Citation: Prairie Risk Management Inc v Marsh Canada Ltd, 2025 MBCA 6
Date: 20250123
Dockets: AI23-30-09927;
AI23-30-09991

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre
Mr. Justice David J. Kroft

BETWEEN:

PRAIRIE RISK MANAGEMENT INC., c.o.b. as PRAIRIE INSURANCE GROUP and PRM INVESTMENTS INC.	***M. A. Veneziano*** *and* ***A. C. Quinn*** *for the Appellant*
(Plaintiffs) Respondents	
- and -	***R. M. Beamish*** *for the Respondents*
MARSH CANADA LTD.	
(Defendant) Appellant	*Appeal heard:* ***September 9, 2024***
- and -	
KEVIN MCCREDIE, ANDREW ROSS and SYLVITE FINANCIAL SERVICES INC., c.o.b. as RISK MANAGEMENT ALLIANCE INC.	*Judgment delivered:* ***January 23, 2025***
(Defendants)	

On appeal from *Prairie Risk Management Inc v Marsh Canada Ltd*, 2023 MBKB 29 [*Prairie Risk*]

PFUETZNER JA

Introduction

[1] The defendant, Marsh Canada Ltd. (Marsh), appeals from a judgment awarding damages against it in the amount of $1,534,000 for breach of contract, breach of confidence and breach of fiduciary duty. Marsh also appeals the trial judge's award of costs on a solicitor and client basis. The plaintiffs cross appeal the trial judge's dismissal of their claim that Marsh breached its duty of honest contractual performance.

[2] As I will explain, the trial judge erred in finding that a fiduciary relationship existed between Marsh and the plaintiff, Prairie Risk Management Inc. (PRM). While he made no reversible error in finding that Marsh misused PRM's confidential information, he awarded damages well in excess of the loss that flowed from Marsh's wrongful conduct. In addition, the trial judge's award of solicitor and client costs to PRM must be set aside.

[3] For the reasons that follow, I would allow the appeal, in part, and dismiss the cross appeal.

Background

[4] PRM provided insurance consulting services to a buying group of hog farmers and producers in Manitoba (the insured members). Prior to PRM terminating their relationship, Marsh performed insurance brokerage services for PRM and the insured members. Marsh was appointed as the broker of record by PRM for the period from December 23, 2008 to March 1, 2017, for purposes of obtaining a group policy of insurance for the insured members

with a syndicate at the Lloyd's insurance market in London, England. Aside from the document appointing Marsh as broker of record, the relationship between PRM and Marsh was not reduced to writing.

[5] Bill Duthoit (Duthoit), the principal of PRM, advised Marsh in November 2016 that PRM would not renew Marsh's appointment as broker of record for the next insurance period beginning March 1, 2017. Duthoit intended to go directly to the Lloyd's market on behalf of the insured members without Marsh. Almost immediately, Marsh began contacting insured members directly to retain their insurance business. Insured members representing approximately forty-five per cent of PRM's revenues chose to have Marsh continue to represent them in the Lloyd's market.

[6] In 2019, Duthoit and related family members sold all their shares in PRM to BFL Canada Insurance Services Inc. (BFL). Prior to the sale, PRM assigned all its legal and equitable rights in the action against Marsh to the plaintiff, PRM Investments Inc.

Proceedings in the Trial Court

[7] The plaintiffs claimed that Marsh was liable for breach of contract, breach of a duty of confidence, breach of fiduciary duty, breach of its duty of good faith in contractual performance and wrongful interference with economic relations. The primary issues for resolution at trial were the legal nature of the relationship between Marsh and PRM and the quantum of damages, if any, caused by Marsh's conduct.

[8] The damages sought by the plaintiffs and set out in their expert's report included the full amount of the profits PRM would have earned from

the insured members who chose to remain with Marsh up to the date of the sale to BFL. The damages calculation also included an amount equal to three times the expected yearly revenue from those insured members on the theory that the value of PRM was reduced by this amount on the sale to BFL.

[9] In contrast, Marsh argued at trial for the calculation of damages based on contractual principles of causation. It asserted that PRM's loss was not caused by Marsh but by the insured members' decisions to remain with Marsh. It also submitted that Marsh could have independently recreated the alleged confidential information quickly and that any damages should be limited to the temporal "springboard" that the confidential information gave to Marsh.

[10] The trial judge made several key findings in granting judgment in favour of the plaintiffs. First, that there was a contract between PRM and Marsh; that "confidentiality was an implied, if not express, term of the contract"; and that, "[i]n acting as they did, [Marsh] breached the contract" (*Prairie Risk* at paras 27-28, 38).

[11] Second, he found that the information of the insured members at issue was confidential to PRM because the list of insured members and the details regarding their operations "was not in the public domain; it was not a mere list of clients. Duthoit had to 'use his brain' to produce a result which could only be produced by somebody who went through the same process" (*Prairie Risk* at para 43). I will also refer to this confidential information as the schedule of values.

[12] Third, the trial judge found that Marsh's use of the schedule of values caused loss and damage to PRM. In addition, he found that Marsh

breached a fiduciary duty to PRM "when it used PRM's client information for its own purposes" (*Prairie Risk* at para 61).

[13] Finally, the trial judge relied on PRM's expert's report to calculate PRM's damages on an equitable basis, seeking to "place PRM where it would have been had it not been for the unlawful and reprehensible conduct of Marsh" (*Prairie Risk* at para 72).

[14] The trial judge dismissed PRM's causes of action for breach of the duty of honesty in contractual performance, unlawful interference with economic relations and constructive trust. PRM had also argued for punitive damages based on Marsh's conduct, which the trial judge declined to award. The claims against the individual defendants were dismissed.

[15] In his costs endorsement, after referring to *Siemens v Bawolin*, 2002 SKCA 84 at para 118 [*Siemens*] and *Lynch v Hashemian*, 2006 SKCA 126 at para 32 [*Lynch*], the trial judge stated that solicitor and client costs were "appropriate and consistent with the goal of complete indemnification for the plaintiff for costs reasonably incurred as a result of Marsh's 'egregious', 'unlawful' and 'reprehensible' wrongdoing."

Issues on Appeal and Cross Appeal

[16] Marsh appeals from the judgment of the trial judge and argues that the trial judge erred, (1) in finding a breach of fiduciary duty, (2) in finding a breach of confidence, (3) in finding a breach of contract, (4) in assessing damages, and (5) in awarding solicitor and client costs.

[17] PRM cross appeals from the trial judge's dismissal of its claim for breach of the duty of honesty in contractual performance.

Analysis

Breach of Fiduciary Duty

[18] The legal test for identifying an ad hoc fiduciary relationship is well settled and was recently addressed by this Court in *Filkow v D'Arcy & Deacon LLP*, 2019 MBCA 61 at paras 63-66. The test was summarized by McLachlin CJC as follows in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36:

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[19] In his reasons, the trial judge correctly identified the legal test for finding an ad hoc fiduciary duty. Quoting from *Hodgkinson v Simms*, [1994] 3 SCR 377 at 379, 1994 CanLII 70 (SCC), he identified that "what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party" (*Prairie Risk* at para 59).

[20] The trial judge's analysis as to why the evidence met the legal test for an ad hoc fiduciary duty is brief and I will set it out in full (*Prairie Risk* at paras 60-61):

> Here, PRM provided its confidential client information to Marsh on the understanding that it would not be used for any purpose other than placing insurance for PRM. The evidence establishes that Marsh accepted the information on that basis. PRM's business interests could be and were affected by Marsh's decision to take and use its confidential information to secure PRM's clients for itself.
>
> In my opinion, Marsh was a fiduciary of PRM's and breached its duty when it used PRM's client information for its own purposes.

[21] What is lacking in the trial judge's analysis is a finding that Marsh had relinquished its own self-interest and agreed to act solely on behalf of PRM. The trial judge's analysis focused on his finding that Marsh misused PRM's confidential information. However, as noted by the Supreme Court of Canada in *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 1989 CanLII 34 (SCC), Sopinka J, dissenting in part [*Lac Minerals*], "the fact that confidential information is obtained and misused cannot itself create a fiduciary obligation" and where "the essence of the complaint is misuse of confidential information, the appropriate cause of action in favour of the party aggrieved is breach of confidence and not breach of fiduciary duty" (at 600-601).

[22] The trial judge did not find that Marsh expressly or impliedly agreed to put PRM's interests before its own and to act solely in PRM's interests—nor would the evidence support such a finding. The trial judge's finding (which I will discuss later) that Marsh agreed not to use PRM's confidential

information for a purpose other than placing insurance did not create a fiduciary relationship. As noted by Binnie J in *Cadbury Schweppes Inc v FBI Foods Ltd*, 1999 CanLII 705 (SCC) [*Cadbury Schweppes*], "the policy objectives underlying fiduciary relationships [do] not generally apply to business entities dealing at arm's length" (at para 30).

[23] Marsh and PRM were arm's length commercial entities operating in the agricultural insurance market. For several years they worked together to service the insured members. As found by the trial judge, that relationship created certain obligations of confidentiality. The trial judge's imposition of a fiduciary duty, however, was in error as he failed to apply a required element of the legal test. I would allow this ground of appeal.

Breach of Confidence

[24] In *Lac Minerals*, after rejecting the proposition that a fiduciary relationship existed between two mining exploration companies, Sopinka J turned to consider the action in breach of confidence. There are three criteria that must be established to make out a breach of confidence: (1) information was supplied that had the necessary quality of confidence about it, (2) the information was communicated in circumstances in which an obligation of confidence arose, and (3) the recipient misused or made an unauthorized use of the information (*ibid* at 608-9).

[25] Regarding the first criterion, Sopinka J adopted the principles set out in earlier English jurisprudence that information with "the necessary quality of confidence about it" can be "the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his

brain and thus produced a result which can only be produced by somebody who goes through the same process" (*ibid* at 610).

[26] In *Cadbury Schweppes*, it was noted that "[e]quity has set a relatively low threshold on what kinds of information are capable of constituting the subject matter of a breach of confidence. . . . '[S]ome product of the human brain' applied to existing knowledge might suffice" (at para 75) [emphasis in original].

[27] The second criterion assesses the circumstances in which the information was shared. The test adopted in *Lac Minerals* at 612-13 was:

> [W]here information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

[28] This criterion has also been described as requiring the plaintiff to show that it "conveyed the confidential information in confidence for a stipulated purpose" (*Composite Technologies Inc v Shawcor Ltd*, 2017 ABCA 160 at para 147, n 92).

[29] The third criterion seeks to determine if the recipient of the confidential information used it for its own benefit in a way that was not authorized by the party that provided the information. In other words, "that the defendant used the confidential information for a purpose other than that stipulated by the plaintiff and to detriment of the plaintiff" (*ibid*).

[30] In the present case, the trial judge found Marsh liable to PRM for misusing the schedule of values on two bases—breach of contract and breach of confidence. As I will explain, there is significant overlap in his analysis on these two related claims.

[31] The trial judge began his analysis by finding a contract between PRM and Marsh, the "essential elements" of which "were not complicated" (*Prairie Risk* at para 27) and involved Marsh acting as broker of record for PRM, working with PRM "to assess the insurance needs of PRM's clients" and negotiating "an insurance policy for PRM and its clients each year" in exchange for "a fee for its services" (*ibid*).

[32] Importantly, the trial judge found "that confidentiality was an implied, if not express, term of the contract" (*ibid* at para 28) and "[t]he evidence establishe[d] that the parties intended that PRM's client information be treated as confidential" (*ibid* at para 30). In so finding, the trial judge referred to the General Insurance Council of Manitoba, *General Insurance Agent Code of Conduct* (Winnipeg: ICM, 2025) s 5 [the *Code of Conduct*], the principles of which he noted were accepted by all of Marsh's witnesses (*see Prairie Risk* at para 36). Key provisions of the *Code of Conduct* require insurance agents and brokers to refrain from placing themselves in a conflict of interest with their clients and to hold information "completely confidential" to be revealed to others only with the client's consent "or in the course of negotiating insurance on behalf of the client" (*ibid*, s 5).

[33] After finding that, in acting as it did, Marsh breached the contract, causing loss and damage to PRM, the trial judge turned to consider the common law claim for breach of confidence. The trial judge properly

instructed himself on the test for breach of confidence from *Lac Minerals*. He then made the key finding that the "information was not in the public domain; it was not a mere list of clients. Duthoit had to 'use his brain' to produce a result which could only be produced by somebody who went through the same process" (*Prairie Risk* at para 43). Lastly, referring back to his analysis regarding the claim for breach of contract, the trial judge stated, "[a]s discussed earlier in these reasons, this information was conveyed in circumstances of confidentiality and Marsh's use of that information caused loss and damage to PRM" (*ibid* at para 44).

[34] I will now turn to consider the alleged errors made by the trial judge in finding that the common law claim of breach of confidence had been established by PRM.

[35] Marsh argues that the trial judge erred in his application of the three criteria to the facts. First, it asserts that, on the trial judge's own findings, the confidential information belonged to the insured members and not to PRM. Next, Marsh submits that the trial judge misapprehended the evidence and erred in finding that the information had taken on the necessary quality of confidence to PRM because "PRM did not use its 'brain' or go through a 'process' to create the schedule of value[s]." Finally, Marsh maintains that it did not use the information in the schedule of values to contact the insured members or to retain their business—instead, it used information obtained independently.

[36] PRM argues that Marsh has not demonstrated any palpable and overriding error in the trial judge's finding that the schedule of values was confidential information to PRM. It asserts that Duthoit used his skill to

gather and analyse the insured members' data to create underwriting information. It also submits that the trial judge made no errors in finding that the schedule of values was provided to Marsh in confidence and that Marsh used it for an unauthorized purpose to PRM's detriment.

[37] I am not persuaded that the trial judge made a palpable and overriding error in finding that the schedule of values was confidential information to PRM. I accept Marsh's contention that the underlying information came from and belonged to the insured members. However, the trial judge's finding that PRM's work in creating the schedule of values gave it the necessary quality of confidence is supported by the evidence that Duthoit used his skill and experience in the industry to gather and collate the information into the form necessary for purposes of underwriting insurance.

[38] In my view, the trial judge made no reversible error in finding that the schedule of values was provided to Marsh in circumstances in which an obligation of confidence arose. It was entirely reasonable to draw the inference that both parties expected the confidentiality provisions of the *Code of Conduct* to apply to any information provided to Marsh. Moreover, the evidence supported an inference that the parties reasonably expected that Marsh would not use the confidential information for purposes other than underwriting insurance pursuant to its appointment as broker of record for PRM.

[39] The final issue is whether the trial judge erred in finding that Marsh used the schedule of values in a way that was not authorized by PRM, to PRM's detriment. The Marsh witnesses provided evidence that they did not use the schedule of values for purposes of soliciting business from the insured

members after Duthoit advised that he would not be renewing Marsh's appointment as broker of record. Their position was that Marsh had a long-standing, pre-existing relationship with Dickson Gould (Gould), the principal of Progressive Group (one of the insured members), due to Marsh being the insurance broker for one of Gould's other businesses. Their evidence was that Gould assisted Marsh in contacting the other insured members, who then directly provided the information needed for Marsh to place their insurance. Gould was not called as a witness.

[40] However, the Marsh witnesses also conceded at trial that they "got the names of the [insured members] . . . off the policy that was placed for [PRM]" and that part of their strategy to retain the insured members was to take "information that was in Marsh's possession from [PRM] about what had been provided to [the insured member] in the past" so as to "compare to show that [Marsh's insurance placement was] better." In addition, the evidence was that Duthoit never asked Marsh to return the schedule of values or any other insured member's information to him after he advised Marsh that the relationship was not being renewed.

[41] The trial judge referred to all of this evidence, including that Gould was recruited to assist Marsh. It is implicit in finding that Marsh misused PRM's confidential information that the trial judge rejected the evidence of the Marsh witnesses that they did not rely on the schedule of values in contacting the insured members or in persuading them to stay with Marsh by comparing the existing PRM insurance policy with the new policy that Marsh proposed. He was entitled to reject all or any part of a witness's evidence.

[42] Another trier of fact may have accepted the evidence of the Marsh witnesses and declined to draw the inference that Marsh used the schedule of values in a way that was not authorized by the terms under which it was provided. While in my view this was a close call, I am not persuaded that the trial judge made any palpable and overriding errors in finding that PRM established a breach of confidence by Marsh.

Breach of Contract

[43] As I have indicated, the trial judge's analysis of breach of confidence and breach of contract was based on the same findings of misuse of confidential information. As I will explain, the damages flowing from these causes of action are, in the circumstances of this case, the same. As a result, I will not address any further the trial judge's finding that a contract existed between the parties and that Marsh breached its contractual obligation of confidentiality.

Damages

[44] In *Cadbury Schweppes*, the Supreme Court had the opportunity to review the doctrinal basis for actions in breach of confidence and the appropriate remedies for breach of confidence in a commercial context. Justice Binnie noted that, "[i]n *Lac Minerals*, . . . it was suggested that the action for breach of confidence should be characterized as a *sui generis* hybrid that springs from multiple roots in equity and the common law" (*Cadbury Schweppes* at para 20). Further, he noted that, in a breach of confidence action, courts have the jurisdiction to "grant a remedy dictated by the facts of the case rather than strict jurisdictional or doctrinal considerations" (*ibid* at para 24).

[45] As a result, "a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute" (*ibid* at para 25) [emphasis in original]. The remedy is to be matched to the nature of the breach based on the particular circumstances of each case. As Binnie J wrote, "whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the appropriateness of a particular equitable remedy but does not limit the court's jurisdiction to grant it" (*ibid* at para 26) [emphasis in original]. Moreover, "the nature of the information may influence the appropriate remedy" (*ibid* at para 43).

[46] Damages for breach of confidence in cases where a proprietary remedy is not appropriate are generally based on causation principles. The Court, in *Cadbury Schweppes*, stated that "the key to the remedy will not be the 'property' status of the confidence but the course of events that would likely have occurred 'but for' the breach" (at para 48). In that case, the appellants had used a confidential production technique for Clamato juice to formulate their own "Caesar Cocktail" (*ibid* at para 64), enabling them to enter the market and to compete with the respondents a year earlier than would otherwise have been the case. In these circumstances, the Court found that "lost opportunity" (*ibid*) was the appropriate method of assessing damages. This method of assessment seeks "to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. . . . [T]he losses made good are only those which, on a common sense view of causation, were caused by the breach" (*ibid* at paras 64, 93) [emphasis in original]. The trial judge, in *Cadbury Schweppes*, had indicated that the breached confidence had acted as a "springboard" that allowed the appellants to bring their competing product to market twelve months earlier than would have otherwise been the

case (*ibid* at para 67). Justice Binnie concluded that "springboard" damages were appropriate in that case to address the value of the lost market opportunity of being free of competition from the appellants for twelve months (see *ibid* at para 71).

[47] The standard of review of an award of damages is deferential. However, an appellate court can intervene where the award is based on an error in principle or misapprehension of the evidence or where the award is wholly erroneous (see *Lantin v Seven Oaks General Hospital*, 2018 MBCA 57 at para 18; *Dansereau v The City of Winnipeg*, 2014 MBCA 18 at para 6).

[48] As I have explained, there was no fiduciary relationship between Marsh and PRM and the trial judge erred in principle in so finding. It is clear that his damages award was based on fiduciary principles. He wrote as follows in *Prairie Risk* at paras 68-69:

> Given that Marsh's conduct gave rise to more than one cause of action both in common law and in equity, the court should consider which will provide the more appropriate remedy to PRM and give PRM the benefit of that remedy.
>
> In this case, equity provides the tools to ensure that PRM is appropriately compensated for the egregious conduct of Marsh and its employees.

[49] Assessing damages on the basis that a breach of fiduciary duty took place was an error in principle and no deference is owed to the trial judge's award. It is also apparent that the trial judge had a strong distaste for Marsh's business tactics. I will only comment on this by repeating the apt observation of Binnie J in *Cadbury Schweppes* that "[m]oral indignation is not a factor

that is to be used to inflate the calculation of a compensatory award" (at para 64).

[50] In my view, the breach of confidence found by the trial judge had a contractual flavour as illustrated by the significant overlap in his analysis of the claims in breach of confidence and breach of contract.

[51] While it is not possible to know precisely how events would have played out in the absence of the breach of confidence, Binnie J noted that courts are "free to draw inferences from the evidence as to what would likely have happened 'but for' the breach" (*Cadbury Schweppes* at para 73).

[52] In the present case, there can be no dispute that Marsh was entitled to compete with PRM for its clients after their relationship terminated. However, PRM was entitled to expect that Marsh would not use the schedule of values in doing so. The trial judge's adoption of PRM's expert's calculation of damages—providing a full indemnity of lost profits—effectively granted to PRM a restrictive covenant prohibiting competition that ended only because PRM was sold to BFL.

[53] The advantage that Marsh had from misusing the schedule of values was a springboard that gave it a head start in contacting the insured members and gathering the information necessary to place insurance on their behalf.

[54] Having said that, there was evidence that Marsh could have contacted the insured members without using the confidential information. Indeed, Marsh's pre-existing relationships with Gould and with other contacts in the Manitoba agricultural sector would have allowed it to do so with relative ease.

[55] Marsh's expert, Chris Polson of PricewaterhouseCoopers (Polson), calculated PRM's damages to be its lost profits (from the insured members that stayed with Marsh) during the period of time it would have taken Marsh to create the confidential information on its own. Polson's opinion was that Marsh could have gathered the necessary data and approached the insured members in one to three months. He estimated the lost profits to PRM during this time to be in the range of $26,000 to $77,000.

[56] While PRM argued at trial and on appeal that the assumptions upon which Polson based his opinion should be rejected, the trial judge's reasons show that he did not do so. The trial judge wrote: "[Polson] relies on assumptions that may be appropriate in a breach of contract, but which, in my view, are inconsistent with equity's flexibility in fashioning a remedy which addresses the harm caused by the conduct of [Marsh]" (*Prairie Risk* at para 73).

[57] Having concluded that no fiduciary duty existed and that the loss caused by the breach of confidence in this case was akin to the springboard advantage that occurred in *Cadbury Schweppes*, in my view, Polson's damages assessment reflects the true loss to PRM. I would decline to remit the matter back to the trial court for the calculation of damages as all of the evidence needed to do so was presented at trial and Polson's opinion was accepted by the trial judge as being appropriate for the calculation of breach of contract damages.

[58] As I have indicated, in the circumstances of the present case, there is no real distinction between the loss flowing from Marsh's breach of confidence and from the breach of their contractual duty of confidentiality. In

my view, the higher end of the range of damages calculated by Polson is reasonable based on an assumption that it would have taken Marsh three months to recreate the confidential information and approach the insured members.

[59] Accordingly, I would allow this ground of appeal and vacate the trial judge's award of damages. I would award damages in the amount of $77,000, plus pre- and post-judgment interest.

[60] I turn now to PRM's cross appeal.

Breach of the Duty of Good Faith Performance

[61] The general duty of honesty in contractual performance is now well established and has been discussed in recent jurisprudence from the Supreme Court that was referred to by the trial judge (see *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7; *CM Callow Inc v Zollinger*, 2020 SCC 45; *Bhasin v Hrynew*, 2014 SCC 71).

[62] The trial judge instructed himself "that parties must perform contractual duties honestly and reasonably and not capriciously or arbitrarily" (*Prairie Risk* at para 47). He emphasized that "[t]he duty is directed to <u>honest performance</u>" . . . of the contract (*ibid* at para 48) [emphasis in original].

[63] PRM's argument before the trial judge was that Marsh breached its contractual duty of good faith by taking its "client's customers while at the same time being paid by [its] client" (*Prairie Risk* at para 46). In finding that PRM's claim failed, the trial judge stated that "PRM's complaint is not related to performance of the contract, but to a direct violation of a term of the

contract, that is, not to take and use confidential client information. There is no allegation that Marsh was not honest in its performance of the contract" (*ibid* at para 53).

[64] PRM's position on the cross appeal is that the trial judge made a palpable and overriding error in failing to find that Marsh's actions were a breach of its duty of honesty and good faith as "Marsh did not tell Duthoit that [Marsh] would be competing with him for PRM's clients" and Marsh "began approaching and soliciting the clients of PRM while attempting to conceal their efforts from their own client by whom they were being paid." PRM seeks "additional damages of $100,000.00 . . . as a . . . rebuke of [Marsh's] conduct."

[65] At the hearing of the appeal, PRM conceded that its claims in breach of contract and in dishonest contractual performance arise from the same conduct on the part of Marsh and that the claims overlap. PRM only seeks to pursue the cross appeal in the event that this Court allows Marsh's ground of appeal in respect of breach of contract.

[66] In light of PRM's concession, I will not address the cross appeal at length. However, in my view, the trial judge correctly stated and applied the legal principles relevant to the duty of good faith in contractual performance. He drew a distinction between breach of contract and failure to honestly perform a contract. He found that the evidence supported PRM's claim that Marsh had breached the implied contractual term—"that PRM's client information [would] be treated as confidential" (*Prairie Risk* at para 30)—but it did not support a finding that Marsh performed any of its contractual

obligations in a dishonest way. I am not persuaded that the trial judge made any palpable and overriding errors in these findings.

Award of Solicitor and Client Costs

[67] The final issue on the appeal is whether the trial judge erred in awarding costs of the trial against Marsh on a solicitor and client basis. Costs awards are quintessentially discretionary and will not be set aside on appeal absent an error in principle or a decision that is plainly wrong (see *Nash v Nash*, 2019 MBCA 31 at para 42 [*Nash*]; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 49).

[68] As this Court has repeatedly stated, solicitor and client costs are generally intended to censure behaviour related to the conduct of the litigation alone and not the conduct that might have been the subject of punitive damages (see *Nash* at para 44). Moreover, a defendant is entitled to put a plaintiff to the proof of its case and doing so is not, in itself, a basis to award solicitor and client costs.

[69] In his very brief costs endorsement, the trial judge made no finding of any reprehensible, scandalous or outrageous behaviour in how Marsh defended the litigation. Nor did the trial judge explain how this was one of "those exceptional cases" that would warrant an award of solicitor and client costs for pre-litigation conduct (*Lynch* at para 32).

[70] However, based on his references to *Siemens* and *Lynch*, I understand the trial judge's reasoning to be that solicitor and client costs were appropriate because Marsh had breached its fiduciary duty to PRM. One of

the reasons for the solicitor and client costs award in *Siemens* was "to provide complete indemnification for costs reasonably incurred by the plaintiff as a result of a breach of fiduciary duty" (*Lynch* at para 33; see also the discussion in *Re Parkinson Estate*, 2024 MBCA 52 at paras 115-19).

[71] As I have already concluded that the trial judge erred in finding a breach of fiduciary duty, the costs award also cannot stand. The trial judge erred in principle in awarding solicitor and client costs based on breach of fiduciary duty.

Conclusion

[72] For the foregoing reasons, I would allow the appeal in part. I would reduce the damages awarded by the trial judge from $1,534,000 to $77,000, plus pre- and post-judgment interest. I would dismiss the cross appeal.

[73] I would set aside the order of solicitor and client costs and award the plaintiffs tariff costs of the trial.

[74] As Marsh has been partly successful in this Court, the parties shall bear their own costs of the appeal and cross appeal.

Pfuetzner JA

I agree: leMaistre JA

I agree: Kroft JA