

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

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Guestlogix Inc. v. Hayter

Guestlogix Inc. (Plaintiff) and Daniel Hayter, Larissa Hoffman, Bristol Office Machines Ltd. and Onboard Retail Solutions Ltd. (Defendants)

Ontario Superior Court of Justice

D.M. Brown J.

Heard: October 1, 2010

Judgment: October 12, 2010

Docket: 10-CV-400356

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Counsel: J. Callaghan for Plaintiff

D. Hager for Defendants, other than Larissa Hoffman

Subject: Civil Practice and Procedure

Remedies --- Injunctions — Procedure on application — Evidence — Affidavits — Cross-examination on affidavits

Plaintiff and corporate defendants were competitors — Plaintiff brought action, alleging breaches of confidence and misuse by defendants of confidential information — Plaintiff brought motion for interlocutory injunction — Defendants brought motion to compel re-attendance of plaintiff's affiant, P, to answer certain questions refused on his cross-examination — Motion granted — Question relating to certain correspondence between L, which plaintiff had sought to secure as customer, and plaintiff clearly related to issue raised by P, within four corners of his affidavit, concerning his narrative of events — As to question concerning production of attachment to email, email was produced and marked as exhibit on P's cross-examination, and email and any attachments constituted integrated communication — As to questions concerning production of plaintiff's response to L's invitation to tender, calculation sheets or documents used to determine pricing and expected profit for L contract, information related to issues P raised in affidavit — Question concerning production of certain internal email related directly to issue raised by P in affidavit — Questions concerning production of email regarding revised pricing sent to L and calculation sheets used to determine that pricing were proper questions dealing with issues raised in affidavit — Question concerning dollar

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

amount of lost profit from L contract was, given that production of plaintiff's pricing emails and associated calculation sheets was ordered, and given deponent's admission that one could imply resulting profit from those sheets, proper one, relating directly to information ordered produced.

Cases considered by *D.M. Brown J.*:

BASF Canada Inc. v. Max Auto Supply (1986) Inc. [\(1998\), 75 O.T.C. 58, 1998 CarswellOnt 3751](#) (Ont. Master) — considered

Bot Construction (Ontario) Ltd. v. Dumoulin [\(2007\), 2007 CarswellOnt 7636](#) (Ont. S.C.J.) — referred to

Canadian Imperial Bank of Commerce v. Molony [\(1983\), 32 C.P.C. 213, 1983 CarswellOnt 369](#) (Ont. H.C.) — considered

Canadian Workers' Union v. Frankel Structural Steel Ltd. [\(1976\), 12 O.R. \(2d\) 560, 76 C.L.L.C. 14,010, 1976 CarswellOnt 508](#) (Ont. Div. Ct.) — referred to

Ferring Inc. v. Richmond Pharmaceuticals Inc. [\(1996\), 65 C.P.R. \(3d\) 361, 45 C.P.C. \(3d\) 299, 90 O.A.C. 88, 1996 CarswellOnt 606](#) (Ont. Div. Ct.) — referred to

Guestlogix Inc. v. Hayter [\(2010\), 2010 ONSC 3510, 2010 CarswellOnt 4084](#) (Ont. S.C.J.) — referred to

R.O.M. Construction Ltd. v. Heeley [\(1982\), 20 Alta. L.R. \(2d\) 200, 29 C.P.C. 194, 46 A.R. 366, 136 D.L.R. \(3d\) 717, 1982 CarswellAlta 100](#) (Alta. Q.B.) — referred to

Wojick v. Wojick [\(1971\), \[1971\] 2 O.R. 687, 1971 CarswellOnt 660](#) (Ont. H.C.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

MOTION by defendants to compel re-attendance of plaintiff's affiant to answer certain questions refused on his cross-examination.

***D.M. Brown J.*:**

I. Overview

1 The defendants, Daniel Hayter, Bristol Office Machines Ltd., and Onboard Retail Solutions Ltd., moved to

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

compel the re-attendance of the plaintiff's affiant, Mr. Brett Proud, to answer certain questions refused on his cross-examination. The defendants submitted that the questions asked arose from issues raised on the face of Mr. Proud's affidavit and were relevant to the issues on Guestlogix's motion for an interlocutory injunction. Guestlogix objected to the questions, contending that in light of the narrowed scope of the relief it was requesting on its injunction motion, the questions were not relevant.

