

CITATION: RatesDotCa Group Ltd. v Trader Corporation, 2024 ONSC 4697

COURT FILE NO.: CV-20-00646962

MOTION HEARD: 20240812

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RatesDotCa Group Ltd. (formerly, Kanetix Ltd.), Plaintiff

AND:

Trader Corporation, Defendant

BEFORE: Associate Justice L. La Horey

COUNSEL: Maanit Zemel, Counsel for the Moving Party Plaintiff

Sarah Stothart, Counsel for the Responding Party Defendant

HEARD: August 12, 2024 by videoconference

REASONS FOR DECISION

- [1] The plaintiff RatesDotCa Group Ltd. (formerly, Kanetix Ltd.) brings this motion seeking leave to further amend its statement of claim to: a) increase the general damages claimed for breach of contract; b) make a claim for punitive or exemplary damages; and, c) allege that the defendant breached its duty of good faith and/or honest performance in contractual dealings. The defendant Trader Corporation does not oppose the amendment to increase the general damages claimed but opposes the balance of the proposed amendments. The parties agree that if I grant leave to plead breach of duty of good faith and/or honest performance in contractual dealings then it follows that I should also grant leave to plead punitive damages and that the reverse also applies.
- [2] For the reasons that follow, the plaintiff's motion to amend is granted only to permit the plaintiff increase the amount claimed for general damages. The balance of the plaintiff's motion is dismissed.

BACKGROUND

- [3] The statement of claim was issued on September 9, 2020. On consent, the claim was amended on October 3, 2022, to reflect the plaintiff's name change.
- [4] The plaintiff operates a website, rates.ca, that enables users to search for and purchase products offered by insurers. The defendant operates www.autotrader.ca which provides a search engine for buying and selling vehicles in Canada.

- [5] On March 5, 2019, the parties entered into a contract called the Traffic Generation Agreement (the “Agreement”) under which users of the defendant’s website would be directed to the plaintiff’s website allowing them to search for and obtain insurance-related products. This was done through a “Tool” created by the plaintiff included on the Autotrader website which permitted users of the defendant’s website to connect with the plaintiff’s website.
- [6] The initial term of the Agreement was for the period from March 5, 2019 to March 5, 2021, subject to renewal. In the statement of claim, the plaintiff alleges that the defendant breached the Agreement when the defendant unilaterally removed the “Tool” from the Autotrader website on February 7, 2020, prior to the expiry of the two-year term.
- [7] In its statement of defence, the defendant states that in January 2020, it advised the plaintiff that the Agreement was being terminated due to the plaintiff’s material breach of the Agreement, and that therefore, it would be discontinuing the use of the Tool.
- [8] Affidavits of documents were exchanged in or about November 2022. Examinations for discovery took place in March and May 2023. The action has not been set down for trial.
- [9] The plaintiff seeks to add a number of paragraphs to the statement of claim under a new heading “Breach of the Duty of Honest Performance”. The proposed amendments allege that the defendant decided to replace the Tool with links to third-party insurers and terminate the Agreement without informing the plaintiff. The plaintiff alleges that the defendant deliberately misrepresented to the plaintiff that it was terminating the agreement because of breaches by the plaintiff, at a time when the defendant knew the plaintiff was not in breach of the Agreement. The plaintiff also seeks to add a claim for punitive and/or exemplary damages for the defendant’s breach of its duties of good faith and/ or honest performance in contractual dealings.
- [10] The plaintiff takes the position that the proposed amendments must be granted, as the proposed amendments do not plead a new cause of action.
- [11] Alternatively, it argues that the material facts necessary to plead the breach of duty of good faith and honest performance were first discovered through the discovery process and that the limitation period has not expired. The plaintiff contends that the issue of discoverability ought to be left to the trial judge and that if the amendments are granted, the defendant should be given leave to plead a limitation defence.
- [12] The defendant opposes the amendments. It submits that the allegations regarding breach of the duty of good faith and honest performance do not fall within the factual matrix of the original claim and constitute a new cause of action premised on new acts that give rise to a new claim for punitive and exemplary damages. As such, these claims are statute-barred by the *Limitations Act, 2002*.¹

¹ S.O. 2002, c. 24, Sched. B

[13] The defendant argues that there is no discoverability argument that can go to trial, as the plaintiff has not put forward any evidence about when it discovered this new claim.

