CITATION: RatesDotCa Group Ltd. v. Trader Corporation, 2025 ONSC 2423
COURT FILE NO.: CV-20-00646962-0000
DATE: 20250422

ONTARIO SUPERIOR COURT OF JUSTICE

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

-and-

Trader Corporation, Defendant (Respondent)

BEFORE: Robert Centa J.

COUNSEL: Maanit Zemel, for the plaintiff (appellant)

Sarah Stothart and Emily Groper, for the defendant (respondent)

HEARD: March 31, 2025

ENDORSEMENT

[1] RatesDotCa Group Ltd. (formerly Kanetix Ltd.) appeals from a decision of Associate Justice La Horey denying leave to amend further its amended statement of claim to plead that the defendant, Trader Corporation, breached its duty of good faith and honest performance in contractual dealings.

[2] I find that the associate judge made no errors of law or palpable and overriding errors of fact or mixed fact and law. The appeal is dismissed with costs payable by the plaintiff to the respondent fixed in the amount of $25,000.

1. Procedural history and proposed amendments

[3] The plaintiff issued the statement of claim on September 9, 2020. The defendant delivered a statement of defence dated October 23, 2020. The plaintiff amended the statement of claim to reflect its name change on October 3, 2022. Affidavits of documents were exchanged in November 2022 and examinations for discovery were completed in March and May 2023.

[4] The associate judge well-described the nature of the dispute in paragraphs 3 to 8 of her reasons for decision. I rely on her description as follows.

[5] The plaintiff operates a website, rates.ca, which 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.

[6] On March 5, 2019, the parties entered into a contract called the Traffic Generation 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.

[7] The initial term of the agreement ran 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 its website on February 7, 2020, prior to the expiry of the two-year term.

[8] In its statement of defence, the defendant states that it advised the plaintiff in January 2020 that the defendant was terminating the agreement due to the plaintiff's material breach, and that, therefore, it would be discontinuing the use of the website tool.

[9] On October 22, 2024, the plaintiff delivered a proposed amended amended statement of claim. The plaintiff proposed to add a claim for punitive damages and six new paragraphs to the pleading that were grouped under the heading "Breach of the Duty of Honest Performance." The new paragraphs read as follows:

> (b) $200,000 in punitive or exemplary damages.
>
> …
>
> Breach of the Duty of Honest Performance
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> 27. Further and in the alternative, Trader breached its duty of good faith and/or honest performance in contractual dealings.
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> 28. Between in or around August and December 2019, while Kanetix was performing its obligations under the Agreement, Trader unilaterally decided to remove the Tool from Autotrader and replace it with links to third-party insurers. Consequently, Trader decided to terminate the Agreement before the end of the 2-year Term, in breach of the Agreement.
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> 29. Trader did not inform Kanetix that it had decided to replace the Tool with links to third-party insurers. Instead, in or around January 2020, Trader deliberately and dishonestly misrepresented to Kanetix that it had decided to terminate the Agreement before the end of the Term because of alleged breaches of the Agreement by Kanetix. At all material times, Trader knew or ought to have known that Kanetix had not breached the Agreement.
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> 30. Trader breached its duty of good faith and/or duty of honest performance in contractual dealings by:

> (a) soliciting business from third-party insurers with the intention to replace the Tool, shortly after the commencement of the Term;
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> (b) not informing Kanetix of its intentions to replace the Tool with links to third-party insurers, shortly after the commencement of the Term; and/or falsely and dishonestly misrepresenting to Kanetix that it had decided to terminate the Agreement due to alleged breaches by Kanetix, when it knew or ought to have known that Kanteix had not breached the Agreement.
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> 31. Trader's herein breaches of the duties of good faith and/or honest performance in contractual dealings give rise to expectation damages to Kanetix, as particularized at paragraphs 24, 25, and 26 herein.
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> 32. Further and in the alternative, Trader's herein breaches of the duties of good faith and/or honest performance in contractual dealings give rise to punitive and/or exemplary damages.[1]

[10] The defendant refused to consent to the proposed amendments on the basis that they constituted a new cause of action and were barred by operation of the *Limitations Act, 2002*.[2] The plaintiff then brought a motion for leave to amend its statement of claim.

2. The decision below

[11] Associate Justice La Horey dismissed the plaintiff's motion for leave to amend the claim. After setting out the text of rule 26.01 of the *Rules of Civil Procedure,* the associate judge summarized the applicable legal principles on motions to amend a pleading.[3] For the purposes of this motion, the most important principle is that the court shall allow an amendment to a pleading unless it would cause the responding party non-compensable prejudice, such as where a limitation period has expired.[4]

[12] Associate Justice La Horey concluded that the plaintiff had pleaded a new cause of action because the plaintiff was seeking to plead a new breach of contract arising out of the same contract on new facts that the plaintiff had not previously pleaded.

[13] Associate Justice La Horey noted that the parties agreed that if she found that the proposed amendments pleaded a new cause of action, the new cause of action was out of time, subject to the principles of discoverability. Associate Justice La Horey observed that s. 5(2) of the

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[1] I have deleted the double underlining that appears on the face of the pleading to improve readability.
[2] S.O. 2002, c. 24, Sched. B.
[3] R.R.O. 1990, Reg. 194.
[4] *Klassen v. Beausoleil*, 2019 ONCA 407, 34 C.P.C. (8th) 180, at paras. 25-33.

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. In order to rebut the statutory presumption, a 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.

[14] The associate judge rejected the plaintiff's submission that it could not have discovered the material facts underpinning the breach of the duty of good faith until the defendant delivered its affidavit of documents and after the examinations for discovery in May 2023.

[15] The associate judge concluded that the plaintiff had filed no evidence to create dispute around discoverability, the limitation period had expired, and that the defendant would suffer non-compensable prejudice from the amendment. Associate Justice La Horey dismissed the motion for leave to amend further the statement of claim.[5]

[16] The plaintiff raises two issues on appeal, which it characterizes as follows:

> (1) Did the associate judge err when she held that the claim for breach of the duty of good faith and honest performance is a new cause of action that is subject to the limitation period?
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> (2) Did the associate judge commit an error of law, or a palpable and overriding error of mixed fact and law, when she found that the limitation period had expired?

3. The standard of review

[17] The plaintiff moved for leave to amend its pleading pursuant to rule 26.01, which sets out the general power of the court to amend pleadings:

> 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.

[18] As the Court of Appeal has explained, an amendment that proposes to add a new cause of action outside the applicable limitation period will typically be denied on the basis of non-compensable prejudice.[6] An amendment will be refused when it seeks to advance, after the expiry of a limitation period, a fundamentally different claim based on facts that were not pleaded in the original statement of claim.[7]

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[5] 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 was granted on consent and is not the subject of this appeal.
[6] *Fehr v. Sun Life Assurance Company of Canada*, 2024 ONCA 847, 44 C.C.L.I. (6th) 171, leave to appeal to S.C.C. requested, 41642, at para. 47.
[7] *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, at para. 23.

[19] The associate judge's finding that the proposed amendments would add a new claim to the proceeding is a legal determination subject to review for correctness on appeal. The associate judge's determination that the new claim would be statute-barred due to the *Limitations Act, 2002*, and therefore gives rise to actual prejudice to the defendant, is a finding of mixed fact and law, subject to review for palpable and overriding error, except if there is an extricable error in principle, which will be reviewed for correctness.[8]

4. The proposed amendments raised a new claim

[20] The plaintiff submits that the associate judge erred when she determined that the proposed amendments raised a new claim. I disagree. The proposed amendments plead many new facts regarding dishonesty and bad faith conduct that appeared nowhere in the earlier versions of the statement of claim. This is not a case where the plaintiff seeks only to characterize the already pleaded facts as also making out an additional cause of action. The facts pleaded in the original statement of claim did not put the defendant's good faith in issue.[9]

[21] I accept the plaintiff's submission that breach of the duty of good faith and honest performance is a subset of breach of contract,[10] and that an allegation of breach of contract can carry with it an allegation of breach of the duty of good faith.[11] However, the cases cited by the plaintiff are only making the uncontroversial point that there is no free-standing common law or statutory duty of good faith and fair dealing independent of a contract.[12] The mere fact that the plaintiff pleaded the existence of the contract in the first claim does not mean that a new pleading of the breach of the duty of good faith and honest performance is not raising a new claim.[13]

[22] The associate judge clearly explained her reasons for rejecting the plaintiff's argument that it was not asserting a new cause of action:

> 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 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

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[8] *Di Filippo v. Bank of Nova Scotia*, 2024 ONCA 33, at paras. 21-22, *Fehr*, at para. 49.
[9] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 19.
[10] *Westeinde (FNP) Inc. v. RE/MAX Core Realty Inc.*, 2019 ONSC 133, at paras. 17, 19.
[11] *1523428 Ontario Inc. / JB&M Walker Ltd. v TDL Group*, 2018 ONSC 5886, at para. 43.
[12] *RH20 North America et al v. Bergmann et al*, 2023 ONSC 2378, at para. 32; *6646107 Canada v. The TDL*, 2019 ONSC 2240, 95 B.L.R. (5th) 164, at para. 8.
[13] *American Axle & Manufacturing Inc. v. Durable Release Coaters Limited et al*., 2010 ONSC 3368, at para. 50.

> breaches of contract, despite knowing that the plaintiff was not in breach.
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> 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.

[23] I agree with the associate judge. An amendment to a pleading may be made past the applicable limitations period when the amendment does not plead a new cause of action or a new or alternative remedy.[14] Here, the proposed amendments did both.

[24] First, the proposed amended claim pleads a new cause of action. A cause of action is a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.[15] The Court of Appeal for Ontario recently relied on the following explanation:

> 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.[16]

[25] The plaintiff has not proposed an alternative claim for relief out of the same facts previously pleaded. The proposed amended claim relies on new facts that did not appear in the original statement of claim. Material facts, in the context of a statement of claim, are those necessary to establish the claim they are advanced to support.[17] In order for the plaintiff's claim for breach of the duty of good faith to succeed, it needs to prove the facts set in proposed paragraphs 28 to 30. The plaintiff is not asking the court to draw a different legal conclusion from the original set of facts.

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[14] *SpaceBridge Inc. v. Baylin Technologies Inc*., 2024 ONCA 871, at para. 28;
[15] *Letang v. Cooper*, [1965] 1 Q.B. 232 (C.A.), at pp. 242-43, cited in *SpaceBridge*, at para. 31.
[16] Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 5th ed. (Toronto: LexisNexis Canada, 2024), at para. 2.438, cited in *SpaceBridge*, at para. 31.
[17] *SpaceBridge*, at para. 34.

[26] I agree with Associate Justice La Horey that the plaintiff has asserted a new cause of action in the proposed claim.

[27] Second, the proposed amended claim pleaded a new or alternative remedy: $200,000 in punitive damages. Counsel for the plaintiff conceded that the current amended statement of claim did not plead material facts to support a claim for punitive damages. The plaintiff requires the proposed new material facts to make out a claim for a new remedy, the punitive damages.

[28] The proposed amendments did not take the existing facts and arrange them in a new path to the same remedy that was originally sought.[18] They alleged new material facts in support of a new cause of action and sought a new form of relief.

[29] I do not accept the plaintiff's submission that the associate judge erred by not concluding that the amendments to the claim simply provided particulars of the claim. The original pleading did not contain all of the facts necessary to support the amendments. The amendments do not simply clarify the relief sought based on the same facts originally pleaded.[19] The plaintiff does not merely plead evidence or further details of facts already pleaded, or an alternative theory of liability.[20] The necessary facts to support the claim for breach of the duty of good faith appear only in the proposed amendments.

