CITATION: Hoy v. Expedia Group, Inc., 2024 ONSC 1462
DIVISIONAL COURT FILE NO.: 710/22
DATE: 2024/03/21

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. Sachs, E. Stewart and Mew JJ.

BETWEEN:	
MATTHEW HOY and JUSTIN STOREY Plaintiffs (Appellants)	*James Bunting*, *Sean Campbell* and *Theodore Milosevic*, for the Plaintiffs (Appellants)
– and –	
EXPEDIA GROUP, INC., EXPEDIA CANADA CORPORATION, TRAVELSCAPE LLC, HOTELS COM LP, HOTEL, COM GP, LLC, HRC 99 HOLDINGS, LLP, TOUR EAST HOLIDAYS (CANADA) INC., TRIVAGO N.V. BOOKING HOLDINGS INC. and BOOKING. COM B.V. Defendants (Respondents)	*Christopher Naudie*, *Adam Hirsch* and *David Williams*, for Expedia Group, Inc., Expedia Canada Corporation, Travelscape LLC, Hotels, Com LP, Hotels.Com GP, LLC, HRN 99 Holdings, LLP, (the "Expedia Group") Defendants (Respondents) *Rob Kwinter*, *Nicole Henderson*, and *Joe McGrade*, for Booking.com B.V., Defendant (Respondent) *Nikiforos Iatrou*, *Byron Shaw* and *Erich Schultze*, for Trivago N.V., Defendant (Respondent) **HEARD at Toronto:** November 16, 2023

THE COURT

Overview

[1] The Plaintiffs sought to certify as a national class proceeding an action concerning what they alleged were systemic misleading advertising practices of the Defendants, who are the major players in the online accommodation booking market. On November 28, 2022, Perell J. dismissed their motion for certification. This is an appeal from that decision.

[2] The motion judge found that, for the purpose of certification, the Defendants had engaged in unfair practices that violated consumer protection legislation. The Plaintiffs filed expert evidence that these unfair practices caused harm in two major ways. First, as put by the motion judge, "consumers are deprived of the opportunity to identify alternative accommodations because they are coerced by the unfair practices to foreshorten a more comprehensive search" (*Hoy v. Expedia Group Inc.*, 2022 ONSC 6650, at para. 80). Second, the Defendants' unfair practices caused economic harm in the form of injury to the operation of the marketplace in which the Plaintiffs were operating. The Plaintiffs did not seek compensation for any loss that they may have suffered individually as a result of the Defendants' unfair practices. In other words, they did not seek compensatory damages. Instead, they sought nominal damages, punitive damages and disgorgement.

[3] The motion judge found that the remedies available were governed by the consumer protection statutes and that, in the instant case, it was plain and obvious that those statutes did not support the Plaintiffs' claim for disgorgement, nominal damages or punitive damages. According to the Plaintiffs, the motion judge made a number of errors of law when he made this finding.

[4] The motion judge also found that the preferable procedure criterion was not satisfied because the access to justice goal of a class action cannot be satisfied where there is no evidence that two or more class members suffered compensatory harm. The Plaintiffs allege that the motion judge erred in law when he made this finding.

[5] The Plaintiffs also argue that the motion judge erred in law when he found that the cause of action criterion was not satisfied with respect to the equivalent consumer protection legislation in other provinces, that "privity" was required for the cause of action against Trivago and that a two-year limitation period applies to define the class.

[6] For the reasons that follow we find that the motion judge made no error when he concluded that the remedies of disgorgement, nominal and punitive damages were not available to the Plaintiffs. Without the possibility of an available remedy, the action cannot be certified. Therefore, the appeal must be dismissed.

Background

The Parties

[7] The Plaintiffs are police officers who used the travel websites operated by Expedia Group and the Defendants, Booking Holdings Inc. and Booking.Com B.V. (the "Bookings Group") to make accommodation reservations over the past decade. One of the Plaintiffs also used Trivago to be referred to Expedia and Bookings to make travel reservations.

[8] The Expedia and the Bookings Defendants are online travel agents ("OTAs") that gather information from hotels and other accommodation providers and provide a search engine that allows users to sort and review information based on their preferences. The OTAs employ algorithms that sort results in response to inquiries made by those using their website.

[9] Travellers can conduct searches on the OTA websites free of charge. They can then, if they choose, book accommodations through the OTA platform. If a traveller ultimately makes a booking, the accommodation provider pays a commission to the OTA.

[10] Trivago operates under a different business model. It is an aggregator rather than an OTA. As an aggregator, it does not offer services for booking accommodations. Instead, trivago.ca displays accommodation offers from OTAs and refers users to their booking platforms. Like the other Defendants, Trivago does not charge users for its services and receives payments for its services from the OTAs with which it contracts.

The Impugned Practices and the Proposed Class Action

[11] The Plaintiffs assert that they were harmed as a result of the algorithms used by the Defendants. They claim that the Defendants displayed results in such a way as to coerce customers into making hotel bookings under false pretenses. These practices are referred to collectively as the "Advertising Practices" and are subdivided into three practices:

(i) The Search Result Practice: The Search Result Practice arises from the Defendants creating the general impression that search results displayed in the Defendants' platforms reflect the objective results of the travellers' search criteria when, according to the Plaintiffs, they do not. Instead, the search results are influenced by the undisclosed, or inadequately disclosed, commissions paid to the Defendants. According to the Plaintiffs, the OTA Defendants charge accommodation providers varying rates of commissions in exchange for assigning the offered accommodations a higher numerical ranking score in the Defendants' algorithms that generate search results. Similarly, online travel agencies, including the OTA Defendants, pay Trivago fees in exchange for displaying their offerings higher on the Trivago search results. As a result of this alleged practice, the Plaintiffs assert that the order in which accommodations are presented in search results depends in part on the amount of commission paid by the accommodation provider.

(ii) The Discount Practice: The Discount Practice refers to the Defendants' practice of advertising the rate for accommodations as a "discount" as compared to the accommodation's "regular" price. According to the Plaintiffs, the "regular "price of the accommodation is presented in a misleading way. It may be the highest rack rate charged by the accommodation provider or it may be a rack rate for a room that does not match the consumer's search criteria, but it is rarely or ever the rate that a consumer would pay for that room but for the alleged "discount".

(iii) The Urgency Practice: The Urgency Practice refers to the OTA Defendants' practice of allegedly using false and/or misleading representations that there is urgency to complete a booking or else the opportunity to book the accommodation could be lost. The Urgency Practice includes representations that there is "one room left at this price", use of a "fire icon", and/or that a certain number of consumers are viewing the same property in circumstances where these claims are untrue or misleading because the statements do not reflect the actual availability of the

accommodation offered. The Plaintiffs do not allege that Trivago engaged in the Urgency Practice.

