SUPREME COURT OF NOVA SCOTIA
Citation: *Trimar Promotional Products Limited v. Milner*, 2021 NSSC 98

Date: 20210318
Docket: Hfx No. 463704
Registry: Halifax

Between:

Trimar Promotional Products Limited

Plaintiff

v.

Greg Milner, **Barry Hayes**, **John Day**, **Michael Day**, and **Atlantic Digital Reproductions Incorporated**

Defendants

Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 12, 16, 17 and 18, 2020, in Halifax, Nova Scotia
Final Written Submissions:	January 5, 2021
Counsel:	Dennis James, Q.C. counsel for the Plaintiff Brian Church, Q.C. and Madeline Shupe (article clerk), counsel for the Defendants

By the Court:

Introduction

[1] A Defendant, Greg Milner ("Milner"), a long-time sales representative with the Plaintiff, Trimar Promotional Products Limited ("Trimar"), gave notice of his resignation from Trimar on May 16, 2016. On or about May 30, 2016, he started employment with Atlantic Digital Reproductions Incorporated ("Atlantic"), until then a supplier to Trimar.

[2] Trimar claims that Milner breached both an implied duty of good faith, loyalty, and fidelity, as well as a fiduciary duty, by conspiring with Atlantic to move from February 2016 and by taking and using Trimar's confidential information to compete with Trimar. Trimar also claims that Atlantic, its owner, a manager, and an ADP sales rep knowingly assisted and conspired with Milner in his breaches.

[3] Atlantic counterclaimed for $2,897.92 for goods sold and delivered. Trimar contested the counterclaim, until the records (Exhibits #11, #14 and #15) were introduced through Barry Hayes.

[4] Over four days, the Court heard evidence from Jeff Dwyer ("Dwyer") (owner of Trimar), and Milner and Barry Hayes ("Hayes") for the Defendants. A joint exhibit book ("JEB") was tendered as Exhibit #1.

[5] There was no written employment contract between Trimar and Milner.

[6] Trimar claims that Milner took confidential sales and sourcing records of Trimar in the months before he left its employ and used these records for the benefit of Atlantic.

[7] Trimar seeks an accounting, pursuant to *Civil Procedure Rule 66*, of the net profits earned by Atlantic from Trimar clients represented by Milner that are listed in a spreadsheet tendered as an exhibit, a permanent injunction enjoining the Defendants from use of Trimar's confidential information, and punitive damages.

[8] The Defendant Milner acknowledges that he owed implied duties of good faith, loyalty, and fidelity to Trimar, which included a duty not to take and disclose confidential information of Trimar following his resignation.

[9] He states that he was an ordinary employee, paid solely as a commission salesperson. He denies that he fell into the category of a managerial or senior employee who could exercise a power or discretion over Trimar's significant business or legal interests. He denies that he owed Trimar a fiduciary duty.

[10] Milner was a 16-year employee of Trimar. Trimar was purchased by entrepreneur Jeff Dwyer in May 2014. Milner acknowledges that, as a result of events in early 2016, he knew that he was not going to stay with Trimar. He acknowledges creating a business plan for a promotional products business in February 2016. He acknowledges meeting with Hayes, an employee of Atlantic, in early May 2016, to explore setting up a promotional products division at Atlantic, a printing business that had dealings with Trimar.

[11] Milner acknowledges that he intended to use Trimar sales and sourcing records related to his clients in whatever new business he started or joined.

[12] On June 2, 2016, Dwyer for Trimar sent an e-mail to Milner (copied to Trimar's lawyer) (JEB, p.114-115) stating that he was aware that Milner illegally took confidential information from Trimar. He directed that Milner confirm destruction of the "stolen" information. He further wrote that Trimar intended to seek damages from him.

[13] Milner says that he intentionally did not approach some of his former clients, whose confidential information he had (such as NSCC and Dalhousie University), and that immediately upon receipt of the June 2, 2016 e-mail he destroyed and stopped using the records that he had taken from Trimar's computers before he left. Effectively, he says that after June 2, 2016, he relied upon his own memory based on his sixteen years at Trimar, and the fact that many of his clients were his friends, with whom he had relationships unrelated to his employment at Trimar.

[14] As against the Defendants other than Milner, the Plaintiff claims damages. In its post-trial brief, its Counsel writes:

> On July 4th, Atlantic Digital was advised directly that Mr. Milner had taken confidential records (Exhibit 12). The evidence of Messrs. Milner, Hayes and Day is that they made no effort to review the Atlantic Digital system to ensure that records were expunged from its system.

