SUPREME COURT OF NOVA SCOTIA

Citation: Down East Vending Inc. v. Lockerbie, 2013 NSSC 229

Date: 2013-07-15
Docket: Syd No. 414050
Registry: Sydney

Between:

Down East Vending Incorporated, a body corporate

Applicant

v.

David Lockerbie and Brian "Sandy" Dowie

Respondents

Judge:	The Honourable Justice Cindy A. Bourgeois
Heard:	June 13, July 2, 3, 2013, in Sydney, Nova Scotia
Oral Decision:	July 15, 2013
Counsel:	Robert Sampson, Q.C. and James Snow, for the Applicant Christopher Conohan, for the Respondents

By the Court:

Introduction

[1] Down East Vending Incorporated ("Down East") was incorporated in 2008, and is in the business of distributing, servicing and stocking beverage and snack vending machines in Cape Breton Island. It is a subsidiary of Cape Breton Beverages Limited, a Pepsi bottling and distribution facility.

[2] The Respondents Mr. Lockerbie ("Lockerbie") and Mr. Dowie ("Dowie") are former employees of Down East, each having resigned from their positons on March 8, 2013.

[3] On April 4, 2013, Down East filed a Notice of Application in Court naming Lockerbie and Dowie as Respondents. In that application, Down East sought an order:

> 1. Declaring that David Lockerbie and/or Brian "Sandy" Dowie are in breach of their fiduciary obligations as former employees and former directors of the Applicant, Down East Vending Incorporated;
>
> 2. Granting an Injunction in favour of the Applicant against the Respondents, requiring them to cease and desist all solicitation of the customers, employees and suppliers of the Applicant;
>
> 3. Damages in relation to the above-mentioned breach of fudiciary duty; and
>
> 4. The costs of this Application.

[4] On April 5, 2013, Down East filed a Notice of Motion against Lockerbie and Dowie seeking as follows:

> Down East Vending Incorporated, the Applicant in this proceeding, moves for an order granting an interlocutory injunction in favour of the Applicant against the Respondents, requiring the Respondents to deliver to the Applicant all papers, electronic files and other materials in their possession, power or control containing any of the Applicant's client information, financial information or other confidential information, and requiring the Respondents to cease, desist and refrain from any and all solicitation of customers, employees and/or suppliers of the Applicant and the disclosure of any confidential information belonging to the Applicant. The Applicant also seeks costs of this Motion.

[5] This decision is in relation to the motion brought by Down East for the above interlocutory relief. Both parties filed several affidavits in support of their

respective positions and the Court heard extensive cross-examination thereon over several days.

The Law

[6] This Court's authority to grant injunctive relief is founded in statute, the civil procedure rules, and of course, the common-law.

[7] Section 43(9) of the **Judicature Act** permits the Court where it appears "to be just and convenient" to grant an injunction, upon "such terms and conditions" as is deemed just.

[8] Down East has brought its motion under Civil Procedure Rule 41, the provisions of which permit a party to seek, where appropriate, an interlocutory injunction. Two provisions are particularly worthy of note.

[9] Rule 41.02(1) provides:

> Nothing in this Rule alters the general law about obtaining an interim or interlocutory injunction before a dispute is heard and determined on the merits.

[10] Further, Rule 41.08 provides:

> 41.08 An interim or interlocutory injunction may be restraining, mandatory, or part restraining and part mandatory.

[11] The parties agree with respect to the test for an interlocutory injunction as contained in the case law. Both cite and rely upon the test enunciated by the Supreme Court of Canada in **RJR-MacDonald Inc. v. Canada (A.G.)**, [1994] 1 S.C.R. 311. Specifically, at paragraph 48, the Court states:

> 48 *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. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[12] The parties also both apparently agree that the first element of the above-noted test may, given the particular nature of this case, be elevated from a "serious issue to be tried" to a requirement that an applicant establish a *prima facie* case.

Both parties rely upon a recent decision of Edwards, J. in this regard, **Survival Systems Training Ltd. v. Survival Systems Ltd.**, 2012 NSSC 202.

[13] I will now turn to consider each of the three steps in further detail.

Serious or *Prima Facie* Case

[14] Down East argues that Lockerbie and Dowie owed it a fiduciary duty by virtue of their positions as Directors and/or by virtue of being "key employees" within the company. It is asserted that they breached this duty both during and after their employment with Down East ended. Specifically, it is argued that while still employees of Down East, Lockerbie and Dowie made use of confidential business information to plan for the commencement of a competing vending business, including soliciting existing Down East customers, and providing sales information to Coca Cola representatives.

[15] Lockerbie and Dowie deny that their roles with Down East were such to attract a fiduciary duty, and if it did, they have done nothing wrong. They have not improperly used confidential information, nor solicited Down East customers. Although they have opened their own vending company, they testified no plan was put into action until after their departure from their former employment.

[16] Although the first prong of the **RJR MacDonald** test requires the Court to undertake a preliminary assessment of the merits of the case, I am to exercise restraint in that regard and tread cautiously. It must be kept in mind at this stage, notwithstanding the evidence mustered, the claim is still in its earliest stages. Documentary disclosure has not been completed, discovery examinations have not been undertaken and the parties pulled together their affidavits quickly.

[17] Another judge, at another time, will make a decision on the ultimate merits, likely with a much broader view of the evidence. This Court should accordingly avoid making conclusive findings of fact or undertaking a conclusive assessment of the merits. My approach therefore in terms of addressing the first step of the **RJR-MacDonald** analysis is to address two questions:

> With respect to whether Lockerbie and Dowie were fiduciaries, has Down East presented either a serious or *prima facie* case? Secondly, has Down East presented a serious or *prima facie* case that they breached that duty?

[18] Regardless of which standard is applied, the answer to both questions is yes. I will explain why, in my view, Down East has successfully navigated this first hurdle.

[19] There is clear authority in the case law that "key employees" can, in certain circumstances, attract fiduciary duties. I have found particularly instructive the approach of Edwards, J. in **Survival Systems, supra**, who reviewed the criteria to designate an employee as being "key" and in turn, a "fiduciary". His Lordship adopts Ontario authority at paragraph 39 of his decision, writing:

> 39 Key employees can also attract fiduciary duties. In GasTOPS Ltd. v. Forsyth, [2009] O.J. No. 3969, 2009 CarswellOnt 5773 (Ont. S.C.J.) (GasTOPS), Justice Granger set out the relevant law on when key employees will be found to owe fiduciary duties to employers at paragraphs 82-85:
>
> > 82 [...] A key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure.
> >
> > [...]
> >
> > i. What were the employee's job duties with the former employer?
> >
> > ii. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
> >
> > iii. Was the employee the primary contact with the customers and (or) suppliers?
> >
> > iv. To what extent was the employee responsible for sales or revenue?
> >
> > v. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
> >
> > vi. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?
>
> 84 After identifying an employee as "key", further determining whether that employee is a "fiduciary" is a difficult endeavor. According to James D'Andrea, "generally, a fiduciary is one who is empowered to act on behalf of and for the benefit of another with the ability to affect that other's interest through the use of discretion" (Employment Obligations in Canada, looseleaf (Aurora Ont.; Canada Law Book 2006))

> 85 The jurisprudence has imposed fiduciary obligations on employees in a number of different factual circumstances and in so doing have considered:
>
> (a) whether the employee has scope for the exercise of some discretion or power, the employee can unilaterally exercise that power or discretion so as to effect the beneficiary is [sic] legal or practical interest and whether the beneficiary is vulnerable to or at the mercy of the fiduciary holding the discretion or power;
>
> (b) knowledge of customer contact information, needs and preferences, and therefore, an ability to influence customers. An employee may be held to be a fiduciary if they are found to have "encyclopedic knowledge" of their employer's customers, unrestricted access to all customer lists and information concerning customers, privy to policy issues and personal contact with, and responsibility for, a large portion of customers ...;
>
> (c) knowledge of the business and market opportunity of the employer or playing a role in the employer's strategic market development is a consideration in determining if the employees owed a fiduciary duty to the former employer ...;
>
> [...]
>
> (d) knowledge of and access to confidential information. It is not necessary for an employee to have access to corporate financial information to be found to be a fiduciary. It is the employee's access to information of which disclosure would make the employer vulnerable. In a sales environment, customer information is critical or in a technological environment, product specifications are critical ...;
>
> [...]
>
> (e) direct and trusted relationships with existing and potential customers, particularly where there is a "unique relationship with the clients personnel contacts and [the defendants] had direct access to confidential information as to the clients' needs, preferences and accepted rates" ...;
>
> (f) whether or not the employee's functions are essential to the employer's business, therefore rendering the employer vulnerable to the employee's departure ...
>
> Any one of these factors, or a combination of them, could result in a finding that an individual owes a fiduciary obligation to his employer.

