

1990

S.H. No. 75271

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

ACTION BUSINESS MACHINES LIMITED, a body
corporate, and 1874000 NOVA SCOTIA LIMITED,
a body corporate

Plaintiffs

- and

TIMOTHY R. ADAMS, KIRK McCORMICK, JOHN THOMSON,
BRAD LESLIE, BARRY MYATT, SYSTECH RETAIL SYSTEMS
INC., a body corporate, EQUILEASE INCORPORATED,
a body corporate

Defendants

HEARD: At Halifax, Nova Scotia, before the Honourable
Mr. Justice David W. Gruchy, in Chambers,
on December 17 and 20, 1990

DECISION: January 3, 1991

COUNSEL: Peter Bryson, Solicitor for the Plaintiffs
David Coles, Solicitor for the Defendants

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Defendants

GRUCHY, J.

This is an action commenced on November 16, 1990, against the defendants wherein the plaintiffs ask for general damages, special damages against certain of the defendants, an accounting as between the defendants and the plaintiffs, certain declarations and an injunction restraining Adams and Systech from competing with Action Business Machines Limited (ABM) in breach of a certain non-competition agreement and/or from disclosing confidential or proprietary information belonging to the plaintiff ABM, and/or an injunction restraining Adams and Systech from soliciting ABM's employees or clients. The

essence of the plaintiffs' claim against the defendants is found in paragraphs 9, 10, 11, 12 and 13 of the statement of claim. Other aspects of the statement of claim deal with the defendants John Thomson, Brad Leslie and Barry Myatt. Those defendants had not been served with any documents pertaining to this action at the time of the hearing and for the purposes of the application for interlocutory injunction were not considered. Paragraphs 23 and 24 of the statement of claim deal with the claims against the defendants actually involved in the application for interlocutory injunction and read as follows:

"23. ABM repeats the foregoing paragraphs and claims against the Defendants, Systech and Adams:

- A. general damages;
- B. special damages for inducing the Defendants McCormick, Thomson and Myatt to breach their contracts with ABM;
- C. special damages for inducing the Defendants McCormick and Thomson to breach their fiduciary duties to ABM;
- D. an accounting;
- E. a declaration that any monies derived from the activities of McCormick, Thomson and Equilease or arising from breaches of the Non-Competition Agreement should be held on a resulting or constructive trust for ABM;
- F. an Injunction restraining Adams and Systech from competing with ABM in breach of the Non-Competition Agreement or from disclosing confidential or proprietary information belonging to ABM;
- G. an Injunction restraining Adams and Systech from soliciting ABM's employees or clients.

24. ABM repeats the foregoing paragraphs and claims against McCormick and Equilease:

- A. general damages;
- B. special damages for inducing the Defendants Thomson and Myatt to breach their contracts with ABM;
- C. special damages from McCormick for breaching his fiduciary duties to ABM;
- D. an accounting or declaration of resulting or constructive trust with respect to all monies obtained from sales to customers of ABM or through the misappropriation of confidential or proprietary information belonging to ABM;
- E. an Injunction restraining McCormick and Equilease from using or disclosing confidential or proprietary information belonging to ABM;
- F. an Injunction restraining Equilease and McCormick from soliciting ABM's employees or clients;"

The application for interlocutory injunction was commenced on the same date as the main action.

The plaintiff has filed the following affidavits in support of the application for injunction: Brent Smith dated November 19, 1990, Frank Coady dated November 8, 1990, Paul McLeod, supplementary affidavit, dated November 28, 1990, Frank Coady, supplementary affidavit dated December 14, 1990, and Brent Smith, supplementary affidavit dated December 14, 1990.

The defendants have filed affidavits, both dated December 17, 1990, of Timothy R. Adams and Kirk McCormick. On December 17, 1990, the defendant cross-examined Paul McLeod, Brent Smith and Frank Coady on their affidavits. The plaintiff

cross-examined Kirk McCormick and Timothy Adams on their affidavits.

In the case now before me, the defendant Timothy Adams was the principal shareholder of Action Business Machines Limited. He sold his shares in that Company on February 16, 1989. The agreement of sale of those shares is not before me. The situation may have been much clearer had it been. There was, however, on the same date a noncompetition agreement which was exhibited in the affidavit of Brent Smith. In that agreement, "prohibited area" was defined as meaning the Atlantic Provinces of Canada and "prohibited business" was defined as meaning "the same business as is being currently conducted by (Action Business Machines) as of the date of the agreement". There is no definition of the word "business" or of the phrase "same business".

