

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**PAT GUINAN and DERRAN GUINAN**

Plaintiffs

and

**NORTHWESTEL INC. and MIKE STILWELL**

Defendants

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Application by defendants to strike part or entirety of statement of claim as not disclosing a cause of action. Concurrent application by plaintiffs to amend statement of claim. Court orders amendment of pleadings in lieu of striking out.

Applications heard at Yellowknife: December 9, 1996

Reasons Filed: January 13, 1997

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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BETWEEN:

**PAT GUINAN and DERRAN GUINAN**

Plaintiffs

- and -

**NORTHWESTEL INC. and MIKE STILWELL**

Defendants

**REASONS FOR JUDGMENT**

1           The parties to this litigation are shareholders of a company by the name of Network North Communications Ltd. ("NNCL") incorporated in 1994. They are also signatories to a document entitled Unanimous Shareholders Agreement ("USA") dated January 23, 1996. In the within litigation, the two plaintiffs allege that the two defendants have (a) breached the USA and (b) breached their fiduciary duties owed to NNCL and the plaintiffs, and that the plaintiffs have suffered damage thereby.

2           There are three applications brought in Chambers:

- (i) the defendant Northwestel seeks an Order striking certain paragraphs of the statement of claim as disclosing no cause of action, pursuant to Rule 129(1)(a)(i),
- (ii) the defendant Stilwell seeks an Order striking the entire statement of claim as against him, as not disclosing a cause of action against him, pursuant to Rule 129(1)(a)(i)
- (iii) the plaintiffs seek to amend their statement of claim to add NNCL as a plaintiff, pursuant to Rule 58 and Rule 134.

3 Counsel agree that the USA is expressly incorporated into the statement of claim by reference. A copy of the USA was marked as exhibit #1 at the hearing of the motions. Also, at one point the defendant Northwestel sought particulars of the plaintiffs' statement of claim and the plaintiffs' solicitors provided these in writing. The demand and response were marked as exhibits 2 and 3. Again, by agreement of counsel, reference is made to these particulars on the hearing of these motions.

4 The pertinent allegations of fact, in the statement of claim, can be summarized as follows:

(1) The plaintiffs each hold 450 shares in NNCL. The defendants Northwestel and Stilwell hold 177 shares and 100 shares, respectively.

(2) The business of NNCL is to develop new technologies, market and provide access to Internet and Internet working services and communications in the Northwest Territories.

(3) The defendant Northwestel carries on a telecommunications business, and related businesses, in the Northwest Territories. Its business includes the same business as NNCL.

(4) The USA contains the following provisions:

(a) The plaintiff Pat Guinan was to be NNCL's manager and was to receive certain prescribed fees for his management services.

(b) Each of the four shareholders was to nominate one person to the board of directors of NNCL. (Article 5.01)

(c) The board of directors was prohibited from taking any action in certain areas. These are specifically listed in the USA and entitled "Restricted Activities". Any action related to a Restricted Activity could only follow a unanimous shareholders' resolution.

(d) Each shareholder covenanted not to use or to disclose any trade secret, business data, etc., acquired by involvement with NNCL to anyone outside NNCL, without consent of the other shareholders. (Article 12.01)

(e) The other shareholders agreed that the defendant Northwestel was entitled to carry on its existing business in the Northwest Territories.

(5) As manager, the plaintiff Pat Guinan developed a Business Plan for NNCL, and all shareholders approved the plan.

(6) Both defendants breached the terms of the USA, in particular Article 5.01, by failing or refusing to nominate a person to the board of directors, causing the company's inability to conduct business operations or to implement the Business Plan.

(7) The defendant Northwestel breached the terms of the USA, in particular Article 12.01, in secretly and without authorization, using or disclosing trade secrets, business data, etc. of NNCL to others, to the detriment of NNCL and the plaintiffs.

(8) The defendants have breached their duties owed to NNCL and the plaintiffs to act with honesty and good faith in advancing the interests of NNCL.

