COURT OF APPEAL FOR ONTARIO

CITATION: Total Meter Services Inc. v. GVM Integration, 2025 ONCA 321
DATE: 20250429
DOCKET: COA-24-CV-0273

Miller, Trotter and Copeland JJ.A.

BETWEEN

Total Meter Services Inc.

Plaintiff (Respondent)

and

GVM Integration*, Guy Roberge* and Bryce McKiernon

Defendants (Appellants*)

Anne Tardif and James Plotkin, for the appellants

Blair Bowen, for the respondent

Heard: March 6, 2025

On appeal from the judgment of Justice Jane E. Ferguson of the Superior Court of Justice, dated February 13, 2024.

Copeland J.A.:

[1] The appellant, Guy Roberge, worked for the respondent, Total Meter Services Inc. ("TMS"), as a software developer and manager. He left the respondent's employ on November 30, 2012, but continued to work for the respondent as an independent contractor because the respondent was not immediately able to replace him. As an independent contractor, Mr. Roberge

continued to have access to the respondent's confidential information, including software, customers, distributors, and sales. Mr. Roberge ceased working for the respondent as an independent contractor in May 2013.

[2] The nub of the allegations in the respondent's claim was that Mr. Roberge and the corporate appellant, GVM Integration, a company controlled by Mr. Roberge, copied the respondent's proprietary software to create software products that competed directly with products that he had developed for the respondent, and also used the respondent's confidential information to solicit the respondent's distributors and clients.

[3] The trial judge found the appellants liable for breach of fiduciary duty and breach of confidence. She found that Mr. Roberge was a key employee of the respondent, who owed it fiduciary duties. She found that Mr. Roberge breached his fiduciary duties by secretly taking business opportunities that would otherwise have been pursued by the respondent. He copied the hard drive from his work laptop at TMS onto his personal laptop. He breached his duty of confidence by using the respondent's confidential information, including source code for its software products, to create competing products. He also wrongfully exploited his confidential knowledge of areas in which the respondent's business was most vulnerable to "springboard" his start-up company, GVM, into direct competition with the respondent, his former employer. The trial judge awarded $750,000 in damages, based on disgorgement of profits.

[4] The appellants appeal from the judgment. They raise two grounds of appeal:

1. The trial judge erred in drawing an adverse inference to conclude that Mr. Roberge wrote the GVM software using the TMS source code; and
2. The trial judge erred in failing to address the appellants' defence that the TCS Opportunities claim was statute-barred, pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, and in failing to find that the TCS Opportunities claim was statute-barred.

[5] For the reasons that follow, I would allow the appeal in part. I see no error in the trial judge's drawing of the adverse inference. However, the trial judge erred in failing to consider the appellants' *Limitations Act* defence to the TCS Opportunities claim. Because the *Limitations Act* defence is based on the pleadings and reviewable on the correctness standard, it is appropriate for this court to decide the issue and a new trial is not required. The TCS Opportunities claim was a new cause of action and was added to the claim outside the limitation period. I would reduce the damages awarded to remove the portion of the damages attributable to that claim.

Analysis

(1) The trial judge did not err in drawing an adverse inference in reaching the conclusion that Mr. Roberge wrote the GVM software using the TMS source code

[6] The appellants' argument that the trial judge erred in drawing an adverse inference in assessing Mr. Roberge's credibility has two branches. First, the appellants argue that there was no evidentiary basis for the trial judge to draw an adverse inference and the trial judge erred by filling an evidentiary gap in the respondent's case through the adverse inference. Second, the appellants argue that it was procedurally unfair for the trial judge to draw an adverse inference. I would reject both arguments.

[7] In her assessment of the credibility of Mr. Roberge's evidence, the trial judge drew an adverse inference against Mr. Roberge on the basis that he failed to comply with his obligation under the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, to produce relevant documents during discovery. In particular, she found that Mr. Roberge produced GVM source code that he knew or ought to have known could not be compared in a meaningful way to the TMS6000 source code. The source code for the GVM software that the appellants produced during discovery was almost all in the C# (pronounced "C Sharp") programming language. The source code for the TMS software at issue was written in Visual Basic. The trial

judge accepted the evidence of the respondent's expert that the fact that the GVM source code produced during discovery was almost all in a programming language other than Visual Basic meant that the source codes could not be compared in a meaningful way to assess whether the GVM software prepared by the appellants was written using the TMS source code.