Trimar's July 4th letter to Milner and Atlantic (presumably from its lawyer) was not tendered at trial. The only record of it are Milner's emails to Hayes on July 4th and 5th, passed on by Hayes to John Day (Exhibits 12 and 13). In these emails, Milner

acknowledges receiving a letter from a lawyer (presumably Trimar's lawyer) and explains the extent to which he had accessed Trimar's records, contacted (and not contacted) Trimar customers, and that he ceased using any of the records upon receipt of formal notice from Trimar.

Reliability and Credibility

[15] To assist in the assessment of reliability and credibility of evidence, courts have approved several tools.

[16] For reliability, courts look at:

1. the accuracy and completeness of observations;

2. the circumstances of observations;

3. memory; and

4. the presence of collaborative or supporting evidence.

[17] As O'Halloran J. A. wrote in Faryna v Chorny, 1951 CarswellBC 133 (BCCA), ("Faryna") at paras. 9, 10 and 11:

> … Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, [relate to reliability.] … a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. … The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case …

[18] For credibility, courts look at:

1. honesty,

2. whether a witness has an interest in the matter or a motive to give certain evidence,

3. the consistency or inconsistency over time amongst a witness' different iterations of the facts,

4. internal inconsistencies in a witness' evidence,

5. consistency or inconsistency with other evidence,

6. demeanor, but considered with caution, and

7. the inherent reasonableness of the evidence, that is, whether it makes common sense.

[19] O'Halloran wrote in Faryna:

> If a trial judge's finding of credibility is to depend solely on which person he thinks he made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box … The real test of truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[20] It is not required that a trier of fact believe or disbelieve a witness' evidence in its entirety. On the contrary, a trier may believe none, part, or all of a witness' evidence and attach different weight to different parts of it.

The Issues

1. What was Milner's duty to Trimar: an implied duty of good faith, loyalty, and fidelity, or did it include an additional fiduciary duty?

2. Did Milner breach any duty owed to Trimar and, if so, the nature and extent of the breach?

3. Did the Atlantic Defendants knowingly assist Milner in breaching a fiduciary duty to Trimar?

4. Did the Defendants commit the tort of civil conspiracy against Trimar?

5. If any defendant is liable, what are the appropriate remedies?

Issue #1: What was Milner's duty to Trimar?

[21] The Plaintiff's pretrial brief describes the implied contractual duty of fidelity that every employee owes its employer and the fiduciary duty owed by a more limited category of employees. For the former, the Plaintiff cites *Employment Law in Canada, Fourth Edition* and *McMahan v. TCG International*, 2007 BCSC 1003. For the latter, it cites *Clarke Road Transport v. O'Toole*, 2017 NSSC 319.

[22] At trial, the Court advised the parties that it had reviewed the text by Gregory K. Steele, and Kenneth Wm. Thornicroft, *Employment Obligations and Confidential Information*, Third Edition (Toronto: LexisNexis, 2015) and, in particular, Chapter 1 (Overview), Chapter 3 (Implied Duty of Fidelity), Chapter 4 (Confidential Information), Chapter 5 (Fiduciary Duties), Chapter 9 (Post-Employment Obligations), and, Chapter 12 (Damages and Other Remedies). The Court relies upon the thorough and the helpful analysis of the relevant legal principles and the case law cited in that text:

> THE DUTIES OF GOOD FAITH, LOYALTY AND FIDELTY
>
> Employees serve their employers with good faith, loyalty and fidelity … The duty of good faith is not dependent upon the level or character of the employment. It is a duty owed by all employees …
>
> The duty of good faith is owed throughout the duration of the employment but, for the most part, ceases when the employment relationship ends, although non-fiduciary employees still have continuing obligations not to disclose trade secrets or other confidential information. During the continuance of the employment relationship, the employee must not engage in conduct that is incompatible with the faithful discharge of the employee's duty … the employee's duty of good faith continues even though the employee has tendered, or has received, notice that their employment will be terminated. …
>
> The employee's duty of good faith is not, however, equivalent to the fiduciary duty owed by directors and senior employees. The latter are more extensive and survive the termination of the employment relationship … They are not, however, completely distinct. The nature and scope of an employee's fiduciary duty depends on all of the relevant circumstances. …
>
> The employee's duty of good faith is multifaceted, and there is no precise list regarding permissible and prohibited activities. Each case depends on its particular facts. …

