, I do not find the alleged conflict of interest arising from this purported relationship to be plausible or significant, or that it reasonably amounts to anything beyond mere speculation or possibility at best: *Singer* at para 38. In turn, I am not persuaded that the Plaintiffs have established a breach of fiduciary duty or otherwise shown a breach of contract in respect of their retainer agreement on any such basis.

c. No Genuine Issue for Trial from the Breach of Contract and Negligence Claims

[76] As set out below, I find that the Plaintiffs' breach of contract and negligence claims raise no genuine issues for trial.

[77] The Plaintiffs claim that the Defendants breached the legal services contract under their retainer by negligently representing them in the Cambridge Action.

[78] It is well-established that the standard of care for lawyers representing clients is that of a "*reasonably competent lawyer*" in similar circumstances: *Central Trust Co. v. Rafuse,* [1986] 2 SCR 148 at para 58. Doherty J.A. writing for the Court of Appeal described this standard in *Folland v. Reardon,* 2005 CanLII 1403 (ONCA) at para 44 as follows:

> The reasonable lawyer standard does not call for an assessment of the sagacity of the decision made by the lawyer. The standard demands that the lawyer bring to the exercise of his or her judgment the effort, knowledge and insight of the reasonably competent lawyer. If the lawyer has met that standard, his or her duty to the client is discharged, even if the decision proves to be disastrous. [Emphasis added]

[79] A lawyer who makes a judgment call that, with the benefit of hindsight, may have been better addressed differently, even if the judgment call is later shown to have been a mistake, will not be found to have been negligent unless the judgment call was outside the range of reasonable choices that a competent member of the profession could have made: *Folland* at paras 41 and 44; *DiMartino v. Delisio,* 2008 CanLII 36157 (ONSC) at para 54; *Kramer v. Collins,* 2023 ONSC 6011 at para 408; *Meister v. Coyle,* 2010 NSSC 125 at paras 43-46, affirmed 2011 NSCA 119 at para 34; *Li v. Macnutt & Dumont and Walters,* 2019 PESC 5 at para 8, reversed on other grounds 2019 PECA 30. It follows that a mere error of judgment or ignorance of some part of the law will not, without more, give rise to a claim of solicitor's negligence.

[80] To be negligent, a lawyer's conduct must fall outside of what an ordinary, competent lawyer would have done: *Folland* at para 44; *Brenner v. Gregory,* [1973] 1 OR 252 (HC) 257; *Kramer* at para 406. The reasonableness of a lawyer's conduct will depend upon the circumstance in each case, including the form and nature of the client's instructions, the client's experience and sophistication, the nature of the action or task, the time available to complete the work, the experience and training of the solicitor, the course of the proceedings and the influence of other factors beyond the control of the client and lawyer: *Pilotte v. Gilbert, Wright & Kirby, Barristers and Solicitors,* 2016 ONSC 494 at paras 39-40; *Kramer* at para 409.

[81] It is generally inappropriate for the court to decide the standard of care in a professional negligence case without expert evidence: *Krawchuk v. Sherbak,* 2011 ONCA 352 at para 130, leave to appeal refused, [2011] SCCA No 319; *Kramer* at para 404; *Formosa v. Persaud,* 2019 ONSC 4860 at para 65, affirmed 2020 ONCA 368. In a solicitor's negligence case, a claimant must generally lead expert evidence to show the standard of care and a breach of that standard:

Krawchuk at paras 131-132. There are three exceptions to this rule: i) where the matters at issue are non-technical; ii) where an ordinary person would be expected to have knowledge; or iii) where the impugned actions of the lawyer are so egregious that it is clear that their conduct fell short of the standard of care, even without knowing the precise parameters of the standard: *Krawchuk* at paras 133-135; *Lindsay v. Aird & Berlis LLP*, 2018 ONSC 7424 at para 46.

