

SUPREME COURT OF NOVA SCOTIA

Citation: Lawton's Drug Stores Ltd. v. Zinck,
2009 NSSC 208

Date: 20090529

Docket: Hfx No. 309879

Registry: Halifax

Between:

Lawton's Drug Stores Limited, a body corporate

Plaintiff

v.

Paul Zinck, an individual, Jill MacLean an individual

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: May 6, 14, 15, 26, 2009, in Halifax, Nova Scotia

Written Decision: August 13, 2009

Counsel: William L. Ryan, Q.C. and Grant Machum, for the plaintiff
Harold A. MacIsaac and Cory Binderup, for the defendants
John Kulik, Q.C. and Robert Mann, for the intervenors

By the Court

[1] By Notice of Motion, Lawton's Drug Stores Limited (henceforth "Lawton's") asks this Court to grant an interlocutory injunction against the two defendants, Paul Zinck and Jill MacLean (henceforth "Zinck and / or MacLean").

[2] The draft order attached to the Notice of Motion provides particulars of the nature and extent of the injunctive relief being sought. If granted, it would:

- (i) enjoin and restrain Zinck and MacLean from concluding the purchase of MacDonnell Pharmacy;

(ii) enjoin and restrain Zinck and MacLean from practicing pharmacy within the town [sic] limits of St. Peter's, Nova Scotia for a period of twenty-four (24) months, and specifically enjoining and restraining either of them from practicing pharmacy at the current site of the MacDonnell Pharmacy;

(iii) require Zinck & MacLean to deliver to Lawton's all papers, electronic files and other materials in their possession, power or control, which contain any Lawton's patient information or Lawton's financial information or other confidential information;

(iv) require Zinck and MacLean to keep detailed records of all Lawton's patients transferring their business to them on or after April 1, 2009 and all subsequent transactions carried out by Zinck and MacLean with respect to such patients, and to maintain an accounting of all profits made by them with respect to such patients;

(v) enjoin and restrain Zinck and MacLean or any other person to whose knowledge or attention any order from this matter should come, from using, copying, transferring, disseminating, retaining or otherwise communicating certain confidential and proprietary information which is the property of Lawton's, including, but not limited to, customer and/or patient lists of Lawton's;

(vi) Require Zinck and MacLean or any other person to whose knowledge or attention any order from this matter should come, to surrender and deliver up to Lawton's all of Lawton's confidential information whether stored in hard copy, electronically or any other format;

(vii) Enjoin and restrain Zinck and MacLean from directly or indirectly contacting any patients, customers, clients, or suppliers of Lawton's who were patients, customer, clients or suppliers of Lawton's on or prior to April 15, 2009 (being the expiry of the two (2) weeks' notice of resignation), for the purposes of transferring their business from Lawton's; and

(viii) Enjoin and restrain Zinck and MacLean from directly or indirectly soliciting current employees of Lawton's for the purposes of resigning from Lawton's.

[3] Lawton's also seeks costs and disbursements to be payable forthwith. I will deal with costs later upon hearing from counsel after I give my decision on the motion.

[4] It should be recalled that intervenor status was earlier granted to Gerry and Susan MacDonnell who are the owners of the shares in MacDonnell Pharmacy Limited. Their counsel was given full-standing to participate in this hearing pursuant

to Civil Procedure Rule 35.10. It was made clear to the Court that Mr and Mrs. MacDonnell had an interest in the proceeding and, depending on the Court's ruling, they could be adversely affected.

LAW GOVERNING INJUNCTIONS:

[5] The authority to grant injunctive relief is rooted in Section 43, sub-section (9) of the *Judicature Act*. It is a discretionary remedy that may be granted “.....in all cases in which it appears to the Supreme Court to be just and convenient [emphasis added] that such order should be made...”. The order “...may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, ...”.

[6] Rule 41 of the Nova Scotian **Civil Procedure Rules** provides the mechanism for advancing a motion for an interlocutory injunction. **Rule 41.02 (1)** makes it clear that the new rule does not alter “the general law about obtaining an interim or interlocutory injunction before a dispute is heard and determined on the merits.” Therefore, existing jurisprudence can be used as a guide to assist in the determination of the motion that is now before me. Before looking at the relevant caselaw it should be noted the **CPR** 41.08 states that:

41.08 Restraining or mandatory injunction

An interim or interlocutory injunction may be restraining, mandatory, or part restraining and part mandatory.

[7] I will now turn my attention to the existing caselaw. The seeds for injunctive relief are planted in well-furrowed ground. In the case of **Frontline Safety Ltd. v. MacKenzie** (2002), 211 N.S.R. (2d) 25 (N.S.S.C.), the Honourable Justice Arthur LeBlanc of this Court had this to say at paragraphs 18 and 19:

[18] The Court has inherent jurisdiction to grant injunctive relief; this is reflected in the *Judicature Act*, s. 43(9) and in Civil Procedure Rule 43. The present test that an applicant must meet was established by the House of Lords in *American Cyanamid v. Ethicon*, [1975] A.C. 396 and adopted by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.

[19] There are three steps that an Applicant for an injunction must meet in order to satisfy the Court that it is just to make such an order. The onus is on the Applicant to show that:

- (i) there is a serious issue to be tried or, alternatively, the Applicant must make out a prima facie case;
- (ii) the Applicant will suffer irreparable harm if the injunction is not granted; and
- (iii) the balance of convenience favours the granting of an injunction

Although proceedings to enforce a restrictive covenant have sometimes been resolved on the first ground, I prefer to assess the viability of the application on an analysis of the entire three part test.

[8] I agree with the approach taken by Justice LeBlanc in assessing the viability of the motion on an analysis of the entire three part test. The usual threshold test for a serious issue was set out in **American Cynamid Company v. Ethicon Limited**, [1975] A.C. 396:

The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried... unless the material available to the Court at the hearing of the application ... fails to disclose that the plaintiff has any real prospect of succeeding in this claim for a permanent injunction at trial, the Court should go on to consider [irreparable harm and balance of convenience].

[9] This test was endorsed by the Supreme Court of Canada in **RJR-MacDonald v. Canada (Attorney General)**, [1994] 1 S.C.R. 311 (at paras. 49-50):

What then are the indicators of a ‘serious question to be tried’? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The Judge on the application must make a preliminary assessment of the merits of the case...

....

Once satisfied that the Application is neither vexatious nor frivolous, motions judge would proceed to consider the second and third tests, even if of the opinion that the Plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is neither necessary nor desirable.

[10] Counsel for Zinck and MacLean suggest that in a case such as the one that is now before me the threshold test should require the party seeking the injunction to establish a *prima facie* case. As support for their argument they have referred to me the case of **Noreco Inc. v. Laserworks Computer Services Inc.** (1994), 136 N.S.R. (2d) 309; 388 A.P.R. 309. The Honourable Justice Jamie S. Saunders, who was then a member of this Court, stated this at paras. 24 - 27:

24 While in *Metropolitan Stores*, supra it was not necessary for the Supreme Court of Canada to choose between the traditional test or the less onerous test prescribed by the House of Lords in *American Cyanamid*, Mr. Justice Beetz does refer to British case law and commentary which:

" . . . illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured: See *Hanbury and Maudsley*, *Modern Equity*, 12th ed. (1985), pp. 736-43." (at p. 333)

25 In Nova Scotia neither approach is to be applied slavishly. A too rigid application of one test over the other might well lead to an unjust result. The particular circumstances between the parties should always be considered in deciding whether it is just and equitable to grant an interlocutory injunction.

26 As noted by Matthews, J.A. in *Gateway Realty*, supra:

" . . . rather the tendency is for the Court to apply a test which is likely to produce a just result." (at p. 84)

27 No matter what test is applied, the ultimate question remains the same: Is it just or convenient that I exercise my judicial discretion by granting the temporary but drastic remedy of interlocutory injunctive relief? I have considered the cases referred to me by counsel. They suggest to me a healthy reticence in allowing interlocutory injunctions. It is, after all, an extraordinary remedy reserved to those cases where there is clear evidence of circumstances necessitating its imposition. The reasons for restraint are obvious. To permit the application is to impose a harsh remedy at the interlocutory stage before there has been a thorough, proper and vigorous determination of the rights and obligations of the parties. There is also a heightened risk of error when applications are limited to affidavit evidence which may or may not be tested by cross-examination....

[11] In the case that is before me counsel were permitted to conduct extensive cross-examination of a number of the witnesses who provided affidavits either in support

of or in opposition to the motion. As a result the Court has a sufficient knowledge and appreciation for the circumstances that exist between the parties.

[12] I will attempt to summarize the facts and then consider them within the legal framework or three-part test referred to earlier.

FACTS:

[13] Paul Zinck and Jill MacLean were employed as pharmacists by Lawton's. Mr. Zinck began his career with Lawton's as a part-time, casual pharmacy student at the Lawton's Pharmacy in New Glasgow in 1997.

[14] On July 31, 1997 he accepted a full-time position as Staff Pharmacist with Lawton's on July 31, 1997. The brief agreement provided details of salary, benefits, vacation entitlement, and up to \$1,000.00 to cover moving expenses to St. Peter's. Mr. Zinck agreed to take a transfer to St. Peter's effective "approximately September 22nd, 1997". By accepting the terms of the agreement, Mr. Zinck committed "to a minimum period of 12 months in the St. Peter's location." Continuing employment was "dependent upon satisfactory performance and was to be reviewed annually."

[15] On June 26, 1998, Mr. Zinck entered into a new agreement with Lawton's to become Store Manager at the St. Peter's location effective June 29, 1998. The agreement provided for an annual performance appraisal and salary review.

[16] On July 27, 1999 Lawton's offered to continue Mr. Zinck's position as store manager "for no specified term... dependent upon satisfactory performance." Mr. Zinck agreed to accept the terms and conditions of this offer on August 3, 1999.

[17] The only other paper document pertaining to Mr. Zinck's employment with Lawton's is a memorandum dated November 6, 2001 from Fred Murray to Mr. Zinck. In it Lawton's agreed to pay Mr. Zinck quarterly incentive payments.

[18] Jill MacLean began her employment with Lawton's as a part-time, casual pharmacy student in St. Peter's in the summer of 2000. On November 19, 2002 Lawton's offered Ms. MacLean the option of working as a student pharmacist with the prospect of a full-time staff position at Lawton's Drugs in St. Peter's upon completion of her B.Sc. (Pharmacy) and provided she achieved the required licensing as a certified pharmacist. In order to receive tuition assistance Ms. MacLean had to

commit to 42-months of “full time active service as a licensed pharmacist with the company....”. The letter of offer made continuing employment contingent on satisfactory performance to be reviewed annually.

[19] Neither the agreements signed by Mr. Zinck nor the one offered to Ms. MacLean made any reference to non-competition in the event that either of them ceased employment with Lawton’s.

[20] This is acknowledged by Lawton’s which bases its claims against Zinck and MacLean on both express and implied terms in their respective employment contracts. They further argue that both Zinck and MacLean were bound by Lawton’s parent company’s “Code of Business Conduct and Ethics” which includes a section on conflict of interest. Found under this heading is a provision which states:

We do not work for a competitor or start up a business that competes with the Company.

[21] Section 9.1 under the heading “Consequences for Breach of Code” states:

... Depending on the severity of the case, any established violation can and may result in immediate disciplinary action up to and including dismissal.”

[22] It is the alleged conduct of Zinck and MacLean both prior to and after they tendered their resignations on April 1, 2009 while still in the employ of Lawton’s that forms the basis for Lawton’s action for damages and injunctive relief.

[23] St. Peter’s and area have been serviced by two pharmacies for the past 15 years. Lawton’s acquired the former St. Peter’s Drug Store in 1994. Rather than sign an employment contract with the new owners, Susan MacDonnell opted to open her own pharmacy along with her husband, Gerry MacDonnell. They have continued to operate MacDonnell Pharmacy in competition with Lawton’s. Eventually the MacDonnells began to think about retirement. They sought the professional advice of lawyers and accountants who advised them to set up a family trust. This was done to provide them with the most favourable tax consequences upon sale of the business by way of shares.

[24] Rumours that the MacDonnells might be interested in selling their pharmacy came to the attention of Mr. Zinck. He passed on this information to his immediate

supervisor, Mark Sinnis, the Senior Director of Operations for Lawton's. This occurred approximately one year ago sometime during the Spring of 2008.

[25] In December, 2008, Mr. Zinck was approached by Lorne Buchanan. Mr. Buchanan had worked as a pharmacist at MacDonnell's Pharmacy but was looking into the possibility of getting some part-time work with Lawton's. He had ceased working at the MacDonnell Pharmacy after apparently failing in his attempt to buy the business from Susan and Gerry MacDonnell.

[26] Once again, Mr. Zinck, passed on this latest information to Mr. Sinnis. According to Mr. Sinnis this information was relayed to Lawton's acquisition team which included Billy Sheikh. In the weeks and months that followed whenever Mr. Zinck inquired of Mr. Sinnis as to the status of Lawton's pursuit of MacDonnell's Pharmacy he was simply told that it was in the hands of Lawton's acquisition people. Mr. Sinnis testified that he never, ever told Mr. Zinck that Lawton's was no longer pursuing the purchase of the MacDonnell pharmacy. Apparently Mr. Zinck was on a "need-to-know" basis with regard to the state of negotiations.

[27] What is now known is that Mr. Sheikh did have contact with Gerry MacDonnell as early as January, 2009. A face-to-face meeting took place along with subsequent exchange of e-mails. A Confidentiality Agreement was signed by Lawton's and the MacDonnells which allowed for the disclosure of financial information pertaining to MacDonnell Pharmacy Ltd. Mr. MacDonnell indicated to Mr. Sheikh that the sale of the business had to be by way of shares and if the parties could agree on the price the closing could not take place until at least May 1, 2009 in order to provide the MacDonnells with the tax benefits accruing from the family trust Mr. MacDonnell also indicated the amount of money he and his wife were seeking based on a valuation which their accountants had previously done for them. On January 18, 2009 Mr. Sheikh contacted Mr. MacDonnell by telephone and provided, according to his affidavit, "Lawton's best offer to purchase MacDonnell Pharmacy."

[28] Further exchanges took place but it was not until March 10, 2009 that Lawton's submitted an initial Letter of Offer to the MacDonnells. Gerry MacDonnell sent an e-mail to Mr. Sheikh and Karen Murphy on the same day stating:

We are not prepared to entertain your letter of offer at this time. If situation changes we will be in touch.

[29] Before receiving Lawton's formal "Letter of Offer", the MacDonnells entered into a Letter of Intent to deal exclusively with Zinck and MacLean in an effort to negotiate an acceptable sale price for their business.

[30] A Mr. Aaron Meers who is a representative of Guardian Drugs played a role in brokering the deal that led to the agreement by which Zinck and MacLean would eventually purchase MacDonnell's Pharmacy. Guardian Drugs is a competitor of Lawton's.

[31] Based on copies of e-mails which Lawton's later found on Mr. Zinck's computer he began having discussions with other pharmaceutical companies concerning the possibility of setting up his own pharmacy business while still employed at Lawton's.

[32] These discussions were more general than specific. Mr. Zinck was not so much testing the market but rather was exploring what the market might have to offer. He was doing what any number of employed people do on a regular basis. As long as it is not done to the detriment of the employer there is absolutely nothing untoward and certainly nothing heinous or diabolical as has been suggested by Lawton's counsel. It is quite natural for individuals to look for opportunities whether they are employed as pharmacists, carpenters, fishplant workers and yes even lawyers. It happens all the time and in all kinds of different employment settings – from the shop floor all the way to the executive suite.

[33] Mr. Zinck was criticized for having pursued these potential opportunities while at work. His performance, however, did not seem to suffer. In Mr. Sinnis' opinion both Mr. Zinck and Ms. MacLean were excellent employees. They were noted for leading the company in medication reviews.

[34] Shortly after Zinck and MacLean tendered their notice of resignation Lawton's representatives attended at the pharmacy with a letter requesting that they turn over their keys, return anything in their possession that belonged to the company and leave the premises. Mr. Zinck was served with the letter by Mr. Sinnis who was accompanied by a bailiff. Ms. MacLean received her copy of the letter later at home. MR. Sinnis indicated to Mr. Zinck that a customer list had been printed from his computer and asked about its whereabouts. Mr. Zinck had taken the list home to assist him in doing medication reviews. He quickly acknowledged having it and allowed Mr. Sinnis and the bailiff to follow him home where it was turned over to them.

Although there was evidence to suggest that the list would have limited value in carrying out medication reviews, there is no evidence that the information contained on the customer list was used by Mr. Zinck to the detriment of Lawton's.

[35] After the resignation letters of Zinck and MacLean were received Lawton's also received notices of resignation from the two pharmacy technicians who worked at the St. Peter's pharmacy. Both of these individuals, Rebecca Coull and Catherine Eagles, had earlier made it known that they were planning to retire in the next few months. They had worked with Zinck and MacLean for a number of years. While their decision to resign earlier than originally planned might have been influenced by Zinck and MacLean's unanticipated departure there is no evidence whatsoever that either Zinck or MacLean persuaded them to leave.

[36] Mr. Sinnis indicated that Zinck and MacLean were asked to leave based on reports he got from some of the other employees. Apparently some had overheard Mr. Zinck advising some customers that he was leaving to purchase the MacDonnell Pharmacy. They formed the impression based on what was overheard that Mr. Zinck was encouraging customers to leave Lawton's and to bring their business to the new location. Other affiants gave evidence to challenge this allegation. It is not up to me to resolve this and all other disputed evidence at this time. That will be done if and when the matter goes to trial.

DISCUSSION AND ANALYSIS:

[37] With this as the factual background I will now look at the three part test for injunctive relief.

[38] In assessing the merits of the case whether the plaintiff has to establish a strong *prima facie* case or the less onerous requirement to show that its claim is no frivolous or vexatious and raises a serious issue to be tried is not the deciding factor in this case. Regardless of the test, the hurdle is not that high. Without commenting on the strength of the plaintiff's case and its chances of success I am satisfied that its claims are not frivolous and vexatious and there is at least a serious issue to be tried. The issue of whether or not Zinck and MacLean broke any fiduciary duties they might have owed to their former employer and whether or not their conduct took away a corporate opportunity or caused economic harm to Lawton's all need to be explored further. I am satisfied that Lawton's has overcome this hurdle.

[39] Turning next to the issue of irreparable harm, counsel for Lawton's argue that their client will suffer irreparable harm should Zinck and MacLean not be prevented from completing the purchase of MacDonnell Pharmacy. Furthermore, they should be prevented from working as pharmacists within the town limits of St. Peter's and specifically for the MacDonnell Pharmacy for a period of 24 months. All this despite the fact neither Zinck nor MacLean never agreed or were even asked to agree to be bound by a non-compete clause in an employment contract.

[40] I am not persuaded that Lawton's would suffer irreparable harm that could not be compensated for in damages.

[41] The market of St. Peter's and area is clearly defined. It is not fractured like some of the larger market areas around the Province. There are only two players. If Lawton's suffers losses for which the two defendants are held liable there should be no major problems in quantifying those losses including damage to reputation and goodwill. Accountants, actuaries and business valuers perform these functions all the time.

[42] If an injunction, particularly one of the length being sought by the plaintiff, was granted there could be irreparable harm to the defendants. They would likely be forced to breach their agreement with the MacDonnells or at least be frustrated in fulfilling its terms. If neither party could work as pharmacists they could not operate the business unless they could hire someone else who is licensed. That, apparently, is not easy to accomplish. Even if they could the financial viability of the business would likely be jeopardized.

[43] Additionally, if both Zinck and MacLean were enjoined from working as pharmacists in their home community they would have to commute or possibly even have to up-root their respective families in order to find other employment.

[44] Although the MacDonnells are not parties to this action they, too, could suffer significant harm if the injunction is granted. They have an agreement to sell their business on terms that are obviously acceptable to them. They were under no obligation to sell to Lawton's. They were entitled to search out the best deal possible. That happened to be with Zinck and MacLean. Mr. MacDonnell's email message to Mr. Sheikh and Ms. Murphy did not reject Lawton's Letter of Offer outright. He left the door open for possible further discussions but his later affidavit and oral testimony during cross-examination made it clear that he and his wife were not satisfied with

Lawton's offer. There is no deal with Lawton's. Eventually there was one with Zinck and MacLean. This agreement may have prevented Lawton's from gaining total control of the St. Peter's market but it did not result from any unfair advantage or exploitation of insider information on the part of Zinck and MacLean. It is clear that Zinck and MacLean had very little independent decision-making authority. They were pretty well left in the dark about the status of negotiations between Lawton's acquisition team and the MacDonnells to the point where they could not be sure if Lawton's was even interested.

[45] Looking to the balance of convenience which I have already touched upon in my discussion of irreparable harm, clearly the balance of convenience favours the defendants.

[46] To grant an interlocutory injunction that would remain in place until the matter is finally decided or for a 24-month period as suggested by Lawton's counsel could have devastating consequences on the two defendants. The defendant, MacLean, will soon be giving birth to her second child. Her husband operates a business in St. Peter's. To force them to possibly up-root their family and close out an existing business would not simply be an inconvenience it could be emotionally and financially devastating.

[47] Likewise, with the defendant, Zinck. He lives in the near-by community of River Bourgeois for nearly 12 years. His wife is originally from River Bourgeois. Members of their extended family live there. Her health is not good. She relies on her family for care and support. To force her to leave so that her husband can find alternate employment somewhere else would be a tragedy.

[48] Clearly the balance of convenience in this case lies with the defendants. I would like to make one final comment before I rule on the motion.

[49] At one point counsel for Lawton's described the conduct of the defendants as tantamount to theft from their employer. This was an unfortunate characterization of two individuals who were by Lawton's own admission good employees. I am not suggesting that they have done nothing wrong but what they have done should not be equated with theft.

[50] The motion for an injunction is denied. I am prepared, however, to order Zinck and MacLean to return all papers, electronic files (however stored) and other

materials, if any, in their possession, power or control, which contain any of Lawton's patient information or Lawton's financial information or other confidential information provided nothing is done that would result in a breach of the *Pharmacy Act* or its Regulations regarding preservation of patient information. In all other respects the motion is dismissed.

[51] The Order I granted on May 29, 2009 is also vacated. It will be left to the normal competitive forces of a free market to determine how these two pharmacies perform.

COSTS:

[52] Counsel are invited to agree amongst themselves as to costs. If an agreement cannot be reached, written submissions should be forwarded to the Court within 10 days.

Justice Glen G. McDougall