2015 NBQB 241 SJC-505-15

Date: 20151215

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

ACKLANDS-GRAINGER INC.

Plaintiff

- and -

WESCO DISTRIBUTION CANADA LP, HAZMASTERS INC., PATRICK GRAVES, JASON MURRAY, EUGENE LAPOINTE and JOHN HENDERSON

Defendants

BEFORE:	Mr. Justice H.H. McLellan
AT:	Saint John, NB
DATE OF HEARING:	December 10, 2015
DATE OF RULING:	December 15, 2015
COUNSEL:	Stephen F. Gleave and Clarence Bennett for the plaintiff Landon P. Young for the defendants

RULING

McLellan, J.:

[1] The plaintiff Acklands-Grainger Inc. or AGI distributes industrial, safety and fastener products with 170 branches across Canada including a branch in Saint John, NB. The defendants Wesco Distribution Canada L.P. and its subsidiary Hazmasters Inc. provide safety products and training for abatement and restoration work (including asbestos and lead abatement) and sell safety-related gear and services in New Brunswick through a branch in Dartmouth, NS and a salesperson based in Charlottetown, PE. There are also four individual defendants. Patrick Graves was the branch manager of AGI in Saint John until he was dismissed without cause on June 28, 2015; Jason Murray, Eugene LaPointe and John Henderson were sales representatives of AGI in Saint John until they quit in October 2015.

[2] Hazmasters is in the process of opening a branch in Saint John to be staffed by those former AGI employees. Mr. Graves is to be the manager and Mr. Murray, Mr. LaPointe and Mr. Henderson are to be sales representatives. The new Hazmasters branch is to be in premises that until 2014 were rented by AGI.

[3] Now by preliminary motion AGI asks that the defendants be ordered:

(a) not to solicit the clients of AGI for five months;

(b) not to use any confidential information of AGI;

(c) not to solicit other employees of AGI in the region for six months;

(d) to preserve all relevant computer data and underlying metadata; and

(e) to agree to an early trial.

Non-solicitation; non-competition

[4] The evidence before the court does not show that any of the defendants signed a binding and enforceable non-solicitation or non-competition agreement. Although Mr. Graves was required to sign a letter in 2012 with a non-solicitation clause ("for a period of six (6) months after the end of your employment with the company, you will refrain from soliciting Acklands-Grainger's customers or team members"), the evidence at this stage of the proceedings indicates that letter was signed without consideration and offends the rule that:

> "... the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms." *Hobbs v. TDI Canada Ltd.*, 2004 O.J. No. 4876 (C.A.), at para 32.

[5] In the absence of a binding and enforceable non-solicitation or non-competition agreement, in effect the plaintiff AGI asks the court to impose one to protect its confidential information from misuse by its former employees and as a "springboard" to launch Hazmasters branch in Saint John.

Confidential Information

[6] Although the defendants deny doing anything wrong with AGI information, a technical search of computer data indicates that Mr. Henderson and Mr. LaPointe appear to have taken confidential information including customer lists from AGI computers in September and October 2015. The truth may be clouded by evidence that iPads were effectively erased, Mr. LaPointe destroyed a USB flash drive memory stick and other records have been deleted or destroyed.

[7] The evidence suggesting improper use of AGI customer lists includes an email from Mr. Graves to Hazmasters on the evening of September 18, 2015 (four weeks before Mr. Henderson and Mr. LaPointe resigned from AGI) as follows:

> "... I met this afternoon with John Henderson and Gene LaPointe and we went over our customer lists for a proposed budget for 4th quarter.
>
> "We all feel that $100,000 per month or $300,000 plus $200,000 from existing HazMaster customers already doing business is within reason....
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> "... Here is a list of customers that we would target for these sales....
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> "Current customer base for Acklands is extremely upset with the latest 5th price increase and are primed for the picking."
> (Record, pages 166 and 167)

Principles

[8] The New Brunswick Court of Appeal in a decision written by Mr. Justice Robertson clarified the applicable principles in *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51 (CanLII), 315 N.B.R.(2d) 328:

> [33] In employment law, the common law and equitable obligations of an employee are cast in terms of a duty to act in good faith, a duty of fidelity and the equitable duty not to breach confidences. A non-fiduciary employee owes the employer a general duty of good faith and fidelity during the currency of the employment relationship. This translates into a duty not to compete with the employer, either directly or indirectly, during the currency of the employment relationship. It also translates into a duty not to disclose "trade secrets" and other "confidential information". Once the employment relationship ends, the duty of non-disclosure persists. However, confidential information does not include the general skills and knowledge acquired by the employee while working for the former employer. This is true so long as the skill and knowledge is committed to memory and not dependant on the employer's documentation. Undoubtedly, employees who depart with suitcases of documents, computer files or even a solitary customer list are

in breach of their post-employment obligations. Employees who leave with only their personal possessions are better able to defend law suits alleging breaches of confidence. In sum, a former employee is entitled to exploit freely the general skills and knowledge acquired as a result of the employment relationship, so long as that knowledge is a product of his or her memory and unaided by the employer's documentation.