[20] The evidence before the Court, from both parties, is that it was Lockerbie and Dowie who for the vast majority of Down East customers were the "faces" of the company, being the primary contacts. In my view, the evidence presented raises a *prima facie* case that Lockerbie and Dowie fell within several of the

above-noted examples of when fiduciary obligations have been imposed on key employees.

[21] The evidence before the Court raises a *prima facie* case that these two key employees did exercise some discretion in their functions, particularly as it related to directing, supervising and disciplining other employees; did possess "knowledge of customer contact information, needs and preferences, and therefore, an ability to influence customers"; "knowledge of the business and market opportunities of the employer"; and "knowledge of and access to confidential information".

[22] From the evidence, I further conclude that Down East has presented a *prima facie* case that Lockerbie and Dowie breached their fiduciary duties owed to it as their employer. Mr. James Chisholm is the Vice-President of Finance of Down East. Attached to his affidavit sworn April 4, 2013, is a series of deleted emails retrieved from the company computer system. These emails, written either by Lockerbie or Dowie, are relied upon heavily by Down East in pursuing its allegation that the Respondents conducted themselves in an inappropriate fashion.

[23] Commencing in September of 2012, the email exchange appears to reflect Lockerbie and Dowie engaging in concrete plans to commence their own vending business, including concrete discussions with Coca Cola, as well as financial institutions. The emails read collectively strongly suggest Lockerbie and Dowie were making concrete plans, obtaining machines, putting financing in place and providing sales projections based upon existing Down East customers to Coca Cola. Although it will be left for another judge to ultimately conclude from the entirety of the evidence, including the emails, what in fact Lockerbie and Dowie were doing, if anything, in the months prior to their departure from Down East, this paper trial will undoubtedly be closely scrutinized.

"Irreparable" Harm

[24] I turn now to consider the second stage of the test, whether absent an injunction, Down East will suffer irreparable harm. In **RJR-MacDonald, supra**, the Court, at paragraph 65 indicated that "irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[25] In addition to the above, Down East relies upon several other case authorities as being of assistance in defining "irreparable harm", including **R. v.**

O'Connor, 2001 NSCA 47, a decision of Cromwell, JA as he then was. Citing directly from Down East's memorandum, it provides:

> In *The Queen v. O'Connor,* 2001 NSCA 47 at paragraph 13, Justice Cromwell, citing Robert Sharpe's leading text on Injunctive relief stated:
>
> > 13 …As Robert J. Sharpe put it in his text, Injunctions and Specific Performance (Looseleaf edition, updated to November, 2000) at (paragraph) 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[26] A closer look at Justice Cromwell's decision, however, including several comments immediately preceding the above quote place the significance of same in a different light. The expanded comments from the Court read as follows:

> 12 The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.
>
> 13 However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at (paragraph) 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[27] Down East also relies upon two decisions, **Survival Systems Industrial Limited v. Syrett** [1997] N.S.J. No. 32, and **Delta Rent-A-Car Ltd. v. Patterson** [1990] N.S.J. No. 157, for the proposition that loss of customers and/or market share constitutes irreparable harm.

[28] The concept of "irreparable harm" was thoroughly considered by LeBlanc, J. in **Front Line Safety Limited v. Devon MacKenzie**, 2003 NSSC 15. There, the Court considered **Survival Systems v. Syrett, supra**, in terms of types of "irreparable harm" and then provided, in my view, a more preferable analysis. The Court writes as follows:

> 42 There are also authorities for the proposition that loss of customers or specific business as well as loss of market share can be compensated for with damages. See e.g. *Mercury Marine Ltd. v. Dillon* (1986), 30 D.L.R. (4th) 627 (Ont. H.C.) and *Ernst & Young, supra*. Furthermore, where the employer is a small company in a specialty

> market, the issue of damages is easier to address: see *Boshart v. Becker Fire Services Ltd.* (1993), 52 C.P.R. (3d) 515 at 518 (Ont. Ct. Gen. Div.).
>
> Recall Sharpe's statement above, that irreparable harm cannot be inferred.
>
> 43 In S.R. Ball, Canadian Employment Law, supra, an authoritative text on employment law in Canada, Ball also states at pages 22-8 -- 22-9:
>
> > The employer not leading clear evidence as to the question of irreparable harm, due to a former employee breaching an obligation, may be fatal to an employer's injunction application. Irreparable harm cannot be founded upon mere speculation. If previous sales history or client lists help to determine potential loss, the court will be less inclined to find irreparable harm. The normal order that the Defendant keep a record sufficient to ascertain its dealings, will assist in ensuring that there is no irreparable harm. The assessment of damages using this method may not be easy, but as long as it is possible, there will not be a finding of irreparable harm. If damages are adequate, even though not readily ascertainable at the time of trial, the application will fail. If the former employee has already successfully solicited business from the employers customer base, and the matter is fait accompli, the court has found damages to be readily ascertainable.

[29] In a similar vein in **Smith v. Maritime Pro Stock Tour Ltd.**, 2007 NSSC 272, Associate Chief Justice Smith, relying on a decision of the Federal Court, instructed that "the evidence of irreparable harm must be clear and non-speculative."

[30] Further, in a recent decision, close to home, Justice McDougall was asked to grant an interlocutory injunction against two pharmacists, former employees of Lawton's, preventing them from opening a competing pharmacy in St. Peter's. In **Lawton's Drug Stores Ltd. v. Zinck**, 2009 NSSC 208, it was argued that the loss of customers and market share would constitute "irreparable harm". Justice McDougall flatly rejected this proposition writing:

> 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 valuators perform these functions all the time.

[31] I turn now to consider the evidence in light of the above authorities. In terms of the affidavit evidence presented by Down East, notwithstanding the expansiveness of the written evidence, very little attention, in my view, was placed on the nature of the irreparable harm alleged by Down East. The affidavits of President Cote, Vice President of Operations MacDonald, and Vice President of

Finance Chisholm, all sworn April 4, 2013 contain the same sole assertion relevant to "irreparable harm", namely:

> "If Dowie and Lockerbie are allowed to solicit customers of the Applicant, the Applicant will lose market share, goodwill and equipment placement on Cape Breton Island."

[32] In addition to the above, the affidavit of Mr. MacDonald sworn June 5, 2013, contains the following:

> 30 I have reviewed the affidavit of Brian "Sandy" Dowie sworn to on April 23, 2013 and in relation to paragraphs 91:
>
> > c. The "loss of market share" has come from customers leaving the Applicant, and will continue, if Dowie and Lockerbie are allowed to continue to solicit customers of the Applicant.
> >
> > d. With each customer who ends their contract with the Applicant, the Applicant loses equipment placement and that client's share of the vending market.

[33] There is, in my view, inadequate evidence contained in the affidavit evidence to establish that the Defendant will suffer irreparable harm if an injunction is not granted as requested. There was a significant amount of *viva voce* evidence, however, the nature of the harm was not a primary focus. On cross-examination, Mr. MacDonald testified that it would be possible to calculate the financial losses over a defined period in relation to any particular lost customer. In his *viva voce* evidence, Mr. Chisholm testified that the long-term effects of a loss of customers would be difficult to quantify. He gave the example that the Company's profit margins may change, giving an example that if they sold fewer chips, their wholesale cost would increase.

[34] In my view, the evidence put forward by Down East regarding the existence of "irreparable harm" was inadequate. It carried the burden of marshalling clear and non-speculative evidence that their losses would be incapable of monetary calculation. It would appear Down East may have held the view that a simple loss of customers or market share would definitively establish irreparable harm. Such a view would be misguided. As noted by LeBlanc, J. above, irreparable harm cannot be inferred, nor founded on speculation, it must be proven.

[35] Although it is clear that Down East has lost customers to Lockerbie and Dowie, and will likely lose market share in the vending business, there is nothing

before me in terms of evidence to establish that these losses cannot be quantified and addressed by way of a monetary award of damages. To repeat the recent words of Justice McDougall, "Accountants, actuaries and business valuators perform these functions all the time."

[36] Having found that Down East has failed to establish irreparable harm, it is not necessary to consider the third element, namely the balance of convenience between the parties.

[37] The motion for an interlocutory injunction is dismissed. The interim Order issued April 30, 2013, is hereby vacated.

[38] If the parties cannot agree on the issue of costs, written submissions should be provided within 30 days.

J.