

SUPREME COURT OF NOVA SCOTIA

Citation: Cameron Seafoods (2005) Ltd. v. Jumelet, 2011 NSSC 365

Date: 20111013

Docket: SK 310467

Registry: Kentville

Between:

Cameron Seafoods (2005) Limited

Plaintiff

v.

Machiel Jumelet, Henriette C Van De Weijer and
BMC Seafoods Limited

Defendant

DECISION

Revised Decision: The text of the original decision has been corrected replacing paragraph 28, the last sentence of paragraph 29, paragraph 30, adding to paragraph 41 the last sentence and replacing paragraph 43 on November 4, 2011, and this replaces the previously distributed decision.

Judge: The Honourable Justice A. David MacAdam

Heard: August 18 and 19, 2011, in Kentville, Nova Scotia

**Final Written
Submissions:** August 12, 2011

Counsel: Andrew N. Montgomery, for Cameron Seafoods

S. Clifford Hood, Q.C. and Matt J. Fraser, for Machiel
Jumelet

Thomas M. MacDonald and Justin E. Adams for BMC
Seafoods

By the Court: (Revised Decision)

Introduction

[1] This is a motion for summary judgment on the evidence. The plaintiff, Cameron Seafoods (2005) Limited, ("Cameron Seafoods"), commenced this proceeding, claiming that the defendants, Machiel Jumelet ("Jumelet") and Henriette C. Van De Weijer ("Weijer"), breached their fiduciary duties to the plaintiff, resulting in continuing damage to Cameron Seafoods. The plaintiff also claimed against the defendant, BMC Seafoods Limited ("BMC") on the basis of vicarious liability for breaches of duties of loyalty by Jumelet and Weijer. Jumelet and Weijer deny breaching any fiduciary duty owed to the plaintiff. BMC says if the plaintiff suffered any damages, it was not the result of any actions by BMC or anyone acting with BMC's knowledge or within the scope of authority given by BMC. Other pleadings by the parties are not relevant on this motion.

[2] The plaintiff moves by amended notice of motion for an order for summary judgment on the evidence on the question of the liability of the defendant Jumelet for breach of fiduciary duty, breach of the duty of loyalty or breach of the duty of good faith, in his capacity as an officer and director of Cameron Seafoods.

Background

[3] The plaintiff buys live lobsters and exports them to buyers in Europe, from its premises in Hall's Harbour, NS. The defendant Jumelet was employed by the plaintiff starting in February 2009. In the 1990s he visited Canada on a number of occasions while operating his own lobster buying business in Europe. He became familiar with Rodger Cameron ("Cameron") while buying lobster from his company, one of a number of Canadian suppliers from whom Jumelet purchased lobsters during this period.

[4] Jumelet had discussions with Cameron about working for his company in a management role. However, before leaving Holland he learned that Cameron had sold the export business to another company, the Barry Group. Jumelet and his wife decided to proceed with their plan to emigrate to Canada, and he accepted employment with the Barry Group as export manager.

[5] In 2005 Cameron advised Jumelet that the Barry Group was ending its lobster export operation in Hall's Harbour, NS, and had offered to sell it back to

him. At that time, Hope Shanks ("Shanks"), Cameron and Jumelet were employees of the Barry Group. Jumelet and Cameron disagree on the extent to which Jumelet was apprised of the negotiations and of the decision by Cameron to reacquire the lobster export operation.

[6] Cameron incorporated Cameron Seafoods for the purpose of the repurchase of the assets, goodwill and receivables of the Barry Group's lobster export operation. Jumelet and Shanks were made minority shareholders, and Jumelet became a vice president and a member of the Board of Directors. Jumelet says he was not aware of this at this time. He also says that the position of director has a different meaning in Nova Scotia than in Europe, where it does not necessarily apply to senior officers, but often to department heads. Nevertheless, by the time he left Cameron Seafoods, Jumelet knew, or should have known, that he was both a member of the Board of Directors and a vice president. Additionally, he acknowledged in oral evidence that he titled himself as the second-in-command to Cameron, and therefore by any definition would meet the test of being a key employee. In his defence, Jumelet acknowledges that he was both a director and vice president. Weijer was employed as an office assistant at Cameron Seafoods. She also managed a restaurant owned by Cameron in Hall's Harbour.

[7] Between 2006 and the late summer of 2007, Cameron Seafoods engaged in discussions with BMC about a joint venture whereby Cameron Seafoods would be the marketing arm of an air freight lobster business and BMC would maintain lobster inventory and pack the lobsters for the purpose of delivering directly to foreign markets. During these discussions the two companies exchanged various pieces of confidential information. According to Jumelet, this information was "in relation to its airfreight customers, trade practices, and financials." He said he expressed concern about this to Cameron.

[8] Jumelet says that by early 2008, he was becoming dissatisfied with his employment at Cameron Seafoods. Cameron's failure to share the workload, as Jumelet says he had promised to do, was causing him to work hours in excess of what he had expected. He says he repeatedly expressed his concerns to Cameron, who took no steps to remedy the situation or to share the work. Jumelet deposed that when Cameron was out of the country he was responsible not only for maintaining the lobster pound, but also for managing Cameron's other business interests, namely the restaurant in Hall's Harbour.

[9] Jumelet says that Cedric Robichau ("Robichau"), the principal of BMC, contacted him in the course of business in September 2008. He says Robichau asked him if he would be interested in joining BMC, in the event BMC entered the air freight lobster industry. In his affidavit Jumelet says he was surprised by this offer. Robichau's discovery evidence, however, appears to suggest that the discussion about Jumelet joining BMC was first raised by Jumelet. (Robichau did not testify on this motion.)

[10] Discussions about Jumelet joining BMC continued. On January 27, 2009, Jumelet e-mailed Cameron (on behalf of himself and Weijer) to inform him that they were leaving Cameron Seafoods and joining BMC. He indicated that he had intended to advise Cameron in person, but decided to inform him by e-mail since he had heard rumours of discussions in the office about this. He wanted to ensure that Cameron was informed by him rather than learning from some other source. He offered to stay on and requested that he be paid his share of the 2008 profits and fair value for the shares of Cameron Seafoods that he would be returning. He indicated that if Cameron decided differently, and wanted him to leave immediately, he would respect that and asked to be advised by e-mail. He also wrote that he had informed Shanks about his decision.

[11] Cameron, rather than waiting for his return, apparently instructed Shanks to advise Jumelet that he was immediately terminated. This occurred early in February 2009. Jumelet tendered his resignation as director and vice president on February 11. Jumelet testified he was not aware he had to forward a separate resignation from his position as director and vice president. He said he had intended his resignation to refer to all of his positions with Cameron Seafoods.

Issue

[12] Is Cameron Seafoods entitled to summary judgment, on the evidence, on the question of whether Jumelet breached his fiduciary duty and duty of good faith as an officer and director?

The law

[13] *Civil Procedure Rule* 13.04 sets out the test for summary judgment on the evidence. It reads:

13.04 (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.

(2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.

(4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

(6) The motion may be made after pleadings close.

[14] The purpose of summary judgment, and the burden on the applicant, was discussed by the Supreme Court of Canada in *Canada (Attorney General) v.*

Lameman, [2008] 1 S.C.R. 372, 2008 SCC 14, where the court said, at para. 10:

10 ...The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage.

Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[15] Essentially, there are two steps in a motion for summary judgment. First, the applicant must show that there is no genuine issue of fact that has to be determined at a trial. If this is established, the respondent must establish that their claim or defence has a real chance of success. The procedures applicable on a motion for summary judgment, and the powers of the chambers judge, are described by Farrar J.A. in *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67, where he said, for the majority, at paras. 13-16:

13 The prerequisites for summary judgment to dismiss an action are -- first, that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success....

14 Accordingly, the first question the Chambers judge had to ask herself was whether she was satisfied that there were no matters of fact or of mixed law and fact requiring trial. Only if she were persuaded that this initial threshold had been met, would she then go on to ask the second question, that is, whether *Globex* demonstrated that it had a real chance of success in advancing its argument that an agency relationship existed between *Launt* and *Numberco*....

15 In conducting the requisite analysis the clear directions of this Court on a number of occasions bear repeating. It is not the function of the Chambers judge on a motion for summary judgment to determine matters of fact or mixed law and fact which are in dispute....

16 The Court's role is limited to assessing the threshold of whether a genuine issue exists for trial. The evaluation of credibility, the weighing of evidence and the drawing of factual inferences (except in limited circumstances) are functions reserved for the trial judge.

[16] Unlike an application for summary judgment on the pleadings, on a motion for summary judgment on the evidence, each party must put forth the evidence on which they rely in respect of the existence or nonexistence of material issues requiring trial. To this effect, McMahon J. said, in *Wolfson Estate v. Wolfson* (2005), 22 E.T.R. (3d) 255, [2005] O.J. No. 6083 (Ont. Sup. Ct. J.), at paras.

23-24:

23 ... a responding party to a summary judgment motion cannot simply rely on the bald assertions contained in the pleadings. The respondent party must demonstrate that there is evidence from which the motion judge can conclude there is a genuine issue for trial. In particular, returning to the decision of *Transamerica Occidental Life Insurance Co. v. Toronto Dominion Bank*, (1999), 44 O.R. (3d) 97 (Ont. C.A.), at p. 11 of that judgment, the Court says as follows:

On all summary judgment motions, the core question is: has the moving party established that there is no genuine issue for trial. Rule 20.04(1) makes it clear that the party responding to a summary judgment motion, in this case the insurers, may not rest on the pleadings, but must provide evidence from which the motions judge can conclude that there is a genuine issue for trial.

24 In determining whether to grant summary judgment in this case, the Court must determine whether there are genuine issues requiring a trial and I cannot assess credibility, weight[sic] the evidence or find the facts. Equally, the decision must be based on the evidence before the Court and the Respondent is obligated to put its best foot forward and provide evidentiary support for its position.

(Citation added)

[17] To a similar effect, the Supreme Court of Canada said in *Lameman, supra* at para. 11:

... the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings.... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal.... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried.... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts....

[18] It is, then, essential that each party "put its best foot forward" with respect to the existence, or nonexistence, of any material issues that require trial.

(A) *Existence of Fiduciary Duty*

[19] In *Frame v. Smith*, [1987] 2 S.C.R. 99, Wilson J. set out (in dissent) the characteristics of a fiduciary relationship, later adopted by the court in *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

Generally speaking, a fiduciary relationship will exist where (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[20] It is well accepted that fiduciary duties are owed to a corporation by its directors, as well as by senior officers who are authorized to act in a managerial capacity: see Kevin P. McGuinness, *Canadian Business Corporations Law*, 2d edn. (Markham: LexisNexis, 2007) at sections 11.115-126. It is also clear that fiduciary duties will vary depending on the circumstances of the particular relationship: see, e.g., *Scott v. Trophy Foods Inc.*, (1995) 140 N.S.R. (2d) 92, 1995 CarswellNS 218 (C.A.), at para. 71. That being said, the fiduciary obligations of directors generally include, *inter alia*, duties to "act in the best interests of the corporation and, correspondingly, not to do anything that undermines or thwarts those best interests", to "maintain the confidentiality of information received or knowledge obtained through the fiduciary position, including a prohibition against making use of such confidential information for the director's or officer's personal benefit", and a duty "not to compete with the corporation, including a prohibition

against appropriating its business opportunities and assets": McGuinness at section 11.124.

[21] It is clear on the evidence, as well as the admission of counsel, that Jumelet was in a fiduciary relationship with Cameron Seafoods. He was not only a director, officer and shareholder of the plaintiff, but was, by his own evidence, "second-in-command," responsible for day-to-day operations of the company while Cameron was absent. In addition to holding the formal titles, he was a key figure in the operation. He submits that he was a fiduciary in a "purely technical sense," in that he held the position "only at the pleasure and will" of Cameron, and as such, the beneficiary was not "particularly vulnerable or dependent on him." This is no answer to the clear existence of a fiduciary duty.

(B) Did Jumelet breach any fiduciary duty he owed to Cameron?

[22] There are a number of activities carried out by Jumelet, and in two instances by Weijer, that Cameron Seafoods says were breaches of Jumelet's fiduciary duty.

[23] In 2008 Jumelet entered into his own computer program particulars of the sales of lobsters made by Cameron Seafoods during the year. Although his records did not encompass all the information maintained in the company database, it apparently included the weight and value of lobsters sold. Other information obtained from, or adjusted from, the plaintiff's sales invoices was also included in the sales records maintained by Jumelet.

[24] Jumelet acknowledged that Robichau contacted him in the fall of 2008 seeking sales projections for BMC's accountant. This is not in dispute. There was some suggestion that Jumelet was told that the projections were to be used by BMC in obtaining bank support for its contemplated venture into the lobster airfreight business. This dispute of fact is not material. Robichau's intended use for the figures does not determine whether there was a breach. Rather, what is relevant is whether Jumelet breached his fiduciary duty by providing this information to BMC, knowing the basis for his projections was the information he had of the sales by Cameron Seafoods. He knew that BMC was considering entering the lobster airfreight business, and had had discussions, whether initiated by himself or by Robichau, about leaving Cameron and joining BMC.

[25] For Jumelet to give the sales figures to Robichau, knowing that these figures were taken from the plaintiff's invoices, was clearly a breach of his fiduciary duty. He was the vice-president, a member of the Board of Directors, and, by his own description, the second-in-command of the company. He was lending assistance to a potential competitor. His evidence that he did not feel he did anything wrong does not change the fact that, while in a senior position and holding executive office, he used information from Cameron Seafoods' records to assist BMC. I do not accept his view that once the sales records were entered into his own database, they became his own records.

[26] A second alleged breach involves Jumelet's review of a draft proposal by BMC seeking government assistance for its intended project. Jumelet was, apart from Cameron, the key employee of Cameron Seafoods. By reviewing and commenting on BMC's proposal for government funding, he was assisting a competitor, with whom he was discussing his own possible future employment. Whether he did so on his own time, or when he was working at Cameron Seafoods, is irrelevant. He remained a director and vice-president. He cannot justify his conduct on the basis that it was done on his own time, or was made up by overtime.

[27] A third alleged breach involved Jumelet advising BMC on forwarding financial information received from a European buyer to the Export Development Corporation to assist in obtaining insurance coverage in the event of sales to them by BMC. Again, while holding executive office and a key position with the plaintiff, he was assisting BMC to establish a lobster airfreight operation.

[28] A fourth alleged breach involved Jumelet contacting a fish supplier in Pictou County for information on possible future availability to BMC of certain sizes of lobster. This contact apparently occurred by e-mail from Jumelet to Mike Duffy of BMC, dated January 21, 2009. Jumelet submitted his resignation as an employee of Cameron Seafoods on January 27, and his employment was subsequently terminated by Shanks, on the instructions of Cameron. At the time of this e-mail, then, Jumelet was still a director, vice-president and a key employee of the plaintiff. As such, in respect to this contact, he was again assisting a potential competitor of his employer to establish its own sources for lobster. The breach arose from Jumelet's action, not from any resulting benefit to BMC.

[29] The shareholders agreement prepared by Cameron, and acknowledged by Jumelet, provided that if a minority shareholder left the company (voluntarily or as a result of dismissal for just cause by the majority shareholder), their shares would be returned to the majority shareholder at the same price at which they were issued. The shares were not assignable to an outside party, unless the majority shareholder agreed. Jumelet's appointments to the Board of Directors and as vice-president were effectively at the will of Cameron. Nevertheless, until he ceased to be a director, vice-president or key employee, he continued to owe a fiduciary duty to Cameron Seafoods.

[30] The plaintiff has established that Jumelet breached his fiduciary duty to the plaintiff by contacting the Pictou fish supplier.

[31] There are a number of other activities by Jumelet that are alleged to constitute breaches of fiduciary duty to Cameron Seafoods. In late 2008 Jumelet made two trips to Europe, which counsel appears to suggest were not in the interests of Cameron Seafoods but rather of BMC. However, there is no evidence that anything he did on either of these trips involved acting in the interests of anyone other than Cameron Seafoods. Indeed, on one of these trips, he met with

one of Cameron Seafood's customers to negotiate a claim by the customer relating to dead lobsters received from Cameron Seafoods.

[32] It was also suggested that Jumelet contacted a customer by e-mail about a shipment that had been sent and not yet received, advising the customer that he had removed some, but not all, of the weak lobsters. Jumelet testified this was a shipment of lobsters that did not go through and therefore was not graded at the plaintiff's Hall's Harbour facility, which was the normal course. Jumelet testified that this customer sought assurance from him that he had inspected the lobsters prior to shipment and this had not been the case in this instance. There was nothing to suggest that Jumelet committed any breach of duty by forwarding the e-mail.