[23] The New Brunswick Court of Appeal in *Imperial Sheet Metal v. Landry*, 2007 NBCA 51 ("*Imperial Sheet Metal")*, wrote: at paragraph 33:

> [33] A non-fiduciary employee owes the employer a general duty of good faith and fidelity during the currency of the employment relationship. This translates into a duty not to compete with the employer, either directly or indirectly, during the currency of the employment relationship. It also translated into a duty not to disclose "trade secrets" and other "confidential information". Once the employment relationship ends, the duty of non-disclosure persists. However, confidential information does not include the general skills and knowledge acquired

> by the employee while working for the former employer. This is true so long as the skill and knowledge is committed to memory and not dependent on the employer's documentation. Undoubtedly, employees who depart with suitcases of documents, computer files or even a solitary customer list are in breach of their post-employment obligations. Employees who leave with only their personal possessions are better able to defend lawsuits alleging breaches of confidences. In sum, a former employee is entitled to exploit freely the general skills and knowledge acquired as a result of the employment relationship, so long as that knowledge is a product of his or her memory and unaided by the employer's documentation.
>
> [34] . . . Once the employment relationship ends, the non-fiduciary employee is permitted to engage in fair competition with a former employer. Fair completion has traditionally meant that the employee may, without fear of legal consequences, establish a business that competes directly or indirectly with the business of the former employer. A correlative right is the right of the employee to work for a competitor of the former employer. As well, in both instances, the employee may bring to that business the knowledge and skill acquired while working for the former employer. The right to compete includes the right to solicit customers of the former employer "whose name and addresses he has learned during the period of his service". . . .

[24] The Court in *Imperial Sheet Metal* made other observations directly relevant to the first issue. In paragraph 5, it notes that courts have divided on whether the definition of a fiduciary should be broad or narrow, and in paragraph 6, the Court of Appeal agrees with the motions judge that the broad approach should be rejected. From paragraphs 33 to 37, the Court clearly differentiates between employees who simply owe a duty to act in good faith from employees who owe a fiduciary duty, and adds that courts are hesitant to impose more onerous fiduciary duties upon any former employees who are not restrained by restrictive covenants.

[25] The Steele-Thornicroft text reads at pages 55 to 56:

> The duty of good faith does not require an employee to remain in service of their employer for as long as their employer wishes. The freedom to change jobs would be meaningless if the duty of good faith prohibited a person from taking steps to obtain new employment until their present employment ended or until they had at least tendered their resignation. While employees are not strictly prohibited from undertaking preparatory activities while still employed, certain actions may constitute a breach of the employee's duty of good faith. Although it is not possible to provide an exhaustive list of all permissible and impermissible activities, a review of the cases illustrates the types of actions that are either permitted or prohibited.

> Although non-fiduciary former employees may solicit the business of their former employers' customers, these employees cannot, while still employed, make customer lists or otherwise photocopy or download electronic files identifying the employer's customers.

[26] In *Fleming v. Calyniuk Restaurants Inc.*, 2007 SKCA 85 ("*Fleming"*), the Court noted that merely taking "preparatory steps of an embryonic nature" to determine what employment alternatives might exist will generally not constitute a breach of the duty of fidelity.

[27] The Steele-Thornicroft text described *Alishah v. J. D. Collins Fire Protection Co.* [2006], OJ No. 4634, (OSCJ) as deciding that, where the employee commissioned the preparation of a business logo, incorporated a company and communicated with his co-workers about starting his own business, Alishah's formation of a plan to leave his employer and having vague discussions with one or two other employees about the possibility of going into business together was not a breach of his good faith obligations.

[28] The Steele-Thornicroft text notes at page 71:

> **Profits Earned Post-Employment**
>
> There is no general common law principle prohibiting ordinary, or even key, employees from competing with their former employer although the competitive activities must be undertaken fairly. Although entitled to compete in the post-employment period, non-fiduciary employees must not use confidential information such as trade secrets, customer lists or other special information they acquired in the court of their employment.

[29] In support, the authors cite *RBC Dominion Securities v Merrill Lynch Canada*, 2008 SCC 54, and, in respect of the post-employment obligations of a "mere" employee, paragraph 44 of *Boehmer L.P. v. Ellis Packaging Ltd.*, [2007] OJ No. 4634 (OSCJ) ("*Boehmer*").