The following clauses are in the agreement:

"2.02 Adams, as an officer, director and shareholder of Systech, agrees with ABM that he will cause Systech not to carry on or be engaged in the Prohibited Business within the Prohibited Area during the Prohibited Period.

3.01 Adams, as an officer, director and shareholder of Systech, agrees with ABM that he will cause Systech to continue to deal exclusively with ABM in the Prohibited Area in the wholesale sale and supply by Systech to ABM of equipment and products ("Systech's Products") required by ABM to conduct its business in the Prohibited Area.

3.02 In consideration of Adams' covenants set forth in Clause 3.01, ABM agrees with Adams that it shall continue to purchase exclusively from Systech Systech's products for use by ABM in the Prohibited Area, provided that Systech continues to provide quality service with respect to Systech's Products and such products remain competitively priced and of good quality."

I will refrain from making comment on any shortcomings of these clauses. It is not for me to try the issues of the case. The purview of my examination is as set forth by Lord Diplock in **American Cyanamid Company v. Ethicon Ltd.** (1975), A.C. 396 (A.C.):

"It is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that it "aided the court in doing that such was its great object, thus abstaining from expressing any opinion upon the merits of the case until the hearing". (Wakefield v. Duke of Buccloch (1865), 12 L.T. 628 at 629"

The affidavits and the evidence in this matter contain much allegation and counter-allegation. I need not and will not attempt to resolve the conflicts among those allegations.

Certain points stand out in the situation as it was developed before me:

1. There was in fact a non-competition agreement involving the plaintiffs and the defendant Timothy Adams.
2. Timothy Adams claims that the plaintiff Action Business Machines Limited has breached Article 3.02 of the non-competition agreement and that by reason thereof he treats the agreement as at an end.
3. Timothy Adams claims to be owed money pursuant to the original agreement for the sale of his shares of Action Business Machines.

4. Timothy Adams claims that Action Business Machines has also breached the non-competition agreement by buying machinery from suppliers other than Systech.
5. Timothy Adams has sold products to certain customers who may or may not have been part of ABM's "business".
6. Systech appears to be supplying products to customers (or former customers) of Atlantic Business Machines through a method of leasing through Equilease. Equilease is owned and operated by Kirk McCormick, a former employee of Atlantic Business Machines.
7. Timothy Adams, through Systech, started selling in the "Prohibited Area" in or about October or November of 1990, or during the period contemplated by the non-competition agreement.

The Law:

I will set forth my understanding of the law which I must apply to the factual situation as was developed before me.

Section 41(e) of the Judicature Act, R.S.N.S. 1989, c. 240 sets forth that an interim injunction may be granted "where it appears to the court to be just and convenient to do so". The case law has developed four criteria to be applied in determining whether an interlocutory injunction should be granted. Those considerations are as follows:

1. The strength of the Plaintiff's case.

2. That unless the injunction is granted, irreparable harm to the Plaintiff will result, which cannot be compensated by damages.
3. The balance of convenience between the parties.
4. The preservation of the status quo.

Both the Trial and Appeal Divisions of our Court have considered various aspects of interim and interlocutory injunctions in many cases. I do not consider it necessary to survey those cases.

It is generally considered that the decision in **American Cyanamid Company v. Ethicon Ltd.** (supra) set what is considered to be new direction or standard in the consideration of the strength of the plaintiff's case and, following that decision, a court must be satisfied that the claim of the applicant is not frivolous or vexatious or, in other words, there is a serious question to be tried. That decision appears to have been a deviation from the previous test applied in the granting of interlocutory injunctions which required that a "strong prima facie case", be established.

Mr. Justice Burchell in **McFetridge v. Nova Scotia Barristers' Society** (1982), 48 N.S.R. (2d) 323 set forth a review of various cases on the matter of interlocutory injunctions including **American Cyanamid** and concluded that review by the following:

"The foregoing review may be seen to confirm my view that there is no firm or fixed rule. My own impression is that the cases reflect an evolutionary trend in which

the courts, responding to the pressures of more complex litigation, are moving away from a very heavy onus to one that is more realistic under modern conditions. I think as well that there has been a natural and I think correct underlying tendency to apply the test that is most likely to produce the best result. It must also be remembered in the usual case a remedy is sought before the commencement of the trial."

In *Lintaman, Gillis, Park Construction Services Limited and Maritime Drywall (1980) Limited v. Goodman, Thorne Riddell Inc.*, and *Bank of Montreal (1983)*, 54 N.S.R. (2d) 320 (N.S.S.C.T.D.), Hallett, J., stated at pages 331-2:

"Lord Diplock went on to state at p.323 in Vol. 2 of the W.L.R.'s that unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief.

Applying these principles to this case, in my opinion, the material filed by the plaintiffs does not fail to disclose that the plaintiffs have any real prospect of succeeding. It is therefore necessary to consider the balance of convenience, keeping in mind that the object of the interlocutory injunction is to protect the plaintiffs against violation of their rights for which they could not be adequately compensated in damages recoverable in the action if they succeed at trial and the corollary of that, that the plaintiffs' need for protection be weighed against the corresponding need of the defendants to be protected against injury resulting from their being prevented from exercising their legal rights for which they could not be adequately compensated under the plaintiffs' undertaking in damages if the defendants were successful at the trial."

In *Kelly's Stereo Mart (Atlantic Ltd.) v. Schneider Enterprises Ltd., Schneider and Schneider (1986)*, 72 N.S.R. (2d) 56 (N.S.S.C.T.D.), Burchell, J. stated at pages 60-61:

"It is, of course the first principle that relief by way of interlocutory injunction is a drastic remedy that should be granted only in exceptional circumstances because it is being sought before there has been any full and proper adjudication of the rights and obligations of the parties. Resulting judicial reticence concerning the remedies is reflected in the several formulations of the so-called threshold test. In the present case it is unnecessary that I review again the oft-debated question surrounding the appropriateness of the so-called traditional test of a strong prima facie case or the seeming more flexible test that are set forth in American Cyanamid...in the present case my finding is that, having established the existence of a restrictive covenant and an apparent breach on the part of the Defendant company, the Plaintiff has crossed the threshold of eligibility, whether that be judged according to the so-called traditional test or the American Cyanamid formulation.

Once an applicant has crossed the threshold of eligibility by establishing a sufficient case, the focus shifts to the second main question that is whether an intervention by way of injunction will be just having regard to the consequences to both parties if the injunction is either granted or refused. It is in the context of this second fundamental question that the courts have recognized and dealt with considerations such as the balance of convenience, preservation of the status quo, irreparable harm and the difficulty of calculating damages, which latter consideration has been put forward in some cases as an aspect of irreparable harm. The decided cases show that the stress to be placed on those considerations depends upon the particular circumstances of the case and they will be emphasized variously in order to produce a just and convenient result... It should not be forgotten that Section 39(9) of the Judicature Act, S.N.S. 1972, c. 2 which authorizes the remedy of injunction, provides that it may be granted where it is just or convenient so to do."

In *J.W. Bird and Company Limited v. Michel Levesque, Cornerstone Construction Products Limited and Cornerstone Developments* (1988), 82 N.S.R. (2d) 435 (N.S.S.C.T.D.), Davison, J. stated at page 439:

"I agree that there will be situations where it will be just to grant an injunction despite the lack of proof of a prima facie case. Ultimately, the issue is whether it would be 'just and convenient' and the judicial discretion required shouldn't be fettered with too many rules. Nevertheless, an injunction should be considered an extraordinary remedy and, my opinion, in most cases a court should require a higher standard than proof of the existence of 'the serious question to be tried' or proof that the claims are not 'frivolous or vexatious'. It is not difficult to meet these tests when you are advancing proof by way of affidavit or by way of competing affidavits. I would suggest, with respect, 'ordinarily' or in most cases where a party seeks intervention which restricts the rights of another before a full trial on the issue, the burden on that party would be to advance evidence to indicate a prima facie case."

Mr. Justice Davison also later set forth the approach which he considered should be taken in cases such as this in the unreported decision of **Action Business Machines Limited v Frank Coady, Roger Landry, Owen MacNeil, Brian McCoubrey, Faye Coady and POS Atlantic Limited**, S.H. No. 66203. He said:

"In J.W. Bird and Company Limited v. Levesque et al (1988), 82 N.S.R. (2d) 435, I set out in some detail my views on the approach which should be taken in considering an interlocutory injunction. The court must exercise its discretion and grant injunctions when it is just and convenient. In exercising the discretion, it must be remembered that the remedy is considered an extraordinary one in that the court is dealing with the rights of the parties short of a full trial on the issues.

In J.W. Bird and Company Limited v. Levesque et al (supra), at p.440, I referred to the judgment of the Supreme Court in Aetna Financial Services Limited v. Feigelman, [1985] 1 S.C.R. 2. In that case, Estey, J. referred to the Chesapeake and Ohio Railway Co. v. Ball, [1953] O.R. 843 where McRuer, C.J.H.C. stated at p.854:

'The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt

with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff would ever succeed in the action. I may put in a different way: If on one hand a fair prima facie case is made out and there will be irreparable damage if the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.'

Following the reference to this passage, Estey, J. stated:

'Reconsideration of the requirement that the plaintiff must show a "strong prima facie case" has come in the wake of the decision of the House of Lords in American Cyanamid v. Ethicon Ltd., [1975] A.C. 396. However, the other principles enunciated by McRuer C.J.H.C. remain unimpaired. As a general proposition, it can be fairly stated that in the scheme of litigation in this country orders other than purely procedural ones are difficult to obtain from the Court prior to trial.'

It is incumbent on the Applicant to advance a prima facie case and show that irreparable harm will ensue which would not be compensated in damages. The court must weigh the balance of convenience and consider the effect of the injunction on the Defendants as well as the Plaintiff."

PRIMA FACIE CASE

The material available to me at the hearing of this application did not fail to disclose that the plaintiffs have any real prospect of succeeding in their claim. Indeed, I find that the plaintiffs have shown a strong prima facie case as against the defendants Adams and Systech. I have some real reservations about the strength of their case as against the

other defendants but in view of my finding below, I need not concern myself about that aspect of this matter.

IRREPARABLE DAMAGE

In view of my affirmative finding to the first question, I must go on to consider whether, unless the injunction is granted, irreparable harm to the plaintiff will result, which cannot be compensated by damages.

The affidavit of Brent Smith establishes that its major customers, being Sobey's, Boland's, Atlantic Wholesalers, Co-Op Atlantic and Lawton's, account for eighty percent or more of ABM's revenues. He says that McCormick, in his capacity as President of Equilease, has attempted to supply equipment and technology to several of ABM's customers, and previously has attempted to market Systech's merchandise. He further concludes in his affidavit as follows:

"14. THAT ABM is especially vulnerable to competition at this time owing to the imminence of the GST. The departure of Myatt and Leslie at this time will cause significant loss and damage to ABM. The Defendants' access to the confidential knowledge and skill of Myatt could result in ABM's loss of major clients and/or a significant amount of work from those clients. The Defendants' use of Myatt's knowledge and skill at this particular time could cripple ABM. The harm would be difficult or impossible to quantify in damages and would likely be irreparable.

15. THAT Thomson now works with or for McCormick/Equilease/Systech from Equilease's Dartmouth offices. Thomson, Adams and McCormick would all be aware of what ABM client contracts are coming up for renewal. Thomson and McCormick would both be aware of ABM's maturing business opportunities with various ABM clients.

16. THAT ABM has spent a great deal of time and hundreds and thousands of dollars developing customer specific software packages and programs for its major clients and in developing a GST program. Because of the imminence of the GST this is an extremely important period of time for ABM. Once a client chooses a particular equipment and technology package, it is likely to retain that package for some years. Accordingly, if the Defendants make use of confidential information belonging to ABM at this time, they could make significant inroads into ABM's client base and cause irreparable harm to ABM not quantifiable or compensable by way of damages. In particular, maintenance and service contracts form a large percentage of the profits of ABM. If ABM loses the equipment and technology package it is also likely to lose the maintenance and service contracts. Accordingly, ABM faces the following losses:

- a) serious decrease in revenues;
- b) loss of market share that will be extremely difficult to regain;
- c) loss of clients owing to ABM's inability to provide maintenance, support and service arising out of the loss of Myatt to Systech/Equilease;
- d) loss of reputation with suppliers and clients;
- e) damage to corporate morale."

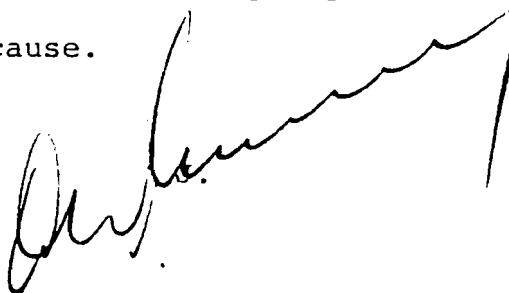
The affidavit and supplementary affidavit of Paul McLeod do not address the matter of damage at all. Nor do the supplementary affidavits of Frank Coady and Brent Smith.

The evidence concerning damage, both affidavit and viva voce, appears to me to be more speculative than real.

I find that the evidence falls short of persuading me that in the absence of an injunction, irreparable damage to the plaintiffs will result, which cannot be compensated by damages.

CONCLUSION

Having concluded that the plaintiffs have failed to persuade me as to the irreparability of any damages, I need not consider any further requirements for an interlocutory injunction. This application is, therefore, dismissed. As I have not considered the full case on its merits following a trial, I refrain from ordering costs to either party, but, rather, order that costs shall be in the cause.

A handwritten signature in black ink, appearing to be 'D. L. ...', written over the end of the text.

Halifax, N.S.

January 3, 1991