[8] The appellants argue that the trial judge erred in drawing the adverse inference based on nondisclosure of the complete GVM source code in Visual Basic because she based the inference on the fact that the source code produced by the appellants was mostly in C# and had a very small number of files written in Visual Basic. The appellants argue that the evidence does not support the proposition that the small number of Visual Basic files in the GVM source code produced by the appellants in discovery meant that a significant amount of Visual Basic source code had been withheld. As a result, there was no evidentiary basis to draw an adverse inference.

[9] I do not accept the argument that the trial judge based the adverse inference on the disparity between the number of C# files and the number of Visual Basic files in the GVM source code produced by the appellants. The trial judge referred to the small number of Visual Basic files in the source code produced by the appellants in discussing the impact of the fact that most of the source code produced was in C#. She found that the small number of Visual Basic files produced by the appellants impeded meaningful comparison by the respondent's

expert of the TMS source code and the GVM source code. But the basis for the adverse inference drawn by the trial judge was primarily the evidence of Bryce McKiernon, which the trial judge accepted.

[10] Mr. McKiernon was a longtime employee of the respondent. In August of 2013, the appellants hired Mr. McKiernon to work at GVM. Mr. McKiernon testified that Mr. Roberge wrote the GVM software in the Visual Basic programming language. Mr. Roberge also testified that he wrote the source code for the GVM software in Visual Basic. Mr. McKiernon testified that Mr. Roberge tasked him to convert the source code for GVM's software from Visual Basic to C#. The trial judge found, based on Mr. McKiernon's evidence, that the conversion from Visual Basic to C# was done, in part, to make the source code more flexible, and in part, "to cover Mr. Roberge's tracks." Based on Mr. McKiernon's evidence, the trial judge found that when he converted the GVM source code from Visual Basic to C#, he did not change or modify the original Visual Basic source code. Thus, the trial judge found that the original Visual Basic source code for the GVM software should have been available in the GVM archive for production during discovery. Yet the GVM software source code produced was almost entirely in C#.

[11] This evidence provided an ample basis for the trial judge to draw an adverse inference in assessing Mr. Roberge's credibility for failing to produce the GVM source code in the Visual Basic programming language. As there was an evidentiary basis for the adverse inference (i.e., this is not a "no evidence"

situation), the trial judge's credibility assessment and her decision to draw an adverse inference as part of that assessment are entitled to deference: *1468025 Ontario Limited v. 998614 Ontario Inc.*, 2016 ONCA 504, at paras. 14-15. I see no palpable and overriding error in her decision to draw an adverse inference.

[12] Nor was there any procedural unfairness in the trial judge drawing an adverse inference. During the discovery process, the respondent sought discovery of the source code for the GVM software at issue. In October 2020, more than two-and-a-half years prior to trial, counsel for the respondent emailed counsel for the appellants alleging that the source code for the GVM software produced by the appellants in discovery was incomplete and that it appeared that some of the source code was withheld or destroyed. This assertion was based primarily on the discovery evidence of both Mr. Roberge and Mr. McKiernon that Mr. Roberge wrote the GVM software mostly in Visual Basic and it was later translated by Mr. McKiernon into C#, yet the GVM source code produced by the appellants in discovery was almost all in C#. In a response by email, counsel for the appellants denied this allegation and asserted that the appellants had complied fully with their discovery obligations.

[13] The appellants argue that if the respondent wanted to pursue the issue of the appellants' failure to comply with discovery obligations under the *Rules*, it was required to bring a pre-trial motion seeking a remedy under rule 30.06, such as cross-examination on the appellants' affidavit of documents, a further and better

affidavit of documents, or inspection of documents. The appellants argue that, not having brought such a motion, the respondent was taken to have accepted counsel for the appellants' representation that complete production of the GVM source code had been made.