[82] In this case, neither side led any expert evidence. As the Defendants did not adduce expert evidence on whether their conduct met the standard of care, the Plaintiffs submit that their motion for summary judgment should be dismissed. In support of their position, the Plaintiffs rely on the Court of Appeal's reasoning in *Sanzone* at paras 24-32, which was followed in *Correct Group Inc. v. Cameron*, 2019 ONSC 3901 at para 98 *et seq*. For their part, the Defendants submit that they were not obliged to adduce any expert evidence given the Plaintiffs' failure to lead any expert evidence on the standard of care or a breach of the standard. The Defendants' position is supported by more recent decisions of the Court of Appeal in *McPeake v. Cadesky & Associates*, 2018 ONCA 554 at paras 11-16, and in *Formosa v. Persaud*, 2020 ONCA 368 at para 10, affirming 2019 ONSC 4860: see also *OZ Optics Ltd. v. Evans*, 2022 ONSC 5890 at para 130, affirmed 2023 ONCA 677.

[83] As the moving parties, the Defendants have the onus under Rule 20.01(3) to show there is no genuine issue for trial: *Sanzone* at para 24. In turn, the Plaintiffs bear the burden of leading evidence to substantiate their claim that the Defendants fell below the standard of care of a reasonably competent lawyer: *Hedley v. Irving*, 2011 ONSC 1645 at para 14; *Formosa (SCJ)* at para 68; *OZ Optics (SCJ)* at para 130. A plaintiff's obligation to "*put their best foot forward*" on a summary judgment motion in a solicitor's negligence case generally requires expert evidence to be led, as the absence of expert evidence may leave no basis for finding that the negligence claim raises a triable issue: *Jacobson v. Skurka*, 2018 ONSC 4483 at paras 66-67; *Sosnowski v. MacEwen Petroleum*, 2020 ONSC 2126 at para 31; *Formosa (SCJ)* at para 68; *Hedley* at paras 14-15.

[84] On summary judgment motions, the adequacy of the evidentiary record in respect of either the moving or responding parties, and the need for expert opinion evidence, is assessed on the particular factual circumstances of each case: *McPeake* at para 13, citing *Connerty v. Coles*, 2012 ONSC 5218 at para 13; *Correct Group Inc.* at para 94. The lack of a supporting expert opinion from a plaintiff may result in a dismissal of a claim, although this would not always be the result: *McPeake* at para 13; *Formosa (CA)* at para 10.

[85] In the circumstances of this case, I find that the Defendants were not required to lead expert evidence to discharge their onus under Rule 20.01(3) to show no genuine issue for trial. Although the motion was brought at a relatively early stage, I find that the extensive evidence in the record for this motion is more than adequate to gain a fulsome appreciation of the facts of the case: *McPeake* at paras 11 and 14; *Formosa (CA)* at para 10; *OZ Optical (CA)* at para 7; *Greenspan* at para 75. To this end, I note that both sides have exchanged documentary productions, and that Ms. Gayle, Mr. Squire, Ms. Shoom and Mr. Freiman were cross-examined on their affidavits for the motion. Taking this all into account, I accept that the evidentiary record is more than adequate to properly understand the facts of this case. Accordingly, I find that the more recent guidance of the Court of Appeal in *McPeake* and *Formosa*, as followed in other recent decisions, should be adopted in this case to not require expert evidence from the Defendants on this motion.

[86] From the record, I am satisfied that Mr. Squire and Ms. Shoom communicated with the Plaintiffs and obtained instructions to achieve the settlement at mediation after advising on the risks associated with continuing the action. The Plaintiffs do not allege that the Defendants acted without instructions, but claim that their advice and related conduct was negligent.

[87] I am satisfied that the Defendants have shown that there are no genuine issues requiring a trial of the action. Having considered the record on the motion, which included affidavits from the Defendant lawyers to address the Plaintiffs' claims, and absent any expert evidence to suggest otherwise, I find that there was no professional negligence.

[88] Among other things, the Plaintiffs claim that the Defendants breached the standard of care by not advancing a particular interpretation of the MOA (i.e., that Ms. Gayle was entitled to a "profit component" over and above her entitlement to dividends, as distinct from her *per diem* payment for Jewish holidays), by not asserting Ms. Gayle's entitlement to an annual bonus, and by not providing Cambridge's counsel with the Signed Addendum prior to mediation.

[89] The facts themselves are not in dispute. The Defendant lawyers did not assert a claim for a discrete "profit component" or annual bonus, and did not produce the Signed Addendum before mediation. However, the issue is not whether these choices by the Defendants were "correct" but instead whether these judgment calls were outside the range of reasonable choices that a reasonably competent lawyer could have made: *Folland* at paras 41 and 44. From their affidavits as filed, the

Defendants submit that their interpretation of the MOA (i.e., as providing Ms. Gayle with a salary, dividends and "profit component") was reasonable, as pleaded and later claimed at the mediation. In addition, Mr. Squire advised the Plaintiffs that the approach taken in raising the claim was meant to avoid highlighting the payments that Cambridge made to Ms. Gayle beyond her salary. Notably, these payments arguably went to support Cambridge's position that Ms. Gayle effectively received dividends through her $3,000.00 *per diem* and $20,000.00 annual bonus payments pursuant to the Signed Addendum that fully satisfied her entitlements under the MOA. Moreover, the Defendants submit that the addendum, regardless of its form, did little if anything to dispel Cambridge's argument that Ms. Gayle was paid dividends in agreed-upon amounts under the Signed Addendum (i.e., as signed on April 19, 2010 shortly after the MOA was signed on March 29, 2010), without any further entitlements. On this point, the Defendants note that the addendum, regardless of the version (i.e., whether signed or unsigned), did not distinguish between the three different types of payments, making it unhelpful to support Ms. Gayle's position as the mediator, Ms. Rothstein, is said to have acknowledged when shown the Signed Addendum at mediation.

[90] The Defendants' acts or omissions for which the Plaintiffs have complained all involved exercises of professional judgment as practicing lawyers. Accordingly, I am not persuaded that any recognized exceptions are engaged that would otherwise dispense with the need for expert evidence from the Plaintiffs to establish that the impugned acts or omissions were negligent: *Krawchuk* at para 130; *Zabel v. Brechin,* 2023 ONSC 1784 at para 241. Where a case resolves before trial by way of voluntary settlement as agreed upon by the client, expert evidence is generally required to establish a claim of deficient or incompetent assistance by counsel: *Bales Beall LLP v. Fingrut*, 2012 ONSC 4991 at paras 34-35, affirmed 2013 ONCA 266 at para 7.

[91] The Plaintiffs could not argue that further evidence may be forthcoming to justify proceeding to trial, as they sought to do in submissions, as the court may presume that the record contains all of the evidence that would have been adduced at trial: *Broadgrain* at para 7; *James* at para 31. Moreover, the Plaintiffs cannot defeat this motion for summary judgment by relying on the allegations in their pleadings: *Riha* at para 5; *Mercedes-Benz* at para 7.

[92] Having regard to the record, I am not persuaded that the Defendants were negligent. It is a well-established rule that expert evidence of a breach of the standard of care is needed to support a claim of professional negligence: *McPeake* at para 11. As the Plaintiffs led no expert evidence,

an adverse inference may be drawn against their case: *Hedley* at para 15; *Formosa (SCJ)* at para 68; *Greenspan v. Goldman, Khosla and Cook*, 2022 ONSC 5578 at para 75. Taking everything into account, including the lack of expert reports from either side, I find that the Defendants were not professionally negligent: *McPeake* at paras 13-15; *Formosa (CA)* at para 10; *OZ Optics Ltd. v Evans*, 2022 ONSC 5890 at para 130, affirmed 2023 ONCA 677.

d. No Genuine Issue for Trial from the Settlement Agreement

[93] I am satisfied that the settlement agreement raises no genuine issues for trial.

[94] By the end of the mediation, the Plaintiffs reached a settlement with Cambridge which the Defendants submit was a reasonable outcome in all of the circumstances. The Plaintiffs now argue that the settlement was improvident based on their interpretation of s. 6(b) of the MOA. However, as discussed below, their position disregards the various risks or uncertainties they would have faced by not settling at mediation and continuing with the litigation.

[95] Under the doctrine of unconscionability, the remedy of rescission is available for an unconscionable contract based on the traditional two-part test requiring: a) proof of inequality in bargaining power; and b) a resulting improvident transaction: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras 64-65, citing *Douez v. Facebook Inc.*, 2017 SCC 33 at para 115.

[96] Contractual interpretation involves issues of mixed fact and law by which the principles of contractual interpretation are applied to the language of a written contract, as considered in light of the factual matrix of the contract when it was made without overwhelming that language: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras 55-58.

[97] I am satisfied that the Plaintiffs' interpretation of s. 6(b) of the MOA is not supported by the language in the clause when properly considered in context. For convenience, s. 6(b) is reproduced as follows:

> [Ms. Gayle] agrees that for those employees who are required by her to attend at the Cambridge Group offices on Jewish Holidays, that she will compensate them on a per transaction basis out of the compensation which she receives. Accordingly, Cambridge agrees that the compensation package and dividends in respect of the Class X Shares payable to [Ms. Gayle] daily shall include in respect of Jewish Holidays an <u>extra amount</u> sufficient to provide her with the amount of the expenses

> to be incurred by her to the employees of the Cambridge Group on the Jewish Holidays plus a profit component for [Ms. Gayle]. [Emphasis added]

[98] In my view, the language under s. 6(b) entitling Ms. Gayle to receive "*an extra amount"* sufficient to pay employees working on Jewish holidays and to also receive "*a profit component*" cannot reasonably mean that she was entitled to *all* of Cambridge's gross profits on Jewish holidays, as the Plaintiffs are submitting. Having considered their submission on this, I find that any such interpretation is fundamentally inconsistent with other provisions of the MOA and its intended purpose of not having Cambridge's principals work on Jewish holidays while having the company operate on those days.

[99] The Plaintiffs' interpretation of s. 6(b) is based on their claim that Cambridge's principals could not work or earn profits on Jewish holidays due to their religious observances. In effect, the Plaintiffs assert that Ms. Gayle was entitled to all of Cambridge's profits on Jewish holidays as its principals could not retain any such profits themselves. Cambridge conceded that its principals could not work on Jewish holidays. But neither Cambridge nor its principals ever conceded that its principals could not earn profits on Jewish holidays due to religious observances, and there is no direct evidence before the court to support the Plaintiffs' assertion on this.

[100] In any event, the Plaintiffs' interpretation would entitle Ms. Gayle to both a dividend (i.e., of up to 4.8% of Cambridge's net earnings) on Jewish holidays along with the "profit component" (i.e., said to include all of Cambridge's gross profits) on the very same holidays. Had the parties to the MOA intended for Ms. Gayle to have all of Cambridge's gross profits on Jewish holidays, there would have been no need to distinguish the dividend from the profit component in the MOA, as was done. Moreover, although the first part of the Plaintiffs' interpretation of Ms. Gayle's entitlements might arguably fulfill the goal to prevent Cambridge's principals from earning profits on Jewish holidays, adding the alleged "profit component" as a second part of her entitlements would effectively mean that Cambridge and its principals would incur a loss every Jewish holiday, which is simply unreasonable and not something the parties would have intended.

[101] In my view, the Defendants have advanced a reasonable interpretation of s. 6(b) to the MOA. Under this interpretation, s. 6(b) was meant to ensure that Ms. Gayle's dividend was sufficient to meet her obligation to pay employees working on Jewish holidays without being out

of pocket herself while still deriving a benefit over and above the base compensation that she was receiving from Cambridge.

[102] On April 19, 2010, Ms. Gayle and Cambridge entered into the Signed Addendum by which the company agreed to pay her $3,000.00 per Jewish holiday (i.e., which she could take as vacation days), plus an annual $20,000.00 bonus. Thereafter, Cambridge paid her a $3,000.00 *per diem* for each of twelve (12) Jewish holidays annually, plus the annual bonus, albeit without any separate amount for dividends. By December 2010, Ms. Gayle was fully aware that Cambridge would not be paying her a discreet profit component under the MOA.

[103] Although the interpretation of the MOA offered by the Defendants and by Cambridge were at least arguable, I am satisfied that the Plaintiffs' interpretation is not. In my view, the Plaintiffs cannot reasonably argue that the settlement was improvident by not accounting for Ms. Gayle's alleged entitlement to *all* of Cambridge's gross profits for every Jewish holiday, which they claim was about $20 million as pleaded, although no records were adduced to substantiate this figure. Mr. Squire and Ms. Shoom assessed Ms. Gayle's dividend entitlement as approaching $878,788.54 (i.e., based on the Canadian calendar of Jewish holidays), although the Plaintiffs submit that this figure should instead be $887,974.71 (i.e., based on the US calendar of Jewish holidays). Even if the larger figure were applied, I am not persuaded that the $500,000.00 settlement amount would have been improvident given the various risks associated with the Plaintiffs continuing to litigate the Cambridge Action, including: a) Cambridge's defence of after-acquired cause (i.e., that, if successful, would have disentitled Ms. Gayle from her termination pay) and its counterclaim for $670.000.00; b) a court finding that the Plaintiffs' claims from or before 2013 were statute-barred; c) the court adopting Cambridge's interpretation of Ms. Gayle's entitlements under the MOA and finding that the company's obligations to her were satisfied; and d) Cambridge's impending defamation claim against Mr. Kerr that would potentially hinder Ms. Gayle's ability to settle her wrongful dismissal claim afterwards. On this motion, the Plaintiffs have essentially ignored or disregarded these risks in claiming that the settlement was improvident. Taking this all into consideration, I find that the settlement was not improvident or unreasonable given the risks which the Plaintiffs would face if the Cambridge Action did not settle.

[104] In my view, the Plaintiffs cannot succeed in claiming that the Defendants were negligent by not engaging in settlement discussions with Cambridge immediately after Mr. Heitner indicated

his interest in negotiating a settlement in February 2016. The Plaintiffs did not adduce any expert evidence to show that the Defendants' conduct fell below the standard of care, and it would be entirely speculative to infer that Ms. Gayle would have obtained a significantly more favourable settlement had Mr. Squire contacted Mr. Cesario to discuss a resolution right after learning about Mr. Heitner's overture to Ms. Gayle. In any event, the Defendants are not responsible for the consequences of Mr. Kerr's unilateral conduct in "*taking matters into his own hands*" without any notice, which led Cambridge to assert a $2 million counterclaim for defamation against him and Ms. Gayle jointly. Mr. Squire later contacted Mr. Cesario about engaging in negotiations to resolve the Cambridge Action which led to the July 19, 2016 mediation and a final settlement of the action.

[105] To the extent that the Plaintiffs' claim of an improvident settlement arises from an assertion that the Defendant lawyers acted negligently in negotiating or recommending the settlement, I find that it would be inappropriate to decide the standard of care without any expert evidence, as noted earlier: *Krawchuk* at para 130; *Bales (SCJ)* at paras 34-35; *Zabel* at para 241. Moreover, as the Plaintiffs led no expert evidence, an adverse inference may be drawn against their case: *Hedley* at para 15. Based on this, I am not persuaded that the Defendants were negligent: *McPeake* at paras 13-15; *Formosa (CA)* at para 10; *OZ Optics (SCJ)* at para 130, affirmed 2023 ONCA 677.

[106] Accordingly, I find that that the Plaintiffs' settlement with Cambridge raises no genuine issues for trial.

e. No Genuine Issue for Trial Arising from the Claim that the Defendants Preferred the Interests of Cambridge's Principals at the Plaintiffs' Expense

[107] As set out below, I find that no genuine issue for trial arises from the Plaintiffs' claim that the Defendants preferred Cambridge's interests at the Plaintiffs' expense.

[108] In my view, the only alleged conduct in this case that may be sufficiently egregious as to not require expert evidence to assess is the Plaintiffs' claim that the Defendants deliberately sought to advance the interests of Cambridge's principles at their expense. As noted earlier, I am satisfied that the Plaintiffs cannot prove an actual conflict of interest that allegedly caused the Defendants to compromise their interests. That said, I accept that their claim that the Defendants deliberately undermined Ms. Gayle's wrongful dismissal claim may arguably not require expert evidence in determining whether their conduct fell below the requisite standard of care: *Krawchuk* at para 135;

Lindsay at para 46. However, the Plaintiffs' claim that the Defendants deliberately undermined Ms. Gayle's interests in the Cambridge Action is rooted in the Plaintiffs' unsupported allegations that Mr. Freiman's faith and/or connections led him, along with the other Defendants, to abandon their professional obligations to their client, Ms. Gayle, and prefer the interests of others, being Mr. Heitner and/or Mr. Feldman, whom the Defendants literally had never met previously. Taking everything into consideration, I find that the Plaintiffs various assertions on this are self-serving, baseless and simply not credible.

[109] The Defendants kept Ms. Gayle and Mr. Kerr closely apprised of every material step in the action while the Plaintiffs reviewed and approved the very documents which they now complain about, being the statement of claim and the mediation brief in the Cambridge Action. The Plaintiffs fully knew what the Defendants were arguing and asserting on their behalf, and had instructed the Defendants to proceed with the case accordingly.

[110] The fact that the Defendants did not advance a questionable legal argument and chose to not send opposing counsel a particular document (i.e., namely, the Signed Addendum) that would not have meaningfully advanced any claim but may have supported Cambridge's position, does not rise to the level of showing that the Defendants favoured Cambridge or its principals. In my view, this evidence goes to show that the Defendant lawyers fulfilled their professional roles to the Plaintiffs and had acted to protect their own clients' interests.

[111] Accordingly, I find no genuine issue for trial arising from the Plaintiffs' claim that the Defendants preferred the interests of Cambridge's principals at their expense.

Outcome

[112] Based on the foregoing, I am satisfied that the Defendants have demonstrated that there is no genuine issue for trial. In my view, a trial is not required to justly decide this case.

[113] Accordingly, for the reasons set out above, the Defendants' motion for summary judgment is granted and the action is dismissed.

[114] Should the parties be unable resolve the issue of costs for the motion, the Defendants may deliver written costs submissions of up to 3 pages (excluding any costs outline or offer to settle)

within 15 days, and the Plaintiffs may deliver their responding costs submissions on the same terms within a further 15 days. Reply submissions shall not be delivered without leave.

Date: April 16, 2024 M.T. Doi J.

[i] Although the notice of action and the statement of claim as amended name Cambridge Mercantile Corp., Jacques Feldman and Bernard Heitner as Defendants, the Plaintiffs are not proceeding with any claims against these parties: see para 28 of the amended statement of claim and para 74 of Ms. Gayle's affidavit sworn August 14, 2023.

[ii] Among other things, section 5 (Remuneration) to Ms. Gayle's employment agreement with Cambridge initially provided for a $95,000.00 annual salary, subject to annual review for increases as warranted in the Employer's discretion based on her overall performance and experience, and such annual performance bonus(es) as warranted in the Employer's discretion in light of performance and results after considering such factors as achieved savings in banking expenses, creation and/or development of banking facilities and relationships, development of new and/or improved control methods, procedures and processes, such other improvements and enhancements as the Employee may have a role in bringing to the business and her position, and any other positive factors which the Employee may wish the Employer to consider.

[iii] On the motion for summary judgment, Ms. Gayle and Mr. Kerr argued that Lerners LLP improperly used the Canadian calendar to identify the Jewish holidays but instead should properly have used the US calendar as that was the calendar that Cambridge had followed and, consequently, would have resulted in a slightly higher claim for Ms. Gayle by increasing the claim by $3,192.60 in 2014, by $3,437.40 in 2015 and $1,682.49 in 2016 (i.e., for a total claim of $887,974.71 instead of $878,788.54), respectively. Ms. Gayle claims that she informed Lerners LLP about this discrepancy in the dividends claim by email on July 17, 2016, but was ignored.

[iv] See paras 20-25 (and Exhibits 40 to 44) to Ms. Gayle's Supplementary Affidavit sworn October 10, 2023.

[v] Although the Plaintiffs engaged counsel on a limited retainer to cross-examine Ms. Shoom, they cross-examined the other Defendant lawyers while acting as self-represented litigants.

[vi] See paras 3 to 19 of Ms. Gayle's Supplementary Affidavit sworn October 10, 2023.

CITATION: Gayle v. Cambridge Mercantile Corp, 2024 ONSC 1792
COURT FILE NO.: CV-18-3008-00
DATE: 2024 04 16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sharna Gayle and Wesley Kerr, Plaintiffs

AND:

Cambridge Mercantile Corp., Jason Squire, Lerners LLP, Mark Freiman, Rebecca Shoom, Jacques Feldman and Bernard Heitner, Defendants

BEFORE: M.T. Doi J.

COUNSEL: Luisa J. Ritacca and Olivia Eng, for the Moving Defendants

Michael B. Lesage, for the Plaintiffs

REASONS FOR DECISION

M.T. Doi J.

DATE: April 16, 2024