II. History of this proceeding

2 This action involves a dispute about the treatment of confidential information concerning on-board airline point of sale systems and devices. The plaintiff, Guestlogix Inc., and the corporate defendants, Bristol Office Machines Ltd. and Onboard Retail Solutions Ltd. (collectively "Onboard"), are competitors in the field. The defendant, Daniel Hayter, used to work for Guestlogix, but resigned in May, 2008, and he went to work for Onboard. The defendant, Larissa Hoffman, worked for over two years with Guestlogix, latterly as an important part of the plaintiff's team seeking to secure work from Lufthansa, but she left in early 2010 to work for Onboard as part of its Lufthansa team.

3 There does not seem to be a dispute that Ms. Hoffman left Guestlogix on January 8, 2010, but did not return to Guestlogix her company laptop until January 25. Guestlogix has filed forensic evidence strongly suggesting that Ms. Hoffman downloaded data from her company computer to external storage devices during that period of time. She attempted to erase all data from that computer before returning it, but forensic analysis was able to reconstruct some of it.

4 Guestlogix commenced this action on April 1, 2010, seeking injunctive and other relief, alleging breaches of confidence and misuse by the defendants of confidential information. Mr. Hayter filed his Statement of Defence on May 25, 2010. On that date Onboard filed its Statement of Defence and Counterclaim. Ms. Hoffman has not filed a defence.

III. The Scope of Guestlogix's Motion for an Interlocutory Injunction

5 In its notice of motion for an interlocutory injunction dated April 7, 2010, Guestlogix seeks orders that:

(i) The defendants deliver up all confidential information, proprietary information and trade secrets of GuestLogix in their possession (Notice of Motion, para. (a));

(ii) The defendants deliver up all electronic devices that were connected in any way to computers in the care of Ms. Hoffman (N/M, para. (b));

(iii) Restrain the defendants, until trial, from using the confidential, proprietary information and trade secrets of GuestLogix, including information about the use of hand held point of sale devices, current or prospective customer information, information about the plaintiff's relationship with its suppliers, marketing and sales information, and pricing information concerning the plaintiff's point of sale devices (N/M, para. (c));

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

(iv) Restrain the defendants from using any such information to solicit an employee or customer of GuestLogix to terminate its relationship with the plaintiff (N/M, paras. (d) and (f));

(v) Require the defendants to identify the use which has been made of all confidential information, proprietary information and trade secrets (N/M, paras. (e) and (h)); and,

(vi) Prohibit Ms. Hoffman from assisting the corporate defendants in their efforts to solicit business from Lufthansa (N/M, para. (g)).

6 As I indicated in my June 18, 2010 endorsement on a productions-related issue ([\[Guestlogix Inc. v. Hayter\] 2010 ONSC 3510](#) (Ont. S.C.J.)), significant events unfolded after GuestLogix launched its injunction motion:

[6] Onboard initially denied that it held any Guestlogix confidential information obtained from Ms. Hoffman. In a supplementary affidavit Onboard revealed that it had received from Ms. Hoffman external devices, some of which were used to download Guestlogix information. Onboard obtained those devices from Ms. Hoffman, together with her Onboard company computer and several discs to which Ms. Hoffman had downloaded information. Onboard made that equipment available to Guestlogix. I gather that forensic examinations of the equipment conducted by Guestlogix and Onboard revealed that all data on the external devices and the laptop had been erased, while documents stored on the disc could be read.

[7] Onboard fired Ms. Hoffman and, at present, she is not represented by counsel in this litigation. Evidently she lives in Germany.

7 Those developments led the plaintiff to inform the defendants that it was narrowing the scope of the interlocutory relief it sought. In an email dated June 27, 2010, plaintiff's counsel advised defendants' counsel:

The only issues remaining in the preliminary injunction concern your client's use of the Lufthansa-related information misappropriated from GuestLogix by its former (and at the time of the commencement of this action, your client's current) employee, Ms. Hoffmann. We are not at this time seeking preliminary relief relating to other violations of obligations to GuestLogix by Ms. Hoffman, Mr. Hayter, or the corporate defendants...

To be as clear as possible, we believe that there are only two issues that remain to be addressed in the preliminary injunction proceedings: (1) the hiring/firing of Ms. Hoffman by your clients; and (2) the use of GuestLogix information by your clients and their employees in order to secure the Lufthansa business.

8 The following day defendants' counsel replied, noting, in part:

With respect to your definition of the issues I suggest that you review the notice of motion that you have served on behalf of GLX. The scope of orders sought against my clients are broad and go far beyond the issues that you set out, and the affidavit of Brett Proud also raises factual issues far beyond the narrow issues that you have set out. I am entitled to cross-examine on all factual issues raised in the affidavits served by GLX.

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

9 On July 23, 2010, plaintiff's counsel reiterated his client's view of the scope of the injunction sought:

[I]t is our view that the pending injunction proceeding relates to Hoffmann's use, while under contract with Onboard and in connection with Onboard's solicitation of Lufthansa, of information and documents relating to Lufthansa that she created or obtained while under contract with or employed by GuestLogix.

10 In its notice of cross-motion returnable before me on August 4, 2010, GuestLogix stated, in paragraph 9, that:

Plaintiff's counsel has advised defendants' counsel of the revised narrowed scope of the relief now being sought by the Plaintiff. However, should Defendants' counsel request it, a revised Notice of Motion reflecting the narrowed request can be provided.

11 In an email dated August 2, 2010 defendants' counsel requested that the plaintiff serve an amended notice of motion setting out the changed relief requested. The next day plaintiff's counsel responded:

First, on the issue of the notice of motion. I think we are having a semantics issue. The grounds for relief make it clear that we are addressing the hiring and firing of Hoffmann, the confidential information taken by Hoffman from GLX and used by BOM in her employ, and any documents that are directly or indirectly created or used by BOM in relation to Lufthansa. While we have asked for LSG documents she may have created, you have advised that she was not working on LSG so I assume that is not an issue. I don't see how our notice of motion can be read otherwise. Indeed, your limited production to date does not indicate any wider interpretation by you. If you think this is still confusing we can discuss.

12 Although for the purposes of determining relevance on this motion I am prepared to read the plaintiff's April 7, 2010 injunction notice of motion in light of the position articulated by plaintiff's counsel in his email of August 3, 2010, I think the plaintiff should deliver an amended notice of motion well in advance of the return of the injunction motion so that the motions judge clearly understands the precise relief sought by GuestLogix.

IV. Applicable principles of law

13 The permissible scope of questioning on the cross-examination of a deponent on his affidavit was nicely summarized by Master Beaudoin (as he then was) in *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [\[1998\] O.J. No. 3676](#) (Ont. Master), at para. 10:

In summary, it appears that the permissible scope of questioning during a cross-examination upon an affidavit filed in support of an interlocutory motion is different from the permissible scope during an examination for discovery. A question may be asked:

- a) if it has a semblance of relevancy;

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

- b) relevancy is determined by an examination of the issues raised in the motion; and by a review of the affidavits filed in support and in response;
- c) if it relates to the credibility of the deponent;
- d) if it relates to an issue raised in an affidavit,
- e) relevant questions may be asked even if they are technically outside of the four corners of the affidavit.

A distinction therefore needs to be made with respect to a consideration of relevancy with regard to affidavits filed by the deponent and the responding party. The *Wojick*, *Ferring* and *Blum* cases would suggest that if a moving party deposes to a fact in an affidavit, that becomes the proper subject for cross-examination even if it were not otherwise relevant to the issues on the pending motion. Accordingly, "Semblance of relevance" would necessarily only apply to questions that go outside of the "four corners" of the affidavit or arise from material filed by the responding party.

14 Whether the "semblance of relevancy" branch remains good law in the wake of the 2010 amendments to the *Rules of Civil Procedure* is not a matter I need to decide, but it is worth recalling the observations made by Anderson J. in *Canadian Imperial Bank of Commerce v. Molony* (1983), 32 C.P.C. 213 (Ont. H.C.) at page 217 about the breadth of the issues raised by a motion for an interlocutory injunction:

It must also be borne in mind that interlocutory injunction is a discretionary remedy. On the motion for such relief in this action, in order to consider the nature and quality of the issue to be tried, the balance of convenience, and the exercise of judicial discretion, it is difficult to say with confidence that any aspect of the conduct of the parties in and about the transaction giving rise to the action is irrelevant.

15 That said, the relevance of questions put on the cross-examination on an affidavit filed on a motion may well be limited to the issues at play on the motion, and not in the larger action: *Bot Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (Ont. S.C.J.), para. 6. As put in the *Canadian Imperial Bank of Commerce v. Molony* case, again at page 217:

Counsel for the appellant referred to *Thomson v. Thomson and Elliot* [1948] O.W.N. 137, where Gale J., at page 138, has this to say:

... a person cross-examining on an affidavit was not confined to the area within the four corners of the affidavit but could cover any matters relevant to the determination of the issue in respect of which the affidavit was filed. But that is something quite different from saying that the cross-examination can touch upon all questions involved in the action, whether or not those questions are pertinent to the motion upon which the affidavit is filed.

16 All that being said, it is necessary to re-iterate that it is a well-established principle that if a matter is raised in,

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

or put in issue by, an affidavit, the opposite party is entitled to cross-examine on the matter even if the matter is irrelevant and immaterial to the motion before the court: *Wojick v. Wojick*, [1971] 2 O.R. 687 (Ont. H.C.), at p. 688; *Ferring Inc. v. Richmond Pharmaceuticals Inc.* (1996), 90 O.A.C. 88 (Ont. Div. Ct.), at paras. 14 and 15.

V. The Questions Refused by Mr. Proud on his Cross-examination

A. Question 284: The production of any correspondence between Lufthansa and GLX around October, 2009 regarding the decision not to award the contract to GuestLogix and any response back from GuestLogix to Lufthansa

17 GuestLogix took the position that this question was not relevant to the narrowed relief it was seeking on its injunction motion.

18 In his affidavit Mr. Proud deposed that GuestLogix's efforts to secure Lufthansa as a customer were initially successful (para. 26), but:

[29] While GuestLogix was engaged in continued discussions with Lufthansa regarding the business requirements and how the GuestLogix solution would satisfy those requirements, BOM is believed to have approached Lufthansa and advised Lufthansa that they would beat GuestLogix's prices...As a result, Lufthansa reopened the bidding process, and BOM is believed to have priced its product and services lower than the price that had been quoted by GuestLogix. GuestLogix was then informed by Lufthansa that Lufthansa was suspending further discussions with GuestLogix, and that it was continuing discussions with another potential vendor, later determined by GuestLogix to be BOM and Onboard.

19 Question 284 clearly relates to an issue raised by Mr. Proud, within the four corners of his affidavit, concerning his narrative of events, particularly in the last sentence of paragraph 29 of his affidavit. Mr. Proud must answer the question.

B. Question 336: Production of the attachment to an email from Mr. Proud to Mr. Baumeister dated November 21, 2008, containing revised pricing

20 Mr. Proud stated that Mr. Baumeister led the team at Lufthansa responsible for the vendor selection process. Mr. Proud's November 21, 2008, email stated, in part, "Please find attached our revised pricing..." GuestLogix objected to production of the attachment on the grounds that the issue of pricing was not relevant to the narrowed scope of the plaintiff's injunctive request.

21 I need not consider the issue of relevancy for this question. The document sought was an attachment to an email that was produced and marked as an exhibit on Mr. Proud's cross-examination. An email and any attachments constitute an integrated communication. Both the email text and the attached text, in whatever format, are discrete elements combining to form one integrated electronic communication. If one part of the communication is produced, the remainder must be produced as well in the absence of any assertion of privilege, of which, in this case there is none. Accordingly, if a party produces the text of an email, it must also produce any attachments to that email.

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

22 Mr. Proud must answer Question 336.

C. Questions 316, 317, 339 and 431: Production of GLX's response to Lufthansa's invitation to tender; production of any GLX calculation sheets or documents used to determine the pricing and expected profit for the Lufthansa Contract, including any such sheets used to put together the revised pricing attachment to the November 21, 2008 email.

23 The defendants argued that Mr. Proud put the issue of GuestLogix's pricing in issue in his affidavit. In paragraph 6 Mr. Proud deposed that GuestLogix's business model was different from that of his competitors:

To be competitive, it is essential to know how to combine the various cost components for the services required by each individual customer in order to obtain their business and earn a reasonable profit. This know-how has allowed GuestLogix to be extremely successful in the marketplace.

Then, in paragraph 11 of his affidavit describing Mr. Hayter's departure to Onboard, Mr. Proud stated: "Now, it is believed that Onboard is using the GuestLogix model, as identified in paragraph 6, above."

24 The corporate defendants advised that they have produced copies of their response to Lufthansa's invitation to tender, and supporting pricing sheets and calculations.

25 GuestLogix submitted that the information sought was not relevant to the narrowed issues on its motion.

26 I conclude that the information sought relates to issues raised by Mr. Proud in his affidavit. The gist of his allegations against the corporate defendants in paragraphs 6, 11, 26 and 29 of his affidavit is that the hiring of Mr. Hayter enabled the corporate defendants to utilize GuestLogix's business model in order to woo a slice of business away from Lufthansa that GuestLogix initially had secured. An adjudication of that allegation will require a comparison of what information Onboard actually used to secure the Lufthansa business against the information, including pricing, that GuestLogix contends constituted its different business model.