[34] Leaving aside the employee's duty to keep confidences, it has to be asked whether there are any common law restrictions preventing an employee from establishing a competitive business or from working for a competitor of the former employer. On this point, the law has long been settled. During the course of their employment, employees are not permitted to compete, directly or indirectly, with their employers. As a general observation, employees who surreptitiously set about to establish a competitive business while continuing to work for their soon-to-be former employer often find it difficult to establish that the duty of fidelity has not been breached. Those who wait until the employment relationship has terminated are more successful in defending a law suit for breaches of the duty of good faith and fidelity. Once the employment relationship ends, the non-fiduciary employee is permitted to engage in fair competition with a former employer. Fair competition has traditionally meant that the employee may, without fear of legal consequences, establish a business that competes directly or indirectly with the business of the former employer. A correlative right is the right of the employee to work for a competitor of the former employer. As well, in both instances, the employee may bring to that business the knowledge and skill acquired while working for the former employer. The right to compete includes the right to solicit the customers of the former employer "whose names and addresses he has learned during the period of his service". Again, it must be emphasized that former employees cannot make use of printed information compiled by the former employer, including a customer list. The use of the employer's documentation or confidential information would amount to "unfair competition". Subject to that limitation, it has to be understood that employers cannot claim a monopoly over their clients or customers. This explains why employees are

routinely required by their employers to execute confidentiality, non-competition or non-solicitation agreements. With respect to the latter two points see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2007] B.C.J. No. 48 (C.A.)(QL), 2007 BCCA 22 (CanLII).

[35] Finally, under the rubric of fair competition, there is nothing inherently wrong in a former employee approaching the employees of the former employer in the hope of enticing them to accept employment with a competitor, including the former employee who has established a competitive business. In short, the former employer cannot enjoin a former employee from recruiting the former's employees. This is true so long as the former employee is not seeking to induce his or her former colleagues to breach their employment contracts. More often than not, it is a simple matter of the colleague giving the employer appropriate notice. I would caution, however, that once one of the former employees is found to be a fiduciary, those who follow him or her into the competing business are often swept into the lawsuit and tarnished with the same brush and legal findings as the fiduciary employee. Whether this reality is a proper reflection of the law is a matter beyond the scope of these reasons.

[36] Understandably, courts are hesitant to impose onerous duties upon former employees who are not restrained by restrictive covenants and the same should hold true when it comes to classifying employees as fiduciaries. With the mobility of the workforce in the 21st century, most workers will eventually find themselves being classified as "a former employee" and on more than one occasion. The one constant in their lives is that they will still need to earn a livelihood. It is simply a fact of modern working life that the skills and general knowledge an individual gains during employment with one employer will be marketed to another in the hope of securing meaningful employment. As Hall J.A. of the British Columbia Court of Appeal so adroitly explained in *Barton Insurance Brokers Ltd. v. Irwin*, [1999] B.C.J No. 220 (QL), 1999 BCCA 73 (CanLII), at para. 39:

> […] However, the general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, as I noted from the earlier authorities referred to, the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment. […]

[37] To be blunt, if there is a clash between the interests of former employers in protecting their business interests and the interests of former employees in earning a livelihood, coupled with the public interest in free competition for goods and services, it is the interests of the former employee that generally prevail: see England at p.11-161 para. 11.141 and Ball at p.15-6.

. . .

[57] It must be recognized that, until the law of fiduciaries took flight, it was not easy for an employer to displace the residual presumption that former employees must retain the right to pursue meaningful employment. If there were any doubt as to which party would suffer the greater harm, depending on whether an injunction issues, the doubt was going to be resolved in favour of the employee. The fundamental right of everyone to pursue meaningful employment and to earn a livelihood remains a fundamental tenet of public policy enshrined in the common law governing employment relationships; see *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 (QL). The law of fiduciaries was never meant to change that reality.