[12] In February of 2019, the Expedia Group, the Bookings Group and Trivago all entered into undertakings with the UK and European Commission regulators to resolve enforcement proceedings related to allegedly unfair or misleading practices used by those companies. The undertakings included commitments by the Defendants to, among other things, refrain from the Advertising Practices and/or commit to providing disclosure and information regarding the use of the Advertising Practices. The undertakings did not include admissions that the Defendants had actually engaged in these practices.

[13] The Australian Competition and Consumer Commission also took action under Australian consumer protection legislation against Trivago concerning the Search Result Practice and the Discount Practice. In January 2020, the Federal Court of Australia found that the Search Result Practice and the Discount Practice employed by Trivago were misleading and not dispelled by any disclaimers. Trivago was ordered to pay AUD 44.7 million for its misleading practices.

[14] According to the Plaintiffs, despite changing their practices in other jurisdictions, the Defendants have not made similar changes in Canada. It is only recently and, in certain cases, only after the commencement of these proceedings, that the Defendants began to provide very limited disclosure regarding the Advertising Practices in Canada on some, but not all, of their platforms. According to the Plaintiffs the current disclosure in Canada did not exist at the time of their bookings.

[15] No Canadian regulator has taken any enforcement proceedings against the Defendants.

[16] According to the Plaintiffs, because of the way the Defendants structured their ecosystems, it is not possible for them to calculate their compensatory damages.

[17] Dr. Charlotte Duke, an expert in the field of behavioural economics, provided evidence on the certification motion on the impact of the Advertising Practices. Behavioural economics is a field of study that combines economics and psychology to explain why people make the decisions they do, and how consumer decision-making is influenced by the way information is presented to them.

[18] Dr. Duke identified a range of harms that result to consumers from the use of the Advertising Practices. At a market level, the Advertising Practices lead to a reduction in competition by reducing the extent to which consumers search for accommodation, thereby increasing the prices paid by consumers for accommodation. At an individual level, the Advertising Practices harm consumers by causing them to pay more for accommodation than they would have done, purchase accommodation that met their needs less well than alternative accommodation and/or purchase accommodation which they perceive to be of higher quality than it actually is. Dr. Duke further opined that all three Advertising Practices, when used together, amplify the harm to consumers as compared to using the different Advertising Practices separately.

[19] The Plaintiffs commenced a class action against the Defendants on September 30, 2020, alleging that the Defendants contravened Ontario's *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("*CPA*"), and the equivalent consumer protection legislation in all other Canadian jurisdictions. They also alleged that the Defendants breached the *Competition Act*, R.S.C., 1985, c. C-34 and were unjustly enriched by sales revenues that they would not have otherwise received but for their misconduct.

[20] In their action, as the motion judge found:

> [85] In any event, the Plaintiffs do not purport to quantify the compensatory harm that they allege they and the putative Class Members suffered. There is no evidence the Plaintiffs or the Class Members did not receive the accommodation they booked. There is no evidence that the Plaintiffs or the Class Members received accommodation that was less in quality than promised. There is no evidence that in any particular case, or on a class-wide basis, that alternative qualitative similar accommodations were available that would meet Class Members' needs equally well at a lower cost, or that would better meet Class Members' subjective needs. There was no explanation or evidence as to how to monetize this compensatory harm based on the Class Members' disappointment in not choosing psychologically more satisfying accommodation.

[21] Through the class action, the Plaintiffs sought disgorgement, nominal damages and punitive damages.

[22] The motion judge heard the Plaintiffs' motion for certification over four days. On November 28, 2022, he dismissed their motion.

[23] On the motion the proposed class was defined as:

> All individuals in Canada who between September 30, 2005 and the date that notice of certification is issued : (i) were referred to one of the OTA (Online Travel Agencies) Websites from Trivago and booked, purchased, and were charged for accommodation by that OTA Website for non-business purposes; or (ii) booked, purchased, and were charged for an accommodation reservation using one of the OTA Websites for non-business purposes.

The Motion Judge's Decision

[24] The motion judge found that the section 5(1)(a) cause of action criterion was not made out for any of the Plaintiffs' causes of action. On this appeal the Plaintiffs have put forward arguments in relation to their consumer protection legislation claims. They put forward no argument in relation to their *Competition Act* claims, and they are not at issue in this appeal.

[25] With respect to the consumer protection legislation claims, the motion judge found:

> (a) The Plaintiffs have demonstrated some basis in fact that the Defendants Expedia and Bookings breached Ontario's *Consumer Protection Act, 2002* and the consumer protection acts of the other provinces and territories since at least 2014, and (b) some basis in fact from which it can be inferred that Expedia and Bookings breached Ontario's *Consumer Protection Act, 2002* and the consumer protection statutes of the other provinces and territories before 2014.
>
> (b) Had the consumer protection statutes applied to Trivago, N.V., the Plaintiffs demonstrated: (a) some basis in fact that Trivago N.V. breached Ontario's *Consumer Protection Act, 2022* and the consumer protection statutes of the other provinces and territories since at least 2014; and (b) some basis in fact from which it can be inferred that Trivago N.V. breached Ontario's *Consumer Protection Act, 2022* and the consumer protection statutes of the other provinces and territories before 2014.

[26] The motion judge concluded that the Plaintiffs could have satisfied the cause of action criteria for their claims in relation to Ontario consumer protection legislation, but that they failed to do so because they were not seeking what the statute provides as a remedy. According to the motion judge the statute only provides for the following remedies – rescission, compensatory damages in lieu of recission and, in addition, punitive damages.

[27] According to the motion judge, disgorgement was not available as a remedy because the *CPA* does not provide for such a remedy. However, he held that even if the remedy was not excluded as a matter of statutory interpretation, the remedy would not be available. According to the certification judge, the Supreme Court of Canada in *Atlantic Lottery v. Babstock*, 2020 SCC 19, [2019] S.C.R. 420, has made it clear that such a remedy would not be available to the Plaintiffs in this case. As put by the certification judge:

> [196] Returning to the case at bar, if Justice Brown's analysis is applied to the statutory causes of action under the *Competition Act* or to the *Consumer Protection Act* causes of action, disgorgement would not be an available remedy, the claim is doomed to fail. It is doomed to fail for the same reason that the claim in the *Atlantic Lottery* case was doomed to fail. There is no connection between the disgorgement and the alleged harm suffered by class members from the statutory tort and the Plaintiffs have intentionally adopted a litigation strategy to avoid having to prove damages. Disgorgement is not a cause of action, it is a remedy for certain types of wrongdoing, not including breaches of consumer protection statutes. In the immediate case, there is no justification for a gains-based remedy; the claim is doomed to fail.

[28] The motion judge found that even if the statutory language did not exclude a claim for nominal damages, no such claim was available since "[n]ominal damages are associated with breach of contract cases." He also found that "Nominal damages are not a means to avoid making a claim for the compensatory damages that the plaintiffs ironically submit occurred but for which they do not seek."