[30] The plaintiff submits that the associate judge erred by relying on *American Axle & Manufacturing Inc. v. Durable Release Coaters Limited et al.*, 2010 ONSC 3368. I disagree. Justice Newbould's analysis is readily applicable to this case and the aspects of the case pointed to by the plaintiff do not render it less so. The plaintiff has pleaded new breaches and sought new damages based on new facts. As *American Axle* makes clear, the plaintiff seeks leave to pursue a new cause of action.

[31] I find that the associate judge correctly concluded that the proposed pleading raised a new cause of action.

5. The claim for breach of the duty of good faith is statute-barred

[32] The next issue concerns the associate judge's determination that the claim for breach of the duty of good faith was statute-barred because the claim was discoverable more than two years before the plaintiff brought its motion to amend the statement of claim.

[33] The plaintiff submits that the trial judge erred in determining that there was no issue of discoverability that should be left for trial. I disagree.

[34] I find that the associate judge correctly stated the law relating to the *Limitations Act, 2002*, and the principles of discoverability. It seems to me that the plaintiff is complaining about

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[18] *SpaceBridge*, at para. 35.
[19] *Klassen*, at paras. 28- 30.
[20] *Di Filippo*, at para. 48

certain "evidentiary findings" made by the associate judge and how she applied that law to the facts of this case. Those findings are to be reviewed for palpable and overriding error. The associate judge's findings were open to her on the record before her. There is no basis for me to interfere.

[35] Under ss. 4 and 5 of the *Limitations Act*, a plaintiff must normally sue within two years of the discovery of the claim.[21] Section 5 of the *Limitations Act* explains when a claim is discovered. Speaking broadly, a claim is discovered when the plaintiff has actual or constructive knowledge of the material facts upon which the plaintiff can draw a plausible inference of the defendant's liability. The *Limitations Act* also creates a statutory presumption that a plaintiff knew the material facts on the day of the act or omission on which the claim is based, unless the plaintiff rebuts that presumption. The statute provides as follows:

> 5(1) A claim is discovered on the earlier of,
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> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
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> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[36] Case-specific evidence is required to demonstrate why a person with a claim did not learn of the matters listed in s. 5(1)(a) of the *Limitations Act* on the day of the act or omission giving rise to the claim.[22] Absent direct evidence from a plaintiff, it is extremely difficult

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[21] *Beniuk v. Leamington (Municipality)*, 2020 ONCA 238, 150 O.R. (3d) 129, at para. 56.
[22] *Land v. Dryden (Police Services Board)*, 2023 ONCA 207, 479 D.L.R. (4th) 683, at para. 28.

to rebut the statutory presumption that the plaintiff discovered the claim on the day the act or omission on which the claim is based took place.[23]

[37] In this case, the plaintiff was moving for leave to amend further its claim and the onus was on the plaintiff to prove that the proposed amendment was viable, including by leading evidence on the issue of discoverability.[24] Although the plaintiff may have taken the position in its written and oral argument that it did not discover the new claim until 2023, that is not the same thing as providing evidence to prove that fact. As the court explained in *Settecase*:

> As is often the case [in] motions, success or failure turns on the evidence that has or has not been filed. In this case, there is an obvious limitations defence to the proposed pleading.
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> While a proposed amendment is deemed to be capable of being proven for the purpose of the motion, that does not extend to facts required to support discoverability as a way of circumventing a limitations defence. There must be actual sworn evidence (or evidence that has been affirmed) asserted in affidavit form regarding the facts relied on to support discoverability. Simply asserting it in a pleading or a factum is not adequate.
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> In that there is no evidence to refute the expiry of the applicable limitation period, this claim does not appear to be tenable at law. On that ground alone this claim should fail. In motions of this kind, a moving party must put their evidence with respect to discoverability before the motions court. He cannot simply assume the matter will be left for trial. In this case, Agostino has given the court no reason to defer the issue by simply ignoring it.[25]

[38] Associate Justice La Horey reviewed the record filed by the plaintiff and concluded that the plaintiff had not rebutted the statutory presumption in s. 5(2) of the *Limitations Act, 2002*. She held:

> 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

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[23] *Rowe v. 1225064 Ontario Limited*, 2022 ONSC 5036, at para. 21; *Brant Securities Limited v. Goss*, 2024 ONSC 915, 92 C.C.E.L. (4th) 328, at para. 84, aff'd 2025 ONCA 8; *M.V. v. Zaitzeff*, 2025 ONSC 905, at para. 43.
[24] *Arcari v. Dawson*, 2016 ONCA 715, 134 O.R. (3d) 36, at paras. 9-10; *Khan v Chemtura*, 2016 ONSC 6812, at paras. 34-35.
[25] *Agostino Settecase v. Agata Settecase*, 2014 ONSC 366, at paras. 101-103.

> 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.
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> In paragraph 17 of his affidavit, Mr. Mayer says:
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> > 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.
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> 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.

[39] The associate judge's conclusion is rooted firmly in the record before her. It is entitled to deference and there is no basis for me to interfere with it. There is no reason in law or policy to require the issue of discoverability to be determined only at trial, as suggested by the plaintiff.

[40] The plaintiff submits that the associate judge erred by rejecting its submission that the requirement to plead with particularity meant that it could not have asserted a breach of the contractual duty of good faith and honest performance any earlier. This submission has no merit. The associate judge addressed this argument as follows:

> 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.

[41] A pleading of a breach of the contractual duty of good faith and honest performance is not subject to a heightened standard of pleading.[26] I see no error in the conclusion reached by

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[26] *Shanbaum v. Surface Real Estate Developments Inc*., 2022 ONSC 1070, at paras. 10- 16.

the associate judge. The plaintiff is not required to plead how it will prove its case, but it must plead the material facts that support the causes of action asserted.

[42] The plaintiff asserts that the associate judge made a number of "evidentiary errors." I disagree. All of the findings of the associate judge were available to her on the record. Moreover, none of the errors would rise to the level of a palpable or overriding error.

[43] The plaintiff also submits that the associate judge erred by not considering the doctrine of fraudulent concealment. I accept that in cases where a defendant's concealment of facts results in a plaintiff's lack of actual or objective knowledge of the elements set out in s. 5(1)(a) of the *Limitations Act*, then that plaintiff does not discover his or her claim until the date the concealed facts are revealed to or known by the plaintiff, at which point time begins to run.[27] In this way, the analysis required by s. 5(1) of the *Limitations Act* captures the effect of a defendant's concealment of facts material to the discovery of a claim. However, I would not give effect to this argument.

[44] The plaintiff did not plead the doctrine of fraudulent concealment in its proposed amendments to the pleading, and it did not raise this issue in the factum or the book of authorities it filed on motion before the associate judge. I would not allow the plaintiff to raise this argument for what is essentially the first time on appeal. In any event, it would also fail for the same reason as the balance of the plaintiff's arguments regarding discoverability: the plaintiff provided no evidentiary foundation to support its submissions.

6. Conclusion and costs

[45] For the reasons set out above, the appeal is dismissed.

[46] Both parties filed similar cost outlines. The plaintiff sought $22,506.25 and the defendant sought $28,032.59, each on a partial indemnity scale. In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 26, 37.

[47] In my view, it is fair and reasonable to fix the costs of the motion at $25,000, inclusive of disbursements and Harmonized Sales Tax, and order the plaintiff to pay that amount to the defendant within 30 days of the date of this order.

Robert Centa J.

[27] *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd*., 2019 ONCA 47, 144 O.R. (3d) 385, at para 72; *Essex Condominium Corporation No. 125 v. Heritage Park Villas Inc*., 2024 ONCA 889, 174 O.R. (3d) 620, at para. 46.

Date: April 22, 2025