[14] I disagree. Although a pre-trial motion under rule 30.06 was an option available to the respondent, its choice not to pursue such a motion did not preclude the respondent from seeking an adverse inference at trial. There was no procedural unfairness to the appellants from the respondent arguing at trial that an adverse inference should be drawn against the appellants on the basis of incomplete disclosure of the GMS source code and the fact that it was disclosed in a language other than Visual Basic.

[15] The appellants were on notice about the issue prior to the trial from the time of counsel's pre-trial correspondence in October 2020. The respondent properly continued to put the appellants on notice of the issue during the trial. Counsel for the respondent cross-examined Mr. Roberge on this issue. No objection was made by counsel for the appellants regarding this cross-examination. Counsel for the respondent also cross-examined Mr. McKiernon on the reasons that the GVM source code had been translated from Visual Basic to C#. The respondent argued in its closing submissions that the trial judge should draw an adverse inference against Mr. Roberge on the basis of failure to produce the complete Visual Basic source code for the GVM software.

[16] In light of the issue of incomplete disclosure of the GVM source code being raised pre-trial and during the trial, the appellants' claim of procedural unfairness has no merit.

(2) The trial judge erred in failing to address the appellants' limitations defence to the TCS Opportunities claim and in failing to find that the TCS Opportunities claim was statute-barred

[17] The respondent launched its claim in 2014. The claim pleaded breach of fiduciary duty, breach of confidence, and breach of contract. The facts pleaded alleged that on November 28, 2012, two days before the end of his employment for the respondent, Mr. Roberge copied software and other confidential information and removed it from the respondent's premises. The claim further alleged that after leaving the employ of the respondent on November 30, 2012, Mr. Roberge used that confidential information to create competing software that incorporated copyrighted aspects of the respondent's software. Thereafter, Mr. Roberge began approaching the respondent's clients at or near the time their service agreements with the respondent came up for renegotiation to perform services for them using/copying the respondent's software.

[18] In September 2020, the respondent amended the claim to allege that Mr. Roberge breached his fiduciary obligations to the respondent by appropriating corporate opportunities of the appellant involving a particular customer of the

respondent named Total Control Systems ("TCS" and the "TCS Opportunities claim"). The TCS Opportunities claim focused on a time period beginning in October 2012, when Mr. Roberge was still employed by the respondent.

[19] The appellants consented to the amendment of the statement of claim, but reserved the right to argue that the TCS Opportunities claim was a new claim and was statute-barred. The appellants amended their statement of defence to plead that the TCS Opportunities claim was statute-barred.

[20] The appellants argued the *Limitations Act* defence at trial.

[21] The reasons for judgment make no mention of the *Limitations Act* defence to the TCS Opportunities claim.

[22] The appellants argue that the trial judge erred by failing to decide the *Limitations Act* defence. They argue that because the *Limitations Act* defence can be decided based on the pleadings, this court should decide the defence and find that the TCS Opportunities claim was statute-barred. Essentially, the appellants argue that although the TCS Opportunities claim is based on the same legal categories as the original claim (breach of fiduciary duty, breach of confidence, and breach of contract), it is a factually distinct cause of action – relying on different factual allegations than the original claim.

[23] The respondent argues that the trial judge considered the *Limitations Act* defence. The respondent argues that the trial judge is presumed to know the law

and her consideration of the *Limitations Act* defence is implicit at the start of her reasons, where she states: “I have reviewed the transcripts and evidence references in the submissions and I find them to be accurate and am not including them in these reasons.” The respondent further argues that the TCS Opportunities claim is not a new cause of action, but merely pleads additional facts as the basis for the original causes of action of breach of fiduciary duty, breach of confidence, and breach of contract.

[24] I do not accept the respondent’s argument that the trial judge implicitly considered the *Limitations Act* defence. Not only did the trial judge fail to make any mention of it in her reasons, but the *Limitations Act* defence to the TCS Opportunities claim is absent from her list of the issues for decision in her reasons.

[25] I agree with the appellants that the trial judge failed to consider and decide the *Limitations Act* defence to the TCS Opportunities claim. The presumption that trial judges know the law and the trial judge’s reference to having reviewed the transcript and evidence references in the submissions cannot fill the gap left by the omission of any reference whatsoever to the *Limitations Act* defence in her reasons.

[26] It is not necessary to determine why the trial judge failed to decide the *Limitations Act* defence, but I note that the reasons for judgment were released nine months after the evidentiary portion of the trial and seven months after the

parties filed written submissions on the trial issues. It may simply have been overlooked, given the passage of time.

[27] The *Limitations Act* defence issue is reviewable on a correctness standard. The question of whether an amendment raises a new cause of action is a question of law: *Polla v. Croatian (Toronto) Credit Union Limited*, 2020 ONCA 818, at para. 31, leave to appeal refused, [2021] S.C.C.A. No. 64. The date of discoverability of the claim is not in dispute between the parties – the TCS Opportunities claim was discovered no later than May 8, 2013. In the circumstances, whether the claim was brought within the limitation period turns on the pleadings and the assessment of whether the TCS Opportunities claim was a distinct cause of action. As a result, it is appropriate for this court to assess the limitations defence and a new trial is not required on this issue.

[28] I agree with the appellants that the TCS Opportunities claim was a new cause of action.

[29] An amendment to a statement of claim will be refused if it seeks to assert a new cause of action after the expiry of the applicable limitation period: *Polla*, at para. 33. In this context, “cause of action” refers to “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”, rather than the legal label attached to a claim (such as “breach of fiduciary duty”): *1100997 Ontario Limited v. North Elgin Centre Inc.*, 2016 ONCA 848, 409

D.L.R. (4th) 382, at para. 19; *Polla*, at para. 33; *Fehr v. Sun Life Assurance Company of Canada*, 2024 ONCA 847, at para. 47. In considering whether an amendment raises a new cause of action, the court must consider whether the original pleading already contains the factual matrix – the acts or omissions said to give rise to liability – to support the claim in the proposed amendment, or whether the proposed amendment seeks to put forward additional facts that are necessary to a new and different claim. In conducting this assessment, the court must read the pleadings generously, in favour of the proposed amendment: *Polla*, at paras. 37-38.

[30] Rule 25.06(8) requires that where "fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred."

[31] The original claim pleaded by the respondent alleged breach of fiduciary duty, breach of confidence, and breach of contract. The facts pleaded alleged that, on November 28, 2012, two days before the end of his employment with the respondent, Mr. Roberge copied software and other confidential information and removed it from the respondent's premises. After leaving the employ of the respondent on November 30, 2012, Mr. Roberge used that confidential information to create competing software which incorporated copyrighted aspects of the respondent's software. Mr. Roberge then began approaching the respondent's

clients at or near the time their service agreements with the respondent came up for renegotiation, to perform services for them using/copying the respondent's software. The original claim referred specifically to software developed and owned by the respondent called TMS6000. There was no mention of the customer TCS or the TCS3000 register in the original claim. Nor did the original claim plead that Mr. Roberge communicated inappropriately with clients of the respondent during his time as an employee of the respondent. Rather, apart from the copying of confidential information two days before Mr. Roberge's resignation as an employee of the respondent, the original claim focused on Mr. Roberge's actions after November 30, 2012, when he resigned as an employee of the respondent.

[32] The TCS Opportunities claim alleged breach of fiduciary duty, breach of confidence, and breach of contract based on facts relating to a specific client of the respondent, TCS, beginning in 2012 when Mr. Roberge was still an employee of the respondent. The TCS Opportunities claim alleged that in early 2012, the President of the respondent, Dennis Swanek, was in discussions with the President of TCS, Dan Murray, regarding an opportunity for the respondent to develop a software called TCSHUB, for a web portal interface which would display information recorded on the TCS3000 register, a piece of hardware developed by TCS that reads fuel quantities. TCS had an existing business relationship with the respondent. In May 2012, Mr. Murray sent a TCS3000 register to Mr. Swanek so the respondent could begin developing the TCSHUB software. Mr. Swanek

forwarded information to Mr. Roberge about the opportunity to develop the TCSHUB the same day.

[33] The amended claim further pleaded that in October 2012, Mr. Roberge secretly contacted Mr. Murray offering to develop TCSHUB himself, to the exclusion of the respondent. He offered to resign from the respondent if he was given the sole opportunity to develop TCSHUB and perform other consulting services for TCS. On October 16, 2012, Mr. Roberge finalized a one-year consulting agreement with TCS and then notified the respondent of his intention to resign as of November 30, 2012. Mr. Roberge and GVM then developed TCSHUB and performed other consulting services for TCS. In addition to focusing on a specific client of the respondent and the time period before Mr. Roberge resigned as an employee of the respondent, the TCS Opportunities claim focused on the development of a specific piece software to be designed to interface with a the TCS3000 register of TCS.

[34] In light of the law establishing that a cause of action is more than just a legal category (such as breach of fiduciary duty) and encompasses the facts pleaded in support of the claim, as well as the requirement in rule 25.06(8) to plead claims of breach of trust with specificity, and reading the pleadings generously in favour of the proposed amendment as required by *Polla*, I would find that the TCS Opportunities claim is a distinct cause of action that was not pleaded in the original claim. The original claim pleaded that Mr. Roberge began approaching the

respondent's clients after he ceased to be its employee and perform services for them using/copying the respondent's software. The TCS Opportunities claim pleaded that while Mr. Roberge was still an employee of the respondent, he secretly worked with a particular client, TCS, to deprive the respondent of a business opportunity to develop a new software product linked to a specific TCS product, the TCS3000 register. The fact that the TCS Opportunities claim is based on the same legal categories as the original claim – breach of fiduciary duty, breach of confidence, and breach of contract – does not lead to the result that it is not a new cause of action. As set out in *North Elgin* and *Polla*, one must look at the specific facts pleaded.

[35] As noted above, it is common ground that the TCS Opportunities claim was discovered no later than May 8, 2013. Because the TCS Opportunities claim was not added until September 2020, more than seven years after it was discovered, it was brought outside the two-year limitation period provided for in s. 4 of the *Limitations Act*.

[36] For these reasons, I agree with the appellant that the TCS Opportunities claim is statute-barred.

[37] The appellants argue that the appropriate remedy for the TCS Opportunities claim being statute-barred is to deduct the amount attributable to the TCS

Opportunities claim from the trial judge's award of damages. I agree that this is the appropriate remedy.

[38] As noted above, the trial judge assessed damages on the basis of disgorgement of the appellants' profit from their tortious conduct. In their factum, the appellants contended that the amount of damages attributable to the TCS Opportunities claim was $305,360. This amount was based on the evidence of the respondent's expert regarding the profit earned by the appellants on the TCS contract. However, in oral submissions, the appellants agreed that because the trial judge did not award the full amount testified to by the respondent's expert, the deduction for the TCS Opportunities claim should be a lesser amount.

[39] The respondent's expert testified that the total amount of damages (i.e., profit earned by the appellants) was $989,942. This was made up of $684,582 in profit that the appellants earned from selling TMS6000-like products and $305,360 in profit the appellants earned from the TCS contract. The trial judge awarded $750,000 in damages for both claims combined. She reasoned that the award should be reduced from the expert's calculations because the expert did not have all the information for the assumptions he relied on in calculating the profit the appellants earned from their tortious conduct. The damages awarded by the trial judge were 75.76 percent of the amounts testified to by the respondent's expert. The trial judge's reasons do not suggest that she applied different rates of reduction to the two claims.

[40] As a result, the appropriate deduction from the damages award for the TCS Opportunities claim being statute-barred is 75.76 percent of $305,360, which is $231,340.74. The award of pre-judgment interest should also be adjusted accordingly.

Disposition

[41] I would allow the appeal in part, and reduce the damages awarded from $750,000, plus prejudgment interest, to $518,659.26, plus prejudgment interest.

[42] I would award costs of the appeal to the appellants in the agreed amount of $20,000, inclusive of disbursements and applicable taxes.

[43] As a result of my conclusion that the TCS Opportunities claim is statute-barred, there should be some adjustment of the trial costs. The parties are encouraged to reach an agreement on the trial costs. If they are unable to do so, they may file written submissions limited to three pages, plus a costs outline. The appellants' submissions shall be filed within 10 days of the release of these reasons. The respondent's submissions shall be filed within 10 days of the filing of the appellants' submission.

Released: April 29, 2025 "B.W.M."

"J. Copeland J.A."
"I agree B.W. Miller J.A."
"I agree. Gary Trotter J.A."