27 That issue was squarely raised by GuestLogix's notice of motion for an injunction, as well as Mr. Proud's supporting affidavit. That GuestLogix might subsequently have narrowed its claim for relief on the motion does not enable it, in effect, to withdraw portions of Mr. Proud's affidavit from testing. It is well established that it is not permissible to withdraw an affidavit simply to avoid cross-examination on it save, possibly, in cases of mistake: *Canadian Workers' Union v. Frankel Structural Steel Ltd.* (1976), 12 O.R. (2d) 560 (Ont. Div. Ct.), p. 575; *R.O.M. Construction Ltd. v. Heeley* (1982), 29 C.P.C. 194 (Alta. Q.B.), pp. 198 to 200. No claim of mistake was asserted by GuestLogix in respect of those portions of Mr. Proud's affidavit. Accordingly, Mr. Proud must answer Questions 316, 317, 339 and 431.

D. Question 354: To produce the internal email sent by Mr. Proud advising of his conversation with Mr. Baumeister of Lufthansa wherein Mr. Proud learned that GuestLogix would be selected as its vendor.

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

28 In paragraph 26 of his affidavit Mr. Proud deposed to the plaintiff's initial success in securing Lufthansa as a customer, the latter's advice that it would be selected as its vendor to provide its complete onboard retail solution, and a February 3 and 4, 2009 meeting between the plaintiff and Lufthansa to discuss the latter's business requirements. The question relates directly to an issue raised by Mr. Proud in this portion of his affidavit and must be answered.

E. Questions 385 and 386: To produce any email with revised pricing sent to Lufthansa after March 23, 2009, together with any calculation sheets used to determine that pricing.

29 In his narrative of events, Mr. Proud deposed, in paragraphs 28 and 29 of his affidavit, that in March, 2009, Ms. Hoffman "continued working on behalf of GuestLogix to secure the Lufthansa account", and that at some time Lufthansa "re-opened the bidding process", an event Mr. Proud believed was due to Mr. Hayter's involvement with the defendants. In his answer to Questions 383 and 384 on his cross-examination, Mr. Proud confirmed that after March 23, 2009, GuestLogix revised its prices for Lufthansa. No objection was taken to those questions.

30 Given the issues raised in paragraphs 28 and 29 of Mr. Proud's affidavit and the absence of any objection to Questions 383 and 384, I conclude that Questions 385 and 386 were proper questions dealing with issues raised in the affidavit.

F. Question 423: To advise of the dollar amount of the lost profit from the Lufthansa contract.

31 The defendants submitted that this question properly related to the issue of irreparable harm, an issue raised by Mr. Proud in the following portion of paragraph 54 of his affidavit:

If GuestLogix is prevented from developing its relationship with Lufthansa because it has been the victim of improper activities by BOM and Hoffman, it will be difficult to monetize the damages to GuestLogix not only with respect to Lufthansa, but with respect to its efforts to gain a greater foothold in the European air market.

32 GuestLogix contended that any amount of lost profit was not relevant to the issue of the misuse by the defendants of the plaintiff's confidential information and constituted a "sideshow". The transcript of Mr. Proud's cross-examination revealed that during this portion of the cross-examination the plaintiff, through the deponent and its counsel, conceded that (i) GuestLogix would have made a profit on the Lufthansa contract, (ii) the profit would have ranged from 40% to 60% of the plaintiff's revenue; (iii) one could imply the profit from the plaintiff's cost sheets and pricing model; and (iv) the profit would have been within the plaintiff's "normal range".

33 Given that I have ordered the production of GuestLogix's pricing emails and associated calculation sheets, and given the deponent's admission that one could imply the resulting profit from those sheets, the question posed is a proper one, relating directly to information ordered produced. Mr. Proud must answer Question 423.

VI. Conclusion

2010 CarswellOnt 7689, 2010 ONSC 5570, 100 C.P.C. (6th) 389, 193 A.C.W.S. (3d) 1108

34 By way of summary, I order Mr. Proud to reattend this month (in advance of the cross-examinations scheduled for England) to answer Questions 284, 316, 317, 336, 339, 354, 385, 386, 423 and 431 refused on his September 20, 2010 cross-examination.

35 As to costs, I would encourage the parties to attempt to settle that issue. If they cannot, the defendants may serve and file with my office brief (i.e. no more than 3 pages) written cost submissions on or before Monday, October 18, 2010. The plaintiff may serve and file with my office similarly brief written cost submissions on or before Monday, October 25, 2010. The page restrictions do not include any filed Cost Outline. I wish to thank counsel for accommodating my schedule on October 1 and agreeing to start at 8:30 a.m.

Motion granted.

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