[58] In my view, the key employee test or approach is the only one that is consistent with the Supreme Court's decision in *Canaero*. Indeed, if one were to

adopt and apply the vulnerability test, in the manner reflected in the jurisprudence, it is conceivable that every lorry driver in this country would owe the same post-employment obligations encumbering the executives of our largest corporations. But I have other more basic or fundamental objections to the so-called broader approach to qualifying former employees as fiduciaries. The broader approach amounts to a reformation of the common law principles and an implicit recognition of a duty restricting former employees from pursuing their own self-interests at the expense of their former employers. Moreover, the broader approach is an implicit recognition of the belief that former employers possess exclusive rights of access to their customers when it comes to competition from former employees. Finally, the broader approach can be rightly criticized for dispensing with the need of employers to require their employees to sign confidentiality and non-competition clauses. Why bother having a contractual provision that is subject to judicially imposed restrictions when more may be obtained by having the employee declared a fiduciary? I recognize that the vulnerability argument is valid to the extent that the former employee possesses trade secrets or confidential information that if disclosed to a competitor will provide an unfair competitive advantage. However, that type of vulnerability does not lead to the conclusion that a fiduciary relationship should be recognized. As Justice Sopinka stated in *Lac Minerals*, at page 596, fiduciary duties must be "reserved for situations that are truly in need of the special protection that equity affords."

. . .

[61] ... The lorry driver and the door to door salesperson are obvious candidates for classification as non-fiduciary employees. I disagree with those cases that have held a sales manager, who reports to an executive officer or owner of a business, to be a fiduciary because of the manager's knowledge and rapport with customers: *White Oaks Welding Supplies v. Tapp* (1983), 1983 CanLII 1674 (ON SC), 42 O.R (2d) 445 (H.C.), [1983] O.J. No. 3103 (QL) and also *Direct Plus Food Group Inc. v. Comeau* (2003), 265 N.B.R. (2d) 1 (Q.B.), [2003] N.B.J. No. 250 (QL), 2003 NBQB 255 (CanLII), where

> the former employee had established a good relationship with distributors of the plaintiff's meat products.
>
> . . .
>
> [78] ... any damages suffered by Imperial are quantifiable. It is simply a matter of an "accounting". Imperial counters with the argument that it will suffer unquantifiable damages arising from a loss of market share and cites *Eversoft Fibre and Foam Ltd. v. James,* [2001] O.J. No. 3741 (S.C.)(QL) in support of this argument. With great respect, what is required at law is evidence of a "permanent" loss of market share and, hence, that decision cannot be followed. In the present case, there is no explanation of why the loss of sales contracts with respect to the sale of ventilation systems would result in a permanent loss of Imperial's market share. I agree with the motion judge when he concluded that Imperial's claim of irreparable harm based on a loss of market share is "speculative". As no one questions that Gray Metal is financially capable of paying any damage award should Imperial succeed at trial, there is no rational basis on which it can be argued that the refusal to grant injunctive relief would expose Imperial to irreparable harm....

Competition

[9] There are approximately seven other competitors of AGI and Hazmasters operating in Saint John. Thus any future changes in the sales volume of AGI or Hazmasters could be caused by changes in the competitiveness of the other seven as well as by the actions (or failures to act) of either AGI or the defendants. In my view it will be difficult for AGI to prove that any reductions in its sales are because of the improper use of its confidential information by any of the defendants and not because of other reasons.

[10] Accordingly AGI's allegations of irreparable harm strike me as speculative. There is no suggestion that the corporate defendants would not be capable of paying any damage award, if AGI should succeed at trial.

Rules for Granting Interim Injunctions

[11] The rules for granting interim injunctions have been developed through a number of decisions including American Cyanimid Co. v. Ethicon Ltd., [1975] A.C. 396; and Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110.

[12] In RJR - MacDonald Inc. v. Canada, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, the Supreme Court of Canada referred to the three-stage test as follows:

> "[The case of] Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits." (S.C.R. p. 334)

Preliminary Assessment

[13] In my opinion there is a serious question to be tried with regard to the defendant's alleged improper use of AGI's confidential information. There is also a reasonable degree of likelihood that AGI will be at least minimally successful at trial.

Irreparable Harm

[14] AGI is a large organization in a complicated and competitive market. I am not persuaded that either AGI or its Saint John branch would suffer irreparable harm if the application is refused.

Balance of Convenience

[15] In my view making the order requested would summarily elevate AGI's right to protect its corporate information to overawe and overwhelm the competing rights of its former employees to work in the industry. It would also put the court in the position of in effect imposing non-competition agreements on former employees with the chilling threat of summary imprisonment for

contempt of court. Those former employees would also be exposed to the risk that AGI could repeatedly attempt to strictly enforce that order.

[16] As well, making the order would have the effect of pre-judging the disputed issues of whether the defendants in fact have wrongly used any confidential information and, if so, whether that caused any damages to AGI. Those issues are best resolved through the litigation process and an eventual trial, untainted by a preliminary order.

[17] In my opinion making the order requested would cause much more harm to the defendants, particularly the individuals, than any harm that might arise to AGI if the order is refused.

Conclusion and Costs

[18] For these reasons the motion is dismissed. Having regard to the preparation for the hearing, I allow costs of $5000.00 payable by AGI to the defendants within 30 days.

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H.H. McLellan
A Judge of the Court of Queen's Bench
of New Brunswick