LAW AND ANALYSIS

Test for the Amendment of Pleadings

[14] Rule 26.01 of the *Rules of Civil Procedure* provides:

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[15] In *Klassen v Beausoleil*² the Court of Appeal set out the applicable principles on motions to amend a pleading as follows:

25 The rule is framed in mandatory terms: the court must allow the amendment, unless the responding party would suffer non-compensable prejudice, the proposed pleading is scandalous, frivolous or vexatious, or the proposed pleading fails to disclose a reasonable cause of action: *158844 Ontario Ltd v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25; *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2009 ONCA 517, 264 O.A.C. 220, at paras. 15-16.

26 The expiry of a limitation period is one form of non-compensable prejudice. A party cannot circumvent the operation of a limitation period by amending their pleadings to add additional claims after the expiry of the relevant limitation period: *Frohlick v. Pinkerton Canada Ltd*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 24; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, 409 D.L.R. (4th) 382, at paras. 21-23; *United Food and Commercial Workers Canada, Local 175 Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671, at paras. 64; *Davis v. East Side Mario's Barrie*, 2018 ONCA 410, at paras. 31-32. In this regard, the "addition of new statute-barred claims by way of an amendment is conceptually no different than issuing a new and separate Statement of Claim that advances a statute-barred claim" (emphasis added): *Quality Meat Packers*, at para. 64; citing *Frohlick*, at para. 24.

27 An amendment will be statute-barred if it seeks to assert a "new cause of action" after the expiry of the applicable limitation period: *North Elgin*, at paras. 19-23, 33; *Quality Meat Packers*, at para. 65. In this regard, the case law discloses a "factually oriented" approach to the concept of a "cause of action" -- namely, "a factual situation the existence of which entitles one person to obtain from the court a

² 2019 ONCA 407 at para 25 – 33; See also *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.* 2017 ONCA 42 at para 25

remedy against another person": *North Elgin*, at para. 19; *Quality Meat Packers*, at para. 65.

28 An amendment does not assert a new cause of action -- and therefore is not impermissibly statute-barred -- if the "original pleading ... contains all the facts necessary to support the amendments ... [such that] the amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded": *Dee Ferraro*, at paras. 4, 13-14; *North Elgin Centre Inc.*, at paras. 20-21; *East Side Mario's Barrie*, at paras. 31-32; *Quality Meat Packers*, at para. 65. Put somewhat differently, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded: *North Elgin*, at para. 23.

29 The relevant principle is summarized in Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3rd ed. (Toronto: LexisNexis, 2017), at p. 186:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon [which] the original right of action is based.

30 In the course of this exercise, it is important to bear in mind the general principle that, on this type of pleadings motion, it is necessary to read the original Statement of Claim generously and with some allowance for drafting deficiencies: *Farmers Oil and Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390 (Div. Ct.), at para. 23.

31 Finally, the court may refuse an amendment where it would cause non-compensable prejudice. The prejudice must flow from the amendment and not some other source: *Iroquois Falls*, at para. 20. At some point the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party is presumed. In this event, the onus to rebut the presumed prejudice lies with the moving party: *State Farm*, at para. 25.

32 Alternatively, the responding party may resist the amendment by proving actual prejudice -- i.e. by leading evidence that the responding party has lost an opportunity in the litigation that cannot be compensated by an adjournment or an award of costs as a consequence of the amendment. It is incumbent on the responding party to provide specific details of the alleged prejudice: *State Farm*, at para. 25.

33 Irrespective of the form of prejudice alleged, there must be a causal connection between the non-compensable prejudice and the amendment. The prejudice must flow from the amendment and not from some other source: *State Farm*, at para. 2.