[33] There is also an allegation that Jumelet expressed dissatisfaction with his employment conditions to third parties, including customers of the plaintiff, and that this amounted to a breach of his fiduciary duty. There was no evidence to support this. In any event, I am not satisfied that this would be a basis on which to find a breach of fiduciary duty.

[34] The plaintiff takes the position that Weijer was Jumelet's "privy at law," and owed a fiduciary duty as a result. The plaintiff did not move for summary judgment against Weijer.

[35] There were two activities by Weijer that counsel appeared to suggest amounted to breach of a fiduciary duty. The first involved her providing assistance to Robichau in establishing his office in Nova Scotia and the second in providing him with a list of customer names and contact information. In respect to the former, Jumelet said that his wife helped design the office as a favour to Robicheau. As to the second, he said he was not aware until after the customer list was forwarded, and perhaps only when he became employed by BMC, that Weijer had forwarded this information.

[36] There was no evidence of Jumelet's involvement in the design of the BMC office, or of his knowledge of or involvement in Weijer forwarding the information to BMC. The allegation that Weijer is a "privy at law" is contested by the defendants. On the evidence, this was activity by Weijer and not by Jumelet. A basic definition of a privy is someone "who partakes or has an interest in some

action or thing": Daphne A. Dukelow, *The Dictionary of Canadian Law*, 3d edn. (Scarborough: Thomson Carswell, 2004) at 995.

[37] The evidence presented does not establish that Weijer was Jumelet's privy. Apart from being his spouse, being employed by Cameron or his companies, and joining BMC together, there is no apparent legal basis to support finding her to be a privy. This motion does not involve the claims by Cameron Seafoods against Weijer. There was little evidence regarding her involvement in these matters.

[38] Other activities said to constitute breaches by Jumelet of his fiduciary duty to the plaintiff were either the subject of factual disputes or involved explanations by Jumelet which, if accepted, would preclude a finding of breach of fiduciary duty.

[39] The plaintiff acknowledged that there was no evidence that any of Jumelet's contact with its customers, including European trips, involved attempts to solicit these customers on behalf of BMC. There was therefore no breach of fiduciary duty arising from Jumelet contacting these customers. Cameron says he instructed Jumelet not to contact a particular European customer, while Jumelet says that after

discussion it was agreed he would contact the customer. This dispute is for trial and is not one to be resolved on a summary judgment motion.

(C) In respect to those activities found, on the evidence, to have amounted to breaches of fiduciary duty, has the respondent shown a genuine issue for trial?

[40] The actions constituting each of the three breaches, previously noted, were acknowledged by Jumelet in his evidence. He did not dispute that the figures provided to BMC were taken from the plaintiff's sales invoices. His explanation was that these figures were drawn from his own database. As noted earlier, I conclude that these remained the plaintiff's figures. Jumelet also argues that they were no more confidential than information that was previously provided by Cameron to BMC in the course of discussions about potential joint ventures. However, the disclosure of this information was made by the company for its own purposes. It was not disclosed by a key employee, director and vice-president, without the knowledge of the majority shareholder, to assist a potential competitor with whom he was in discussions for employment on his own behalf. The circumstances are not comparable.

[41] Jumelet acknowledges reviewing and providing comments to Robichau on the BMC draft proposal for government assistance. He also acknowledges providing advice to BMC with respect to forwarding financial information respecting European customers and potential future customers of BMC to the Export Development Corporation for the purpose of obtaining insurance in the event of such sales. There was no evidence disputing Jumelet's contacting of the Pictou County fish supplier respecting the availability of certain sizes of lobsters on behalf of BMC.

[42] None of these activities are in dispute and there is no genuine issue for trial on these issues.

Conclusion

[43] The plaintiff is entitled to summary judgment against Jumelet in respect to his providing sales figures generated from Cameron Seafood's invoices to Robichau, providing comments on the draft proposal for government assistance on the part of BMC, for advising BMC in respect to forwarding financial information

regarding BMC customers and potential customers to the Export Development Corporation for the purpose of obtaining insurance, and in respect to contacting the Pictou County fish supplier on behalf of BMC.

[44] The plaintiff has not established a breach of fiduciary duty in respect to any of the other activities of Jumelet, or of Weijer, referenced on this motion.

MacAdam, J.