[29] The motion judge found that the Plaintiffs' claim for punitive damages was also doomed to failure because while punitive damages were available as a stand-alone remedy under the *CPA,* that claim must rest on more than a simple assertion that the Defendants breached the unfair practices provision of the *CPA.* According to the motion judge, an examination of the Plaintiffs' Statement of Claim reveals that nothing more is pleaded "beyond the allegations of breaches of the legislation."

[30] The motion judge also held that the claim was doomed to fail under the consumer protection legislation of the other provinces and territories. In Alberta, B.C., Saskatchewan and Newfoundland and Labrador, reliance is required for a cause of action under their consumer protection legislation and the Plaintiffs did not plead reliance. In Quebec, New Brunswick, Nova Scotia, Yukon, the Northwest Territories and Nunavut, there is no statutory cause of action – any "breach of the statute must be pleaded as part of a non-statutory cause of action." Quebec's consumer protection legislation provides no claim for damages. It only enables rescission. There is no cause of action for unfair practices in the consumer protection legislation of Nova Scotia, the Northwest Territories or Nunavut.

[31] With respect to the consumer protection act claims against Trivago, the motion judge found that the Plaintiffs had not pleaded material facts to support the allegation that Trivago was a "supplier" within the meaning of the *CPA.* Under the *CPA* (and under the consumer protection statutes of other provinces) a consumer may bring a civil action against a "supplier" that engaged in or acquiesced in an unfair practice that caused damage or loss. The motion judge also found that even if there was some basis in fact for concluding that Trivago was a "supplier", privity of contract is required for a claim of unfair practices under the consumer protection statutes. In this case, there was no privity of contract between the Plaintiffs and Trivago.

[32] The motion judge found that "[i]ndependent of the proposed class action's failure to satisfy the cause of action criterion, the action is not certifiable as a class action because there is no basis in fact that two or more of the putative Class Members suffered compensatory harm; being dissuaded from choosing more psychologically-economically satisfying accommodation is not a type of compensatory harm." According to the motion judge, it is a "fundamental principle that for an action to be certified as a class proceeding there must be some evidence that two or more putative Class Members suffered compensatory harm."

[33] To the extent that the Plaintiffs were relying on Dr. Duke's evidence to support their allegations of harm "it should be recalled that there is no economic component to this harm that can be plausibly or feasibly calculated, and the Plaintiffs make no effort to provide proof or a methodology for determining the quantification of economic damages for the class."

[34] According to the motion judge, the only compensatory harm alleged in this proceeding was psychological harm in the form of "after-the-fact decision regret and disappointment because of what might have been the putative Class Member's accommodation if he or she had received differently ordered information about available accommodation." This type of harm is not the type of harm that qualifies as a compensable psychological injury.

[35] With respect to the identifiable class criterion, the motion judge found that "subject to amendment to the Class period" that criterion would be satisfied. As the motion judge recognized, the proposed class definition "uses the fifteen year ultimate limitation period of the Ontario *Consumer Protection Act, 2002*." However, according to the motion judge, the presumptive limitation period of the *Limitations Act, 2002* applies class wide "because all of the Class Members ought to have known that there was reason to believe that they had a cause of action against the Defendants within two years of their use of the Defendants' search engines." Given this, the class period should be defined at two years before the commencement of this proceeding – September 18, 2018.

[36] With respect to the discoverability principle, the motion judge found that in order to rebut the presumptive limitation period,

> [249] …the onus is on each and every Class Member to refute that they did not have subjective or objective knowledge of enough material facts. However, in the immediate case, each and every Class Member cannot meet this onus because they do not plan to do so. The design of the class action is that they will not expose themselves to individual issues trials to determine when they discovered their claims. The onus is on each and every Class Member to refute the presumption of s. 5(2) and they do not and will not by their own choice meet the onus. It follows that on a class-wide basis the presumption of s. 5(3) is not refuted.

[37] The motion judge did not accept the Plaintiffs' argument that the Plaintiffs' claim "could not have been discovered until Class Counsel was retained or experts were retained to opine about how the search results have been wrongfully manipulated by the search algorithm or to advise them about the inadequacy about the Defendants' disclosure of how the search engines rank the information." According to the motion judge, this argument fails because the Plaintiffs took no steps "to acquire facts to become knowledgeable about the claim until Class Counsel were retained, but the limitation period does not stop running if the plaintiff takes no steps to investigate whether he or she has a claim." Furthermore, the notice provisions of the Ontario *CPA* "bolsters the idea that the Legislature's intent was that the claims under the Act must not be delayed much beyond the occurrence of the unfair practice." According to the motion judge it was not in the interests of justice to waive the notice requirements under the Act when " no claim for compensatory harm is actually being pursued and where the claim for psychological harm that was suffered does not qualify as compensable harm and where the consumer has no complaint about the accommodation he or she experienced apart from the complaint that he or she might have chosen some other accommodation that was more pleasurable."

[38] Given his findings as detailed above, the motion judge also found that the common issues criterion was not satisfied. Punitive damages could not be certified as a common issue even if the cause of action criterion was satisfied for three reasons – (1) "the issue is not common to the putative Class Members and would depend on the outcome of the individual issues trial"; (2) "[a] common issue question about punitive damages is not certifiable in the absence of other certifiable common issues"; and (3) "it is often premature to make the determination of whether punitive damages is certifiable at the time of the certification motion." That issue should be determined at the common issues trial, after discovery and production has taken place.

[39] With respect to certifying aggregate damages as a common issue, aggregate damage awards for the remedies of disgorgement or nominal damages are not available because the remedies are not available.

[40] The motion judge found that there were four reasons why the preferable procedure criterion was not satisfied. First, the cause of action and the common issues criteria were not satisfied. Second, "there is no basis in law for an aggregate damages award." Third, the proceeding does not satisfy the goal of access to justice as there is no access to justice concern because there is no evidence that any Class Member suffered compensatory harm. Fourth, with respect to the goal of behaviour modification, the preferable procedure to stop the Defendants is an action by the regulators or individual actions by consumers who "genuinely suffered a loss that is compensable in law."

[41] If all of the other criteria were satisfied, the motion judge found that the representative plaintiff criterion would be satisfied.

Issues

[42] This appeal raises the following issues.

(a) Did the motion judge err when he found that it was plain and obvious that disgorgement was not an available remedy under consumer protection legislation?

(b) Did the motion judge err when he found that it was plain and obvious that nominal damages were not an available remedy in the circumstances of this case?

(c) Did the motion judge err when he found that it was plain and obvious that punitive damages were not an available remedy in the circumstances of this case?

(d) Did the motion judge err when he found that it was plain and obvious that the proceeding could not be satisfied as a class proceeding because there was no basis in fact for finding that two or more putative class members had suffered compensable harm?

(e) Did the motion judge err when he found that it was plain and obvious that the action based on equivalent consumer protection legislation in other provinces could not be certified?

(f) Did the motion judge err when he applied a two-year limitation period to define the class?