Whether the proposed amendments plead a new cause of action

[16] Courts have often wrestled with the question of whether an amendment asserts a “new cause of action” after the expiry of the applicable limitation period. Justice Nordheimer (sitting in Divisional Court) considered the issue at length in *Farmers Oil and Gas Inc. v Ontario (Ministry of Natural Resources)*.³ In that case, after a canvassing of the authorities he held as follows:⁴

As may be obvious from the above, the distinction between the authorities relied upon by the appellant, and those relied upon by the respondent, turns on whether the proposed amendments do, or do not, arise out of the same facts, or the factual matrix, that was pleaded in the original statement of claim. If they do, then the amendments should be permitted. If they do not, and the limitations period has expired, then the amendments should be refused.

[17] And further:⁵

In the end result, the requirement to read a pleading generously, and the concomitant requirement to allow amendments unless they will inflict non-compensable prejudice, means that the presumption is that any amendment, that can reasonably be seen as falling within the four corners of the existing claim, ought to be permitted. In that regard, I agree with the sentiment expressed by Master Short in *Brand Name Marketing Inc. v. Rogers Communications Inc.*, [2010] O.J. No. 5430, 2010 ONSC 2892 (S.C.J.), at para. 84:

I believe that equity dictates that if a defendant knows that the "finger of litigation" is pointing in its direction, and an action is commenced on a timely basis based on specific actions, this court ought to take appropriate steps to ensure that the true *lis* between the parties is addressed, rather than permitting one party to perhaps escape its possible liability by relying upon a technical *Limitations Act* defence.

[18] The plaintiff argues that the amendments are not a new cause of action, but rather expand on the pleaded allegation that the defendant breached the contract by removal of the Tool before the end of the term and arise out of the same factual matrix as pleaded in the original statement of claim. It is the plaintiff’s position that the proposed amendments expand on these allegations by pleading that the defendant also breached the implied contractual duty of good faith and honest performance.

[19] I do not agree. In my view, the amendments plead a new cause of action. The amendments rely on material facts not pleaded in the original claim including that the defendant solicited business from third-party insurers intending to replace the Tool, that it failed to inform the

³ 2016 ONSC 6359 (Div Ct), leave to appeal to ONCA refused, February 24, 2017 (M47111).

⁴ *Farmers* at para 22

⁵ *Farmers* at para 31

plaintiff of its intentions and that it falsely and dishonestly misrepresented to the plaintiff that it had decided to terminate the Agreement on the basis of the plaintiff's alleged breaches of contract, despite knowing that the plaintiff was not in breach.

- [20] The plaintiff argues that the amendments do not alter the breach of contract alleged, the removal of the "Tool"; rather the amendments simply add an allegation that the manner of the breach was dishonest and that this not a new breach of contract. I do not agree. The alleged breach of duty of good faith and honest performance is a separate allegation of breach of contract. The new allegation that the termination of the contract was dishonest is different from an allegation that the defendant had no basis to terminate the contract before the expiration of the two-year term. The original statement of claim included no allegations of dishonesty or misrepresentation.
- [21] This case is analogous *American Axle & Manufacturing Inc. v Durable Release Coaters Ltd.*,⁶ where Justice Newbould considered a proposed amended claim for damages arising from an alleged breach of contract, and in refusing the amendment, held:⁷

50 While it is the same contract as previously pleaded that is claimed in the amendments to have been breached, the contractual provisions and breaches relied on in the amendment are different from the previous pleading and the breaches and resulting damages are different from those previously pleaded. They constitute new causes of action.

- [22] In the case at bar, the plaintiff is seeking to plead a new breach of contract arising out of the same contract relying on new facts not previously pleaded.

Whether the proposed amendments are barred by the Limitations Act

- [23] The parties agree that if I find that the proposed amendments plead a new cause of action, this new cause of action is out of time under the *Limitations Act, 2002*, subject to discoverability.
- [24] Subsection 5(2) of the *Limitations Act, 2002* provides that a person is presumed to have known of the claim on the date that the act or omission on which the claim is based took place, unless the contrary is proved.
- [25] In order to rebut the statutory presumption, the plaintiff must provide some evidence about discoverability in order for the amendment to be allowed with leave for the defendant to plead a limitation period.⁸
- [26] In its factum and oral submissions, the plaintiff argues that the earliest that the plaintiff could have discovered the material facts of the defendant's breach of the duty of good faith

⁶ 2010 ONSC 3368

⁷ *American Axle* at para 50

⁸ *Skrobacky v Frymer*, 2014 ONSC 4544 at para 14

was when the defendant produced certain internal correspondence in its sworn affidavit of documents and in May 2023, during the examination for discovery of the defendant's representative.

[27] The problem with this argument is that there is no evidentiary basis for it. The plaintiff tendered the affidavit of the plaintiff's Chief Executive Officer, Igal Mayer. Mr. Mayer attaches to his affidavit some of the defendant's discovery productions and excerpts from the discovery transcript of the defendant's representative. Yet, nowhere in his affidavit does he say when the plaintiff discovered the material facts underlying the proposed amendments regarding the breach of the duty of good faith and honest contractual performance. Nowhere in his affidavit does he say that the plaintiff did not discover the material facts until review of the defendant's discovery evidence. The affidavit is silent on the issue.

[28] In paragraph 17 of his affidavit, Mr. Mayer says:

In its Affidavit of Documents, Trader produced internal email correspondence that suggested that, sometime between August 2019 and December 2019, Trader had decided to remove the Tool and replace it with a link to a third-party insurer. Trader did not inform Rates of this decision. Attached hereto and marked as collectively as Exhibit "G" are copies of some of this email correspondence.

[29] Ms. Zemel contends that the statement in paragraph 17 of Mr. Mayer's affidavit that "Trader did not inform Rates [the plaintiff] of this decision." is sufficient to raise the discoverability issue for the purposes of this motion. It is not. This statement does not speak to when the plaintiff knew or should have known about the defendant's motives. It would not be appropriate for me to speculate or make an assumption about what the plaintiff knew or when it knew it.

[30] Although I agree with the plaintiff that a disputed issue about discoverability should not be determined at the pleadings stage and should be left to the determination of the trial judge on a full evidentiary record,⁹ there has to be a dispute. In the absence of some evidence from the plaintiff in this case, there is no dispute.

[31] The plaintiff also submits it was not in a position to plead breach of the duty of good faith and honest performance until receipt of the discovery evidence, because of the rule of pleading that allegations of dishonesty and bad faith must be plead with particularity. However this argument conflates pleading of material facts with pleading of evidence.

[32] As the expiry of the limitation period is non-compensable prejudice, the amendments cannot be permitted.

⁹ *1917916 Ontario Ltd. (c.o.b. Save On Contracting) v Tarion Warranty Corp.*, 2022 ONSC 5034 at para 51; *Frohlick v Pinkerton Canada Ltd.*, 2008 ONCA 3 at para 32.

Costs

[33] The parties have agreed that the successful party is entitled to partial indemnity costs of the motion in the sum of \$14,000 (all-inclusive). The parties did not agree on whether the defendant would be entitled to costs of amending its defence or further discovery, if the plaintiff was successful. As the plaintiff was not successful, I do not need to deal with this issue.¹⁰

DISPOSITION

[34] The plaintiff's motion to amend the amended statement of claim to increase the amount claimed for damages for breach of contract to \$1,500,000 is granted as agreed by the parties. The plaintiff's motion in respect of the balance of the requested amendments is dismissed.

[35] The plaintiff shall pay the defendant's partial indemnity costs in the sum of \$14,000 (all-inclusive) within 30 days.

L. La Horey, A.J.

Date: August 23, 2024

¹⁰ I have assumed that since the only amendment that is being granted is the increase to the amount of general damages, the defendant's request for compensation for additional costs is not applicable. If my assumption is not correct, the parties may contact my assistant trial coordinator to schedule a case conference to determine a mechanism for resolving the issue.