(9) The defendants' actions and wrongdoings have caused NNCL to cease its business operations whereby NNCL has lost business opportunities and has suffered loss and damage, and the plaintiffs have suffered damage to their investment in NNCL and their employment status with NNCL.

5 The complaint of the defendant Northwestel on its present application centres on paragraphs 20 and 22 of the statement of claim; however, for context I here quote paragraphs 19 through 22 inclusive:

"19. The defendants have breached the USA, the particulars of which are as follows:

(a) The defendants have breached the terms of section 5.01 of

the USA, the particulars of which are as follows:

(i) on or about April 4, 1996 and on or about May 29, 1996 Guinan sent letters of demand to the defendants asking that they immediately appoint nominee directors of NNCL in accordance with section 5.01 of the USA;

(ii) to date, the defendants have failed or refused to appoint nominee directors to NNCL's Board of Directors despite the demands by Guinan. This has resulted in NNCL not having a duly constituted Board of Directors as required by section 5.01 of the USA, and therefore being unable to effectively conduct business operations, to respond to requests for proposals dealing with matters within the intended scope of operations NNCL, and to proceed with the proposed Business Plan of NNCL;

(iii) As a result of NNCL being unable to effectively conduct business operations and proceed with the Business Plan aforesaid, NNCL ceased all other business operations as of the close of business on June 14, 1996 to avoid incurring further unnecessary liabilities contrary to the best interests of NNCL; and

(iv) any other such particulars that will be proven at the trial of this action.

(b) Northwestel has further breached the terms of section 12.01 of the USA by secretly and without notice to NNCL, Guinan or Derran, directly or indirectly used or disclosed trade secrets, business data, and other information acquired by it by reason of its involvement and association with NNCL and its affiliates, to the detriment of NNCL, Guinan and Derran, the particulars of which are as follows:

(i) on or about February 6, 1995 an employee of Northwestel entered into a written agreement with NNCL for the use of copyright protected computer software (the "Program") prohibiting the use, copy, modification, sale, lease, sublease or transfer of the Program owned by NNCL without the written consent of NNCL. The Program was intended for customers of NNCL and was provided to the employee of Northwestel

as a customer of NNCL. The Program was subsequently copied by and used by Northwestel without the written consent of NNCL and to date Northwestel is continuing to use the Program without NNCL's authority, for the purpose of competing directly or indirectly with the business of NNCL;

(ii) Northwestel acquired information from NNCL regarding logon procedures, configuration files, setup procedures and transferred such information onto Northwestel computers without the knowledge and consent of NNCL, Guinan or Derran, for the purpose of competing directly or indirectly with the business of NNCL;

(iii) as manager of NNCL, Guinan prepared a detailed list of equipment and development costs associated with establishing an Internet Network System in various communities in the Northwest Territories based upon the demographics of each community (the "Equipment List"), dated May 19, 1995. This information provided to Northwestel has been used by Northwestel to create its equipment list and to compete directly or indirectly with the business of NNCL;

(iv) as manager of NNCL, Guinan met with and provided Internet related information and training to Northwestel's sales management team in June of 1995. Guinan and NNCL were at all times presented to clients by Northwestel as its "partner". Northwestel has used the information, to the exclusion of NNCL, to directly compete with NNCL to pursue new clients; and

(v) any other such particulars that will be proven at the Trial of this action.

20. Further, or in the alternative, the Defendants, as Shareholders, have breached the duties owed to NNCL and to its shareholders, arising as a result of Sections 5.09 and 6.05 of the USA and the Act, to act honestly and in good faith with a view to the best interests of NNCL and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, the particulars of which are as follows:

(a) by the conduct which the Plaintiffs allege constitute breaches of

Section 5.01 and Section 12.01 of the USA as outlined above;

(b) by competing with NNCL's business and affairs by seeking its own contracts and entering into business agreements with other government supported businesses to provide Internet Related Services, to the exclusion of NNCL;

(c) by breaching representations, promises and agreements to act jointly with NNCL to obtain and provide Internet Services to the Northwest Territories, and in particular in breach of the Agreement;

(d) by requiring NNCL to discontinue any joint arrangements or negotiations with other communication organizations or corporations in the Northwest Territories which would benefit NNCL, Guinan or Derran, with a view to Northwestel holding a monopoly over Internet communications;

(e) by refusing to cooperate with responses to requests for proposals dealing with matters within the intended scope of business of NNCL;

(f) by refusing to participate in the management and implementation of the Business Plan.

(g) by failing to assist and/or inform NNCL, Guinan or Derran of the availability of available governmental financial assistance, Northwestel having knowledge of and obtained the same, for its own benefit; and

(h) any other such particulars as will be proven at the Trial of this action.

21. In the yet further alternative, the Plaintiffs have by the actions of the Defendants, been deprived of their investment and interest in NNCL, and the acts or omissions described above and the powers given to the Defendants under the USA are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or unfairly disregard the Plaintiff's interests.

22. Further, as a result of the breaches of the USA, breaches of duty and wrongdoings described above, the Plaintiffs have been greatly injured in the value of their share holdings in and employment with NNCL, have lost business opportunities and have suffered loss and damage, the particulars of which are as follows:

- (a) loss of the opportunity of responding to the Government of the Northwest Territories Request For Proposal, Digital Communications Network;
- (b) loss of opportunity of NNCL contracting with Northwest Territories Power Corporation;
- (c) loss of opportunity of pursuing and obtaining an Internet Node from C.A. net Networking Inc.;
- (d) loss of opportunity of NNCL contracting and pursuing with Inuvik Communications;
- (e) loss of opportunity of NNCL contracting with Hay River Communications Ltd.;
- (f) generally precluded from NNCL advancing alliance strategies as set out in the Business Plan to establish Internet Access; and
- (g) any such other particulars that will be proven at the Trial of this action."

6                    In its application for an Order striking paragraphs 20 and 22, the defendant Northwestel relies on Rule 129(1)(a)(i):

R.129(1) The Court may, at any stage of a proceeding, order that

- (a) any pleading in the action be struck out or amended, on the ground that
  - (i) it discloses no cause of action or defence, as the case may be...

7                    Northwestel does not on this application attack paragraph 19 nor does it dispute the plaintiffs' right to claim in contract for breaches of the USA in paragraph 19.

8                    It is submitted on behalf of Northwestel, however, that paragraphs 20 and 22 do not disclose a cause of action. The premise of paragraph 20, it submits, is that

shareholders owe to each other a duty to act honestly, in good faith, and in the best interests of the company. Northwestel submits there is no such duty at law in Canada. In support, it cites the following cases: *Ferguson v Imax Systems Corp.* (1980) 12 B.L.R. 209 (Ont.H.C.); *Pelling v Pelling* (1981) 130 D.L.R.(3d) 761 (B.C.S.C.); *Trimac Ltd. v C.I.L. Inc.* [1990] 1 W.W.R. 133 (Alta.Q.B.); *Brant Investments Ltd. v KeepRite Inc.* (1991) 3 O.R.(3d) 289 (Ont.C.A.).

9 Northwestel's assertion with respect to paragraph 22 is that its particulars refer to losses or damage suffered by NNCL and NNCL is not a plaintiff. This defendant says that the named plaintiffs' claim in paragraph 22 is for consequential losses occasioned by the alleged damage to NNCL. It is submitted on behalf of Northwestel, citing the rule in *Foss v Harbottle* (1843) 67 E.R. 189 that a shareholder cannot, in a personal action, enforce any rights of the company, i.e., cannot sue for consequential damage to himself which results from damage inflicted on the company. It submits that such a derivative action is prohibited at law, and relies upon the following authorities: *Winchell v Del Zotto* (1976) 1 C.P.C. 338 (Ont.H.C.); *Prudential Assurance Co.Ltd. v Newman Industries* [1982] 1 All E.R. 354 (C.A.); *Rogers v Bank of Montreal* [1985] 5 W.W.R 193 (B.C.S.C.); *McGauley v British Columbia* (1989) 39 B.C.L.R.(2d) 223 (B.C.C.A.); *Roman Corp. v Peat Marwick Thorne* (No.1) (1992) 8 B.L.R.(2d) 43 (Ont.G.D.); *Roman Corp. v Peat Marwick Thorne* (No.2) (1993) 12 B.L.R.(2d) 10 (Ont.G.D.); *Randolph v Graye* [1995] O.J. No.777 (Ont.G.D.).

10           The plaintiffs oppose the application to strike paragraphs 20 and 22. Their counsel submits that the claims being advanced in the statement of claim are actionable ones. She concedes that certain of these claims involve novel and developing areas of the law and also that portions of the pleading could have been expressed more clearly or differently. It is submitted on the plaintiffs' behalf that a pleading should not be struck if its flaws are capable of amendment.

11           Specifically with respect to the impugned paragraph 20, plaintiffs' counsel states that the intention was to allege a fiduciary relationship between plaintiffs and defendants, giving rise to fiduciary duties and obligations owed by these defendants to these plaintiffs, at common law. And for the submission that the law regarding fiduciary obligations is still emerging, is yet in a state of flux, counsel relies, for example, on the 1989 decision of the Supreme Court of Canada in *Lac Minerals Ltd. v International Corona Resources Ltd.* 61 D.L.R.(4th) 14. Although in that case the Court was divided as to the existence of a fiduciary relationship on the facts, in both the majority and minority judgments, it was held that the categories of relationships which might give rise to fiducial obligations are not closed. The plaintiffs also rely on *Dusik v Newton* (1985) 62 B.C.L.R.1 (B.C.C.A.); *Morton v Asper* (1989) 62 Man.R.(2d) 1 (Q.B.); and *Trimac, supra*.

12           As to the defendants' attack on paragraph 22 which attack is rooted in the fact that while the paragraph alleges damage suffered by NNCL yet that entity is not a litigant herein, the plaintiffs respond by pointing to their concurrent application, on behalf

of themselves and NNCL, to add NNCL as a named plaintiff in this action.

13                   Our Court of Appeal has very recently reviewed the power of this Court to strike pleadings under Rule 129(1)(a)(i) and its predecessor Rule 124A(a)(a), *Fallowka et al v Whitford et al* [1996] N.W.T.J. No.95. It was held that the major rule is that a pleading will not be struck out for want of a cause of action unless the flaw is plain and obvious and beyond doubt. The Court reiterated the following principles: (i) the claim advanced must be hopeless to be struck out, (ii) a court must use extreme caution on a motion to strike out a pleading for want of a cause of action, (iii) that the plaintiff will have to make novel arguments is no ground to strike out, (iv) a pleading should not be struck out by deciding a difficult question of law (at p.9 and p.14).

14                   Having considered carefully the submissions of counsel, I am not satisfied that the impugned paragraphs of the statement of claim ought to be struck. I note that the Rule says that the Court "may" strike out - the remedy is permissive not mandatory. Also, striking out is not the only remedy where there is no cause of action - the Court can order the pleading amended.

15                   Here, it is significant that the plaintiffs, concurrently, seek to add NNCL as a named plaintiff, by an application properly brought under Rule 58 and Rule 134. There can be no prejudice to either defendant by allowing such an application. NNCL alleges it has been wronged by these defendants. NNCL has the right to commence an action

against these defendants. It is still well within any limitation period. If a separate action was commenced, NNCL and/or the plaintiffs could apply for an order directing (or the Court *ex mero motu* could direct) a consolidation of the two actions under Rule 318. To now allow NNCL to join the present action would achieve the same goal as a later consolidation, and would be in concert with the very object of our Rules of Court:

Rule 3. The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding.

16 To allow NNCL to be added under Rule 58 as a named plaintiff would essentially address the defendants' complaint concerning paragraph 22. The amendment to the opening words of paragraph 22 being proposed by the plaintiffs/NNCL on their motion is as follows (the changes being underlined):

"22. Further, as a result of the breaches of the USA, breaches of duty and wrongdoings described above, the Plaintiffs Pat and Derran Guinan have been greatly injured in the value of their shareholdings in and employment with NNCL, and the plaintiff NNCL has lost business opportunities and has suffered loss and damage, the particulars of which are as follows:..."

17 In my view, the amended paragraph 22 would then clearly disclose a cause of action. Counsel for Northwestel fairly acknowledged that, at a minimum, this area of the law is in a state of flux.

18 Turning to the other paragraph being assailed on this interlocutory

application, paragraph 20, in my view the appropriate remedy is to direct that the plaintiffs amend that paragraph to clearly specify that it is duties and obligations arising out of a fiduciary relationship that is relied upon (as indicated by plaintiffs' counsel on the hearing of the application).

19 I also accept, for purposes of this interlocutory proceeding only, that the common law in the area of fiduciary obligations is still being developed. Given the state of the law in this area, and assuming all of the allegations in the statement of claim to be true, I cannot conclude that the plaintiffs' claim in paragraph 20 is necessarily hopeless. *Lac Minerals* suggests that fiduciary duty cases are fact intensive. The plaintiffs should not be precluded from putting their evidence and their legal arguments before a trial judge, in my opinion. *Hearn Stratton Construction Ltd. v Commissioner of the NWT et al.* [1992] N.W.T.R.107.

20 I turn now to the parallel application of the defendant Stilwell. In his notice of motion, he seeks an Order striking the entire statement of claim, as disclosing no cause of action, pursuant to the same subrule, i.e. 129(1)(a)(i). This defendant points out that the allegations against him in the statement of claim are narrower than those made against his co-defendant Northwestel. His counsel adopts the submissions made on behalf of Northwestel regarding the attack on paragraph 20, and also makes additional, similar submissions based on the rule in *Foss v Harbottle*, citing the following additional authorities: *Lloyds Bank of Canada v Berg* [1988] A.J. No.210 (Alta. C.A.); *Kaverit Steel*

*and Crane Ltd. v Kone Corp.* [1993] A.J. No.402 (Alta.C.A.); *C.I.B.C. v Derksen Brothers* (1995) 100 Man.R.(2d)224 (C.A.).

21 Further, the defendant Stilwell notes that the only specific allegation in the statement of claim against himself (an allegation which he admits in his statement of defence) is that he failed or refused to put a nominee on the board of directors. He submits that such failure is of no, or little, legal consequence and that the damage alleged by the plaintiffs in their statement of claim is unconnected to such failure.

22 It may indeed be that the defendant Stilwell has, *inter alia*, a good defence founded in remoteness. However, as stressed in *Fallowka, supra*, a good defence constitutes neither want of a cause of action, nor ground to strike out.

23 For the reasons stated earlier in reference to the Northwestel application, I am unable to grant Stilwell's request for final relief at this interlocutory stage. Neither defendant advances any reasonable justification for opposing the plaintiffs/NNCL's proposed amendment to the statement of claim. With appropriate amendments to their pleadings, the plaintiffs' case is at least arguable against both defendants.

Accordingly, an Order will issue as follows:

- (a) granting the plaintiffs' application for an Order adding NNCL as a plaintiff and allowing an amendment to the statement of claim as proposed in the draft pleading attached as Schedule A to the notice of motion and as directed in (b) below:

- (b) granting the s.129(1)(a)(i) application of the defendant Northwestel, in part, by directing the plaintiffs to amend paragraph 20 to specify that the plaintiffs therein allege the existence of a fiduciary relationship between plaintiffs and defendants and to paragraph (i) of the prayer for relief to clarify that the plaintiffs therein seek one damages award in the amount of \$2,089,727.50 and not two awards each in that amount.
- (c) granting the s.129(1)(a)(i) application of the defendant Stilwell, in part, by directing the plaintiffs to amend their statement of claim as in (b) above.

24                    There being divided success, I direct that costs of these applications be costs in the cause.

J.E. Richard,  
J.S.C.