(g) Did the motion judge err when he found that it was plain and obvious that privity was required to pursue an action against Trivago?

(h) Did the motion judge err in his preferability analysis?

[43] As indicated earlier in these reasons, this decision will only deal with the first three issues.

Analysis

Did the Motion Judge Err when he found that disgorgement was not a remedy under consumer protection legislation?

[44] Whether a plaintiff has a cause of action under section 5(1)(a) of the *CPA* is a question of law. Thus, a motion judge's decision on this issue is reviewable on a standard of correctness (*Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502, at para. 39).

[45] The test for determining this issue is the same as the test for determining whether a pleading should be struck for failing to disclose a reasonable cause of action. The question to be answered is – Assuming that the facts as pleaded are true, is it plain and obvious that the pleading should be struck? For the purposes of answering this question the "facts asserted in the statement of claim are to be taken as true unless patently incapable of proof" and the "statement of claim is to be read generously" (*Ibid* at para. 38).

[46] As already noted, the motion judge found that there was some basis in fact to conclude that the Defendants had engaged in unfair practices under the *CPA*.

[47] Section 18 of the *CPA* is the section that specifies the remedies that are available to a consumer if a person has engaged in an unfair practice.

> **Rescinding agreement**
>
> 18(1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.
>
> **Remedy if rescission is not possible**
>
> (2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to receive damages, or both, if rescission of the agreement under subsection (1) is not possible,

> (a) Because the return or restitution of the goods is no longer possible; or
>
> (b) Because rescission would deprive a third party of the right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

[48] In this case rescission is not possible and, therefore, the applicable section is s. 18(2).

[49] It is well-settled that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 118).

[50] Section 18(2) makes it clear that a consumer is entitled to "damages" as a remedy if rescission of the agreement is not possible. As the Plaintiffs point out, it does not limit the word "damages" to compensatory damages. However, the leading authority for the remedies available under s. 18(2) of the *CPA* is the Ontario Court of Appeal's decision in *Ramdath v. George Brown College of Arts and Technology*, 2015 ONCA 921, 329 D.L.R. (4th) 490. In that case the Court of Appeal found as follows at para. 90:

> GBC argued, both at trial and on appeal, that to claim and be awarded damages under s. 18(2), a consumer still needs to establish causation. I agree. However, the necessary causal link is the link between the damages and the agreement, i.e. that the consumer suffered damages that flowed from entering into an agreement after or while an unfair practice was occurring.

[51] In this case, as set out above, the motion judge found that:

> There is no evidence the Plaintiffs or the Class Members did not receive the accommodation they booked. There is no evidence that the Plaintiffs or the Class Members received accommodation that was less in quality than promised. There is no evidence that in any particular case, or on a class-wide basis, that alternative qualitative similar accommodations were available that would meet Class Member' needs equally well at a lower cost, or that would better meet Class Members' subjective needs.

[52] Just as there is no evidence of this kind of loss, there is no pleading that the Plaintiffs suffered any loss of this kind.

[53] In other words, the Plaintiffs have not established a causal link between the agreements they entered into and any damages they suffered. The Plaintiffs assert that they have

established a causal link between the unfair practices and the damage to the market. This too is a goal of consumer protection legislation.

[54] In *Richard v. Time Inc.* 2012 SCC 8, [2012] 1 S.C.R. 265, the Supreme Court of Canada discusses the purposes and objectives of the Quebec consumer protection legislation as follows:

> [160] The *C.P.A.*'s first objective is to restore the balance in the contractual relationship between merchants and consumers. This rebalancing is necessary because the bargaining power of consumers is weaker than that of merchants both when they enter into contracts and when problems arise in the course of their contractual relationships. It is also necessary because of the risk of informational vulnerability consumers face at every step in their relations with merchants. In sum, the obligations imposed on merchants and the formal requirements for contracts to which the Act applies are intended to restore the balance between the respective contractual powers of merchants and consumers.
>
> [161] The *C.P.A.'*s second objective is to eliminate unfair and misleading practices that may distort the information available to consumers and prevent them from making informed choices. Most of the measures imposed by the legislature to achieve this objective are found in Title II of the *C.P.A.*, which we discussed above.
>
> [162] The legislature's intention in pursuing these two objectives is to secure the existence of an efficient market in which consumers can participate confidently. [Cites omitted]

[55] The expert evidence provided by the Plaintiffs (which was not contradicted by the Defendants) speaks to the ways in which the unfair practices at issue undermined "the existence of an efficient market in which consumers can participate confidently". If this is the primary objective of consumer protection legislation, that objective would, according to the Plaintiffs, be enhanced, rather than undermined, if a wider range of damages were available to the court to drive home the message that unfair practices will not be tolerated.

[56] The problem with this submission is that the motion judge's position, that the focus of the remedies in s. 18 is on the damages suffered by the consumer (not the market) by virtue of the fact that they entered into an agreement while the unfair practice was occurring, is supported by para. 90 (discussed above) of the Court of Appeal's decision in *Ramdatth.*

[57] The Plaintiffs point to another paragraph of *Ramdath*, which they argue confirms that disgorgement is an available remedy under s. 18(2) of the *Act* - para. 94. In that paragraph the Court of Appeal states:

> [94] …In his text, *The Law of Damages*, referred to by the trial judge, Professor Waddams discusses the measure of damages in statutory remedies for misrepresentation, including the Ontario *Consumer Protection Act.* He explains that the language of s. 18(2) that prescribes the compensation entitlement for a plaintiff, together with the availability of punitive and exemplary damages in s. 18(11), give a court" complete flexibility to award whatever damages would be appropriate at common law" including the restitutionary measure.

[58] The Plaintiffs rely on this paragraph to support their assertion that the motion judge erred in finding that it is plain and obvious that disgorgement is not available as a remedy under the *CPA.* However, while *Ramdath* does suggest that restitutionary remedies are available under s. 18(2), it makes it clear that the measure of damages sought must be "appropriate at common law. "

[59] While the Plaintiffs argued in oral submissions that because their claim was one under s. 18(2) of the CPA, there was no need to consider the leading authority on whether and when disgorgement is available at common law, we disagree. Not only does *Ramdath* reference the common law as a marker for whether a remedy is available, so does s. 18(1) of the *Act*, which contains the most inclusive references to remedies, namely, "any remedy that is available in law."

[60] In *Atlantic Lottery*, the Supreme Court of Canada discusses the availability of the disgorgement remedy in the context of a motion to certify a class action against the government agency that approved the operation of video lottery terminal games in Newfoundland and Labrador. The plaintiffs claimed that these terminals were inherently dangerous and deceptive, leading to a risk of addiction and suicidal ideation. In a 5 to 4 decision the Court found that the claim disclosed no reasonable cause of action.

[61] In that case the plaintiffs claimed disgorgement as a remedy. They did so because they asserted, as the Plaintiffs in this case do, that they were unable to calculate their compensatory damages because the terminals at issue do not create records for particular customers. Thus, according to the plaintiffs, the defendant's conduct may have contributed to their lack of evidence on the issue of compensatory damages.

[62] What emerges from *Atlantic Lottery* is that disgorgement is not a restitutionary remedy. As put by the Court at para. 24:

> In sum, then, restitution for unjust enrichment and disgorgement are two types of gain-based remedies. Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while *restitution* is awarded in response to the causative events of unjust enrichment where there is correspondence between the defendant's gain and the plaintiff's deprivation. [Cites omitted].

[63] What also emerges from *Atlantic Lottery* is that disgorgement is a remedy that is awarded in certain limited circumstances – most often in situations where the cause of action is founded on a breach of fiduciary duty. In the tort context, the remedy raises the following concern:

> [34] The difficulty is not just normative, although it is at least that. The practical difficulty associated with recognizing an action in negligence without proof of damages becomes apparent in considering how such a claim would operate. As the Court of Appeal recognized, a claim for disgorgement is available to any plaintiff placed within the ambit of risk generated by the defendant would entitle *any one* plaintiff to *the full gain* realized by the defendant. No answer is given as to why any particular plaintiff is entitled to recover the whole of the defendant's gain. Yet corrective justice, the basis for recovery in tort, demands *just that*: an explanation as to why *the plaintiff* is the party entitled to a remedy. Tort law does not treat plaintiffs "merely as a convenient conduit of social consequences" but rather as "someone to whom damages are owed to correct the wrong suffered." A cause of action that promotes a race to recover by awarding to the first plaintiff who arrives at the courthouse steps undermines this fundamental principle of tort law. [Cites omitted].

[64] While the Plaintiff's action is not an action in tort, the concern raised about extending the remedies available under s. 18(2) to disgorgement when there is no evidence of harm to the individual consumer is, as the motion judge recognized, relevant. Why should the Plaintiffs be entitled to the full gain realized by the Defendant when they have not established that they have suffered any harm by virtue of the Defendants' conduct? It is also worth noting that the conduct at issue in s. 18(2) is similar to the conduct at issue in a negligent misrepresentation claim.

[65] In *Maginnis v. FCA Canada Inc.*, 2021 ONSC 3897 (Div. Ct.), the Divisional Court found as follows with respect to the availability of disgorgement for claims under the *CPA*:

> [45] While the motion judge did not discuss disgorgement of profits, that remedy is not available under the *Consumer Protection Act.* Nor would disgorgement of profit be available in this case at common law. As the Supreme Court of Canada stated in *Atlantic Lottery*, above, disgorgement of profits is only available for certain causes of action, such as breach of fiduciary duties, and it is not an independent cause of action (at paras. 27, 30). In order to make out a claim for disgorgement, the appellants must first prove an actionable misconduct. Claims in negligent misrepresentation, conspiracy to injure and breach of the *Competition Act* require proof of consequential harm, and the motion judge found there was no evidence of compensable harm after the repair.

[66] In *Atlantic Lottery*, all the judges accepted that the plaintiffs might have a cause of action in breach of contract. However, as put by the majority at para. 49:

> But that is of no moment here, since the plaintiffs have made it clear… that they seek only *non-compensatory* remedies for breach of contract, namely disgorgement and punitive damages. Whether the plaintiffs' breach of contract claim discloses a *reasonable* cause of action should be considered in light of the remedies the plaintiffs actually seek. The question to be decided here, then, is whether these remedies are available to the plaintiffs, assuming the truth of their pleadings.

[67] While not framed as a breach of contract claim, the Plaintiffs rely on a case where disgorgement was awarded for an interest unconnected with any harm to the Plaintiffs themselves when the court found that the defendant had breached their contract with the plaintiff.

[68] As the motion judge found, *Atlantic Lottery* is clear that disgorgement is available for breach of contract only in exceptional circumstances where a) the nature of the plaintiff's interest is such that it cannot be vindicated by other forms of relief; and b) the circumstances warrant making such an award (e.g., where the plaintiff has a legitimate interest in preventing the defendant's profit-making activity).

[69] The minority in *Atlantic Lottery* found that the first part of the test was satisfied because compensatory damages might be inadequate since the video terminals that were the subject of the action did not create the necessary records to calculate such damages. The Plaintiffs in the case at bar make a similar argument. However, as the motion judge noted, the majority in *Atlantic Lottery* disagreed finding that "compensatory damages are not inadequate merely because a plaintiff is unwilling, or does not have sufficient evidence, to prove loss" (para. 60).

[70] According to the majority, "inadequacy flows *not* from the availability of evidence, but from the nature of the claimant's interest."

[71] An example of a case where the nature of the claimant's interest was seen as potentially justifying a remedy of disgorgement is that at play in *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 02. This case is referred to in *Atlantic Lottery* and is the case relied upon by the Plaintiffs. That case concerned an appeal from a partial summary judgment granted in favour of the plaintiff awarding it restitutionary damages for a breach by Canada of the Nunavut Land Claims Agreement. The breach at issue concerned a covenant to establish a system of statistical monitoring. The plaintiff claimed restitutionary damages and the judge below ordered Canada to disgorge the savings it had accrued from the delayed performance of its monitoring obligations. In upholding this finding, the Nunavut Court of Appeal found:

> [88] [Canada] received valuable consideration for the covenant to establish a system of statistical monitoring. If it could simply refuse to perform that covenant and argue that it need not pay any damages because none could readily be established, it would potentially deprive the Inuit of many of the intended benefits of the Land Claims Agreement. In the context of a land claims treaty, insulating the contracting government from any consequences of a breach of a covenant like this is legally unacceptable. As a result, the case management judge was correct in concluding that the respondent is not limited to a claim for nominal damages. Some appropriate measure of damages must be found.

[72] The Plaintiffs submit that the damage to the market identified by their expert, Dr. Duke, is analogous to the harm to the Inuit people at issue in the decision from the Nunavut Court of Appeal. The mere fact that this harm may be difficult to quantify does not mean that it should go unpunished.

[73] The nature of the Plaintiffs' interest in the case at bar is not analogous to the nature of the plaintiff's interest in the case from the Nunavut Court of Appeal. The nature of their interest is most analogous to that of a plaintiff in a negligent misrepresentation claim. This is very different from a party to a land claim agreement.

[74] In short, as the motion judge correctly found, *Atlantic Lottery* has confirmed that disgorgement for breach of contract at common law is to be reserved for cases where there are exceptional circumstances. The motion judge made no error when he found that the circumstances of the Plaintiff's claim were not exceptional enough to qualify for such relief at common law.

Did the motion judge err when he found that it was plain and obvious that nominal damages were not an available remedy in the circumstances of this case?

[75] Nominal damages may be available for certain causes of action. For instance, nominal damages may be awarded in a breach of contract case where a breach of contract has been established but damages from the breach have not (see: *RINC Consulting Inc. (Rousta Capital) v. Grant Thornton LLP*, 2020 ONCA 182, at para. 52). In such circumstances, nominal damages serve a symbolic rather than a compensatory purpose and may also serve to vindicate the rights of the party to whom they are awarded.

[76] In this case, the motion judge decided that it is plain and obvious that the nominal damages claimed by the Plaintiffs would not be available to them, based upon the allegations in their pleading and his interpretation of the applicable consumer protection statutes that seek to prohibit deceptive or unfair sales practices. As is the case with the Plaintiffs' other claims for restitutionary or disgorgement remedies discussed above, the motion judge determined that the remedy of nominal damages cannot arise from the Plaintiffs' pleading which exclusively alleges breaches of regulatory legislation.

[77] The motion judge also concluded that, in addition to this determination based upon an interpretation of the applicable statutes, nominal damages would not be available to the Plaintiffs pursuant to either common law or equity on the facts as pleaded even if other causes of action were advanced.

[78] The Plaintiffs assert on this appeal that the motion judge erred in holding that nominal damages are not available to them and take the position that it is not plain and obvious that their claim for nominal damages will not succeed. In support of their assertion, they rely principally upon the partially dissenting opinion of the minority in *Atlantic Lottery* that expressed the view that nominal damages may be awarded in some cases without proof of loss.

[79] In particular, the partially dissenting opinion in *Atlantic Lottery* held that the claim before it in that case for breach of contract should not be struck, as several remedies for breach of contract were open to the plaintiffs, including nominal damages. This observation was elaborated upon by it, as follows:

> [104] Unlike a claim in negligence, loss is not an essential element of a cause of action for breach of contract. In my view, there is a basis for an action for breach of contract and a basis to obtain remedies against ALC even in the absence of pleadings of specific personal loss. For example, a court finding breach of contract may make binding declarations of right, whether or not any consequential relief is or could be claimed, and whether or not a declaration was pleaded as relief sought (Rules of the Supreme Court, 1986, r. 7.16; see also L. Sarna, The Law of Declaratory Judgments (4th ed. 2016), at pp. 5-6; *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at pp. 647-48).
>
> [105] In addition, nominal damages may be given in all cases of breach of contract as a manner of 'affirming . . . that there is an infraction of a legal right' (*Owners of the Steamship 'Mediana' v. Owners, Master and Crew of the Lightship 'Comet'*, [1900] A.C. 113 (H.L.), at p. 116, per Lord Halsbury L.C.). Nominal damages are thus always available for causes of action, like breach of contract, that do not require proof of loss, even if they are not pleaded (see, e.g., *Place Concorde East Ltd. Partnership v. Shelter Corp. of Canada Ltd.* (2006), 2006 CanLII 16346 (ON CA), 211 O.A.C. 141, at paras. 56 and 75-78; *Saskatchewan Government Insurance v. Wilson*, 2012 SKCA 106, 405 Sask. R. 8, at para. 13; J. Edelman, McGregor on Damages (20th ed. 2018), at pp. 406-7; M. Gannage, "Nominal Damages for Breach of Contract in Canada" (2011), 69 Advocate 833, at p. 834; J. Cassels and E. Adjin-Tettey, Remedies: The Law of Damages (3rd ed. 2014), at p. 355). Assuming that the plaintiffs can ultimately prove the existence of a contract and its breach by ALC, they may be entitled to an award of nominal damages.

> [106] Litigants have the right to pursue reasonable causes of action to vindicate their rights. In my view, the plaintiffs' breach of contract claim is a reasonable cause of action. As it is actionable without proof of loss, it always necessarily implies nominal damages. This alone precludes striking the claim.

[80] No such claim for breach of contract is advanced by the Plaintiffs in the action before us. Further, no other cause of action was pleaded by them that could arguably succeed without adequate proof of actual damages.

[81] In their affidavit material filed on the certification motion, neither Plaintiff provided any evidence of actual damages having been sustained by either of them for which compensation was sought. There was no indication that they had paid more for any hotel or travel services than they should have due to the alleged breach by the Defendants, or any one of them, of the statutes upon which the Plaintiffs rely. No assertion or proof of any out-of-pocket expenses incurred by the Plaintiffs as a result of the conduct of the Defendants was advanced. Had it been that actual damages were sustained; it would have been a relatively simple matter to set out the nature and cause of such damages suffered by the Plaintiffs and to quantify them.

[82] The motion judge considered the issue of nominal damages within the framework of his assessment of the cause of action criterion for certification as a class action. His conclusion is firmly supported by the majority decision in *Atlantic Lottery*. Indeed, the majority of the Supreme Court of Canada in its decision overturned the certification of the class action that claimed, among other things, breach of contract without asserting proof of any actual damages or a plausible methodology for calculating them. In doing so, the Court considered that to permit a claim to be certified as a class action in such circumstances would not reflect a proportionate procedure for the adjudication of disputes. The majority of the Court stated as follows (at para. 67):

> [67] The remaining question on breach of contract is whether the plaintiffs' claim should survive as a hollow cause of action that does not support any of the remedies they seek. In my view, it should not. While I agree with my colleague Karakatsanis J. that declaratory relief and nominal damages are available in theory as remedies for breach of contract, a reasonable claim is one that has a reasonable chance of achieving the outcome that the plaintiff seeks. That is not this claim. To be sure, the circumstances here are unusual. Not only did the plaintiffs plead only gain-based relief and punitive damages, both of which I have concluded are unavailable in the circumstances, the plaintiffs also expressly disclaimed remedies quantified on the basis of individual loss. At no point did the plaintiffs argue that their claim should survive because nominal damages are available. In my view, the plaintiffs' breach of contract claim should be assessed on the basis of the questions put before the

> Court — namely, whether a gain-based remedy or punitive damages are available in the circumstances. And on that basis, it is obvious that the plaintiffs' breach of contract claim does not disclose a reasonable cause of action. To allow this claim to proceed to trial would simply be to delay the inevitable, and would not reflect a 'proportionate procedur[e] for adjudication'. [Cites omitted]

[83] To the extent that the Plaintiffs rely upon the opinion expressed by the minority in *Atlantic Lottery*, that opinion is not binding upon us nor was it binding upon the motion judge. Moreover, even accepting that certain causes of action other than breach of contract (such as battery) may not require proof of actual damages, the nature of the claim advanced in this proceeding is not among them.

[84] Further, we consider that the facts as pleaded by the Plaintiffs do not give rise to any viable tort *per se*, as has been asserted in argument before us. Rather, the common law cause of action that most closely arises from the conduct of the Defendants as alleged by the Plaintiffs in this case would be one for misrepresentation. An action for misrepresentation would require both reliance upon the alleged misrepresentation and proof of damage as a result in order to be sustained, in our view. If there were neither reliance upon the alleged misrepresentation nor any actual damages flowing from it, any action based upon such a claim would be viewed as unreasonable and considered doomed to fail.

[85] More importantly, we agree with the motion judge for the reasons articulated by him that nominal damages are not available pursuant to either the consumer protection or the competition legislation, breaches of which form the basis of the Plaintiffs' claims for damages in this proceeding. While we recognize that such legislation is to be interpreted generously in favour of consumers (see: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531), we do not consider that a generous interpretation necessarily would or should permit compensation to be ordered in the absence of proof of any actual harm. To do so would violate what the motion judge correctly described as the compensatory injury principle, a fundamental principle that underlies the determination of suitability of an action for certification as a class proceeding.

[86] We are therefore of the opinion that the motion judge did not err in holding that nominal damages are not available in this case. As he observed, nominal damages are not designed to be a means of avoiding the making of a claim for compensatory damages that, in this case, the Plaintiffs submit actually occurred but for which, for tactical purposes, they do not seek to recover.

[87] If the intention of the Plaintiffs is to seek vindication of their consumer rights through an award of nominal damages, and not seek compensation for any actual damages suffered by them and other members of the proposed class, that vindication could be obtained through the processes available under the regulatory legislation they rely upon.

[88] Accordingly, we would not give effect to this ground of appeal.

Did the Motion Judge Err when he found that the claim for punitive damages did not satisfy the cause of action criterion?

[89] As acknowledged by the motion judge, punitive damages are available for breaches of the *Consumer Protection Act*. Section 18(11) expressly provides that a court may award punitive or exemplary damages in addition to any other remedy in an action commenced under section 18.

[90] However, the motion judge concluded that the plaintiffs' claim exclusively for punitive damages (compensatory damages not having been claimed and the remedies of disgorgement and nominal damages having been found to be unavailable) was not legally tenable.

[91] That conclusion was informed by the motion judge's review of the Supreme Court of Canada's decision in *Richard* and in particular that court's analysis of the Québec *Consumer Protection Act*, which he contrasted with the provisions of the Ontario Act.

[92] In *Richard*, the Supreme Court observed that the conditions for claiming punitive damages are approached differently by the common law and Québec civil law respectively. Whereas at common law, punitive damages can be awarded in any civil suit in which the plaintiff proves that the defendant's conduct was "malicious, oppressive and high-handed [such] that it offends the court's sense of decency", the *Civil Code of Québec* does not create a general scheme for awarding punitive damages and does not establish a right to this remedy in all circumstances. Rather, punitive damages can be awarded only where the law so provides.

[93] The Supreme Court held that, as a matter of statutory interpretation of the Québec *Consumer Protection Act*, CQLR c P-40.1, consumers can be awarded punitive damages even if they are not awarded contractual remedies or compensatory damages at the same time.

[94] That said, the Supreme Court observed that the purpose of an award of punitive damages under Québec's *Consumer Protection Act* is to prevent conduct on the part of merchants and manufacturers in which they display ignorance, carelessness or serious negligence with respect to consumer's rights and the merchant's and manufacturer's obligations to consumers under the Act and also to provide a recourse to consumers in response to merchants' and manufacturers' acts that are intentional, malicious or vexatious. The mere fact that a provision of the *Consumer Protection Act* had been violated was not enough to justify an award of punitive damages: the court was required to consider the whole of the merchant's conduct at the time of and after the violation.

[95] The objective of punitive damages in common law jurisdictions is described by Laurence David and Bruce Feldthusen in *Halsbury's Laws of Canada - Damages*, (II(3)(5)) at HAD-12 "Damages aimed at punishment, deterrence and denunciation" (2021 Reissue):

> Punitive (also called exemplary) damages are awarded against a defendant in exceptional circumstances. Punitive damages are awarded to punish the defendant (in the sense of retribution), to deter future wrongdoing by the defendant or others and to denounce the defendant's conduct. Punitive damages are an important exception to the general common law rule that

> damages are awarded to compensate the victim, not punish the wrongdoer. This is because punitive damages focus on the defendant's misconduct rather than the loss suffered by the plaintiff. Punitive damages are, moreover, "only to be awarded where compensatory damages are inadequate to accomplish the objectives of retribution, deterrence, and condemnation …".

[96] The question of whether, as a general proposition, punitive damages are available as a free-standing remedy in the absence of other remedies is not free from doubt. Professor Waddams, in *The Law of Damages* (Toronto: Canada Law Book, looseleaf) writes, at §11:9, that "exemplary damages may be awarded where the plaintiff has suffered no loss at all". However, the authorities which he cites in support are all cases where the plaintiff also obtained either nominal damages (*Johnston Terminals & Storage Ltd. v. Miscellaneous Workers' Wholesale & Retail Delivery Drivers & Helpers Union, Local 351*, (1976) 61 D.L.R. (3d) 741 (B.C.S.C.), *Cousins v. Wilson*, [1994] 1 N.Z.L.R. 463 (H.C.)) or injunctive relief (*Cash & Carry Cleaners Ltd. v. Delmas* (1973), 44 D.L.R. (3d) 315 (NB C.A.).

[97] Assuming that a claim for punitive damages alone is an available remedy at common law, a limiting factor is the requirement of s. 18(11) of Ontario's *Consumer Protection Act*, when read in conjunction with s. 18(2). Section 18(11) provides that a court may award exemplary or punitive damages in addition to any other remedy in an action commenced under section 18. Where, as in the present case, rescission by a consumer who has entered into an agreement after or while a person has engaged in an unfair practice, is not possible, section 18(2) limits the remedies available to a consumer to recovery of the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer, or to recover damages, or both.

[98] To similar effect, section 100 of the Ontario *CPA* provides that if a consumer successfully brings an action under the Act, the court, when ordering that the consumer recover the full payment which he or she is entitled to under the Act, may in addition to such order, award exemplary or punitive damages.

[99] The motion judge underlined, as we have, the words "in addition to". Although he did find that the availability of damages under section 18(2) was a prerequisite to being able to recover punitive damages, the Plaintiffs argue that the motion judge's interpretation of the Act was too narrow. Section 18(1) provides that "any remedy" is available to respond to an unfair practice, "including damages". As a matter of statutory interpretation, the Plaintiffs say that remedies other than compensatory damages are implicitly available, thus giving courts broad discretion to craft a remedy appropriate to the circumstances. Indeed, in *Richard*, at para. 146, the Supreme Court adopted a previous interpretation of the provision in section 49 of the *Charter of Human Rights and Freedoms*, CQLR c C-12, that in case of unlawful and intentional interference with any right or freedom recognised by the *Charter*, a tribunal may, in addition, condemn the person guilty of it to punitive damages, as meaning:

> … that a court can not only award compensatory damages but can "in addition", or equally, as well, moreover, also (see the definition of "*en*

> *outre*" in *Le Grand Robert de la langue française* (1986), vol. 6), grant a request for exemplary damages. The latter type of damages is therefore not dependent on the former.

[100] As already referred to, the Plaintiffs, citing the Court of Appeal's decision in *Ramdath*, at para. 98, argue that the language of section 18(2), read together with the availability of punitive and exemplary damages provided for by section 18(11), gives 'a court "complete flexibility to award whatever damages would be appropriate at common law" including the restitutionary measure'.

[101] *Ramdath* concerned the propriety of making an award of aggregate damages at the trial of a class action. The Court of Appeal rejected arguments that the damages of class members, who were students enrolled in a post-graduate course in International Business Management, could only be assessed on an individual basis and could not be aggregated. Pursuant to an agreed-upon formula approved by the trial judge, all class members would be entitled to damages.

[102] In our view, *Ramdath* provides no assistance on the issue of whether, in a consumer protection action, a claim for punitive damages, absent a claim for compensatory damages or availability of the remedies of disgorgement and nominal damages, is legally tenable.

[103] While accepting the principle that consumer protection legislation should be "interpreted generously in favour of consumers", we reject the argument that the motion judge's application of the clear language of the statute amounted to a "reading down" of the remedies available to consumers under the *CPA*. Interpreting remedial legislation in a manner that furthers the important policy objective of protecting consumers and providing redress for unfair practices does not give courts liberty to ignore the entire context of the statutory scheme.

[104] That is what the motion judge did. In interpreting and applying the statute, he followed the admonition of the Supreme Court in *Richard* that even if a free-standing remedy of punitive damages is available in law, the pleaded facts must be capable of supporting such a claim, concluding, at para. 177:

> … the Plaintiffs claim for punitive damages is based on no more than the pleaded fact that the Defendants may have breached the unfair practices provisions of the *Ontario Consumer Protection Act, 2002* and the comparable provisions from the other provinces and territories. However, as the Supreme Court pointed out, there must be something more than a breach of the *Consumer Protection Act* for an award of punitive damages.

[105] The Plaintiffs' statement of claim pleads in support of their claim for punitive damages that the Defendants have been the subject of unfair consumer practices proceedings brought by regulators in the United Kingdom, the European Union and Australia.

[106] As already noted, the record discloses that in the United Kingdom and the European Union, Expedia Group, Trivago and the Bookings Group entered into undertakings with the regulators

to refrain from engaging in practices similar to those pleaded by the Plaintiffs in the Ontario action. In Australia, proceedings were brought against Trivago in the Federal Court of Australia by the Australian Competition and Consumer Commission alleging misleading or deceptive conduct under the *Australian Consumer Law*. The Federal Court found Trivago liable for breaches of the *Australian Consumer Law* (*Australian Competition and Consumer Commission v. Trivago N.V.* [2020] FCA 16) and imposed injunctive relief and a fine of AUD $44.7 million (*Australian Competition and Consumer Commission v. Trivago N.V. (No 2)* [2022] FCA 417).

[107] The motion judge continued, at para. 178:

> In the immediate case, there is no pleading beyond the allegations of breaches of the legislation. The circumstance that there were regulatory proceedings in Australia, the United Kingdom, and the European Union are no more than doubling down on the allegations of breaches of the legislation in the Statement of Claim, and it remains to be determined whether the conduct in Canada is the same or different than in Australia and the United Kingdom and it even remains to be determined whether the regulatory proceedings elsewhere are relevant given that the statutes and the jurisprudence may be different.

[108] Although more germane to the issue of preferable procedure, it is noteworthy that in the Australian *Trivago* case, which was prosecuted by a regulator, the court considered it "necessary for the purposes of specific and general deterrence to fix penalties that are far greater than the profit Trivago earned from its contravening conduct" and that Australian consumers had suffered loss and damage estimated at approximately AUD $30 million. By contrast the Plaintiffs in the present case do not assert compensatory loss or damage.

[109] To be capable of supporting a claim for punitive damages, the allegations made against the defendants which are grounded on the foreign regulatory proceedings, must amount to high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour: *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 36

[110] In support of its claim for punitive damages, the Statement of Claim pleads that:

> 102. This Court should order the Defendants to pay substantial exemplary and punitive damages. The Defendants' conduct was high-handed, malicious and reprehensible, and it departs to a marked degree from the standards expected of the most used and trusted online travel websites.
>
> 103. The Defendants consistently and repeatedly made the Advertising Practice Claims, which were false, misleading, deceptive, and unconscionable. The Defendants continued to do so (in whole or part) even after they agreed in other jurisdictions to cease engaging in these unfair and

> deceptive practices. A substantial exemplary and punitive damages award is appropriate to deter the Defendants and other travel metasearch and OTAs from engaging in this predatory and abusive conduct.

[111] It is not sufficient to simply recite in a pleading the words that are required to advance a claim for punitive damages. Courts must look beyond the labels used by parties and determine the true nature of the claim pleaded. At the pleadings stage, this requires a determination of whether, assuming the verity of all of the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, per McLachlin J. at para. 84. A similar approach is warranted at the certification stage in a class proceeding.

[112] We agree with the motion judge's conclusion that what amounts to little more than a bare allegation that the Defendants may have breached the unfair practices provision of the Ontario *Consumer Protection Act*, without more, is insufficient to meet the punitive damages requirement for misconduct that is high-handed, malicious, arbitrary or highly reprehensible. The factual allegations that regulatory proceedings, in other jurisdictions, under different statutes, resulting in one adverse adjudicated outcome against one of the defendants in Australia, and undertakings not to engage in certain conduct given to EU and UK regulators by some of the Defendants, do not address the issue of how the Defendants' conduct in respect of Plaintiffs seeking redress under Canadian consumer protection legislation amounted to the exceptional circumstances that, if proven, would justify an award of punitive damages.

[113] Accordingly, we agree with the motion judge that the Plaintiffs' claim for the remedy of punitive damages does not satisfy the cause of action criterion.

Conclusion

[114] For these reasons the appeal is dismissed. As agreed by the parties, the Plaintiffs shall pay the Defendants their costs of the appeal, fixed in the amount of $120.000.00, all inclusive, to be allocated among the Defendants as the Defendants see fit.

_____

H. Sachs J.

I agree _____

E. Stewart J.

I agree _____

Mew J.

Released: March 21, 2024

CITATION: Hoy v. Expedia Group, Inc., 2024 ONSC 1462
DIVISIONAL COURT FILE NO.: 710/22
DATE: 2024/03/21

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

H. Sachs, E. Stewart and Mew JJ.

BETWEEN:

MATTHEW HOY and JUSTIN STOREY

Plaintiffs (Appellants)

– and –

EXPEDIA GROUP, INC., EXPEDIA CANADA CORPORATION, TRAVELSCAPE LLC, HOTELS COM LP, HOTEL, COM GP, LLC, HRC 99 HOLDINGS, LLP, TOUR EAST HOLIDAYS (CANADA) INC., TRIVAGO N.V. BOOKING HOLDINGS INC. and BOOKING. COM B.V.

Defendants (Respondents)

REASONS FOR JUDGMENT

THE COURT

Released: March 21, 2024