[30] In *Road Trailer Rentals Inc. v. Robinson*, [2008] O.J. No. 570 (OSCJ) ("*Road Trailer Rentals*"), the Court held that the actions of a former employee who contacted customers of his former employer to advise them that he was leaving his employment and giving them new contact information did not breach his duty not to solicit his former employer's customers before he left his employment.

[31] The authors wrote: "Fiduciary employees, however, stand in a markedly different position". They cite *Canadian Aero Service Ltd. v. O'Malley*, [1973] S.C.J.

No. 97 ("*Canaero"*). This Court notes that the *Boehmer* decision, at paragraph 42, describes six principles governing the post-employment obligations of fiduciary employees. In *Canaero* the Court, without creating a strict rule, set out several considerations to determine whether an employee's conduct conformed to the general obligation of loyalty, or to a higher fiduciary standard. Steele-Thornicroft enumerate eight factors at page 73 of their text.

Persons with a Fiduciary Duties

[32] The term "fiduciary" today refers to the legal obligations imposed on a person who is the dominant party in a trust-type relationship. As set out in *Frame v. Smith*, [1987] 2 SCR 99 (SCC) ("*Frame*"), a fiduciary duty arises where:

1. The fiduciary has scope for the exercise of 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 person exercising the discretion or power.

[33] The text goes on to state:

> Employees may be grouped into three categories: ordinary or mere employees, key employees and senior executives or "top management". While all employees owe duties of good faith, loyalty and faithful service to their employers … only key employees (and not all key employees) and senior executives will be bound by higher order fiduciary obligations …
>
> Typically, the courts will find that directors, officers and senior executives owe a fiduciary duty to their employers, while lower-level employees do not. … While occupation status, standing alone, is often a good indicator of whether a particular person is a fiduciary, a closer examination of the employee's actual duties and responsibilities is the better approach.

[34] The previously mentioned *Canaero* decision of the Supreme Court of Canada addressed the liability of corporate officers and directors who wrongfully appropriate a maturing corporate opportunity. Most instances involve people in larger corporations who hold positions carrying significant operational responsibilities.

[35] In *Hudson's Bay Company v. McClockin*, [1986] MJ No. 350 (MQB) ("*Hudson's Bay"*), the Court found that, in a small branch operation of a Hudson's Bay Company store in Winnipeg, the Defendant hearing-aid specialist - the designated manager, who managed and controlled the small department, was "key" to that department's function. The Court held that he owed a fiduciary obligation on the Defendant.

[36] On the other hand, in *Tomenson Saunders Whitehead Ltd. v. Baird*, [1980] OJ No. 386. (OHCJ), an insurance brokerage firm's vice president was held not to owe a fiduciary duty to his employer. Steele-Thornicroft wrote: "Although holding a title commonly assumed to reflect the status of a corporate officer, he was, in fact, merely a sales representative."

[37] In *Sanford Evans List Brokerage v. Trauzzi*, [2000] O.J. No. 1394 (OSCJ) ("*Trauzzi"*), the Court noted that a fiduciary obligation is not to be imposed lightly and that the employee's title is not inevitably determinative. The employee should have authority to "guide and direct" the company's affairs. The employee's ability to exercise a power or discretion with respect to the employer's affairs is the key factor rendering the employer vulnerable to any abuse by the employee of their discretionary authority. The Court described the issue as one of ultimate power and responsibility.

[38] The Court notes that in the *Trauzzi* case, the Defendant was vice-president of the Plaintiff when she planned on leaving her employment, well before she submitted her resignation, and encouraged other employees to join her. Summarized on page 121, the writers state:

> As a general rule, all former employees, including those who have ongoing fiduciary obligations, are entitled to use the general knowledge and skills accumulated during their employment when competing with their former employers post-employment. They may advertise to the general public without breaching their duty of good faith or, when applicable, their fiduciary duty.

[39] In *Barton Insurance Brokers Ltd. v. Irwin*, [1999] BCJ No. 220 (BCCA) ("*Barton Insurance"*), the Court of Appeal upheld that a general insurance office supervisor and salesperson being entitled to solicit their former employer's clients, that they could identify from memory. The supervisor was not a fiduciary and, in the absence of a restrictive covenant, her actions did not constitute unfair competition.

The Evidence

[40] The relevant evidence consisted of the evidence of Dwyer and Milner.

[41] Jeff Dwyer was an entrepreneur who owned four diverse businesses. He had obtained a market degree in 1972.

[42] In 2014, he bought Trimar from Mike Monaghan. Its five employees included the owner Mr. Monaghan, his daughter, a graphic designer, and two sales representatives – Jerome Kelly, who had been with the business for 17 years, and Milner, who had been with the business about 14 years.

[43] Shortly after purchasing Trimar, Dwyer instituted several major changes:

1. He converted all of the business records and communication system from paper based to electronic or computer based. He purchased software programs to deal with design, marketing, ordering, invoicing, and accounting. He put the records on the cloud and made them accessible from anywhere. The only records not accessible to everyone were: the Adobe Design software, which was only available to the designer, and the financial and personnel records for the business, which were only available to Dwyer. Effectively, Dwyer could run the business from his home.

2. The second major change involved bringing in new employees to the business. He testified that he hired both inside and outside sales reps, as well as other persons with whom he had close associations before he bought Trimar. In January 2015, his long-time friend and associate Don Fahie ("Fahie"), came on board as an outside sales rep with the title of "sales manager". Fahie had worked in and run his own products promotion business and brought clients with him to Trimar. Even before buying Trimar, Dwyer had known and relied on him for his experience and expertise, particularly in relation to HR personnel and financial matters. He denied that Fahie was "over" anyone on a day-to-day management basis despite his title as sales manager. Dwyer hired Ms. Christopher and Mr. Oland as outside sales representatives, and Mr. Wall as an inside sales representative. Ms. Porter was hired first for sales support and later for part-time accounting. Mr. Connor was hired for accounting. A new graphic designer replaced the former designer. He added Ms. McGougan, first as an outside sales rep, then as an inside sales rep.

[44] He described the role of outside sales reps as working with their own clients from their homes on the own hours. They were paid by commission. Inside sales reps were expected to work in the office full days servicing their own customers and walk-in customers. When asked to describe the difference between outside and inside sales reps, and the reason for the higher commissions paid to the outside reps, he replied that the customers of inside sales reps belonged to Trimar.

[45] It appears that all sales reps were, at the time Milner worked for Trimar, paid on a commission only basis, which commissions were negotiated annually with Dwyer. After Milner left, Dwyer started paying inside sales reps' salary plus commission (although less commission than outside sales reps).

[46] Any new walk-in business was apportioned between or among inside sales reps equally. Dwyer testified unless there was a reason to change, once a customer was assigned to a sales rep, the customer would usually stick with that rep. When Jerome Kelly, one of the sales reps that Dwyer inherited, left the business, Dwyer and Ms. Porter reassigned his accounts among the remaining sales reps.

[47] When Dwyer purchased the business, he found Milner to be reliable and knowledgeable. He found Milner more helpful than Mr. Monaghan, who had agreed to stay on to help in the transition. He testified that his relationship with Milner was very good until the last six months. Milner was "pleasant unlike the others … he came early and stayed late". Milner was usually the person to open the office in the morning and close it at the end of the day.

[48] In 2015, Mr. Kelly left under unpleasant circumstances. For a while, Milner and Dwyer were the only inside sales reps. He testified that he relied upon Milner's knowledge and business experience for advice. He submits that this made him a fiduciary.

[49] He testified that about six months before Milner left, Milner gave the signs of being disgruntled. One example he noted was that Milner became upset in January 2016 when Dwyer hired another outside sales rep.

[50] On cross-examination, he acknowledged that Milner's income was entirely based on commission. At the time, there was no base salary for inside sales reps, unlike at present.

[51] When asked if he had a meeting with Milner every year, he replied: daily. When asked if Milner asked for a raise, he replied that everyone asked for one, but

he did not remember if Milner did, and then replied: "I suppose so". (This evidence was not credible, and not believed.) He added that Milner was his best sales rep. Milner's average total annual sales were about $200,000.00 (JEB, pp.38,39,43). He was asked how the draws on commissions worked. He replied that he would do those. He was again asked if, as the best sales rep, Milner looked to him for extra, to which Dwyer replied that he did recall that he ever asked for a raise.

[52] He acknowledged that for the year 2015, Milner had won a $2,000.00 travel voucher as the top sales rep. He acknowledged that he attempted not to pay it after he discovered Milner's "theft" of Trimar's records, but he eventually honored the travel voucher.

[53] He was again asked if Milner had come to him for an increase in his draw and had been turned down. While acknowledging that Milner had generated over $200,000 in business for Trimar, the tops of any reps, Dwyer replied that Trimar was underperforming, and he had bought the business to make a little money. He added that Milner was only doing about two-thirds of his potential. The Court noted that Mr. Dwyer avoided answering directly and in a straight-forward manner questions about what the Court later accepted as requests by Milner for better advances (draws) and an increase in his compensation. No evidence was tendered as to Milner's actual commission income, or how it compared to others employed by Trimar.

[54] Dwyer denied that Fahie was the office manager, but he acknowledged that he "was always an advisor to me". Fahie had worked for a competitor in 2014, but Dwyer would go to him regularly for advice until Fahie eventually joined Trimar in January 2015.

[55] He acknowledged that Milner came to work early every day and he relied upon Milner to be in the office to open it and to close it. They talked every day. Dwyer lived in Porters Lake and could monitor the staff and goings-on of the business by computer and by phone from his home. He identified the e-mail of September 10, 2015 (JEB, pp.7 - 10) as his listing of the reassignment of customers among the inside sales representatives when Mr. Kelly left Trimar. He acknowledged that he and Ms. Porter determined the reassignment of Mr. Kelly's customer accounts among the inside sales representatives, including Ms. Porter.

[56] He acknowledged that he tried to have the police arrest Mr. Kelly when he left Trimar. He acknowledged that he sued the former owner of Trimar, Mr. Monaghan, for $25,000.00 but ended up being ordered to pay Mr. Monaghan $10,000.00.

[57] When Dwyer was told by Defence counsel that Milner denied that he was involved in decision-making after Dwyer bought Trimar, Dwyer replied that he thought Monaghan would teach him the business, but Milner did.

[58] When told that Milner denied having any management level access to records, Dwyer at first disagreed and later said that Milner had the same access as everyone else to every deal in their system. He acknowledged that he did not have access to accounting and personnel records.

[59] When told that Milner claimed that his T4 income slips were always wrong and caused Milner to be frequently frustrated, Dwyer acknowledged that "100% there were some problems", but he placed the entire blame on his former accountant.

[60] When told that Milner would testify that, when Milner asked for a raise, Dwyer not only denied him a raise because Dwyer was hiring other sales representatives, but threatened to reduce his compensation, Dwyer denied that his compensation was ever reduced.

[61] Dwyer acknowledged that Milner was not subject to any non-compete agreements, and he did not sign the "manual" that Dwyer introduced after he purchased Trimar.

[62] Finally, when questioned about Dwyer's claim that Milner was a management employee, Dwyer repeated that he had access to every deal in "our" system, the same as every other sales rep, again acknowledged that he had no access to the accounting and personnel records, and agreed that no other employee reported to Milner.

[63] Greg Milner is now retired. The following is his evidence relevant to the first issue.

[64] Milner had been in sales for his whole life, except for a short time around 9/11. He has always been active in the sports circles, and as a volunteer in the community.

[65] He began working for Trimar between 2000 to 2002, when Mr. Monaghan owned it. It was a small company - a fun place to work. He made new friends.

[66] Dwyer bought Trimar in 2014. They had a decent working relationship and got along fine. When Dwyer first bought Trimar, he asked a lot of questions of everyone. Dwyer wanted to modernize and expand, and Milner soon could see that he was not part of Dwyer's future plans for Trimar. In the first year, Dwyer brought

in his “inner circle”: Don Fahie and Wendy Porter. Both had worked with him in the past. Fahie had a lot of knowledge as the past president of the Promotional Products Association.

[67] Milner and Jerome Kelly were given keys to the office. Dwyer appreciated that they came to work early.

[68] Milner identified the e-mail of September 10, 2015 (JEB, pp.7 - 10), from Wendy Porter advising the sales reps of the reassignment by Dwyer of Mr. Kelly’s accounts. Milner stated that most of Kelly’s customers were redirected to Ms. Porter, Ms. Christopher, and Mr. Wall. He was assigned mostly inactive or non-lucrative accounts.

[69] Milner testified that he was not a “key man”. When Dwyer bought the business, Milner did not know that Monaghan had promised to help Dwyer. At the beginning, Dwyer asked questions of himself, Mr. Kelly, and the graphic designer.

[70] Milner testified that, during his first year of ownership, Dwyer went to a national sales convention with Don Fahie and Mr. Connor (the accountant). He did not invite Milner. Milner perceived this as evidence of who was important to Dwyer at Trimar.

[71] Milner said that he had “zero impact” in the new phone system, computer system, software, or security system introduced by Dwyer when he purchased Trimar.

[72] At first, he took it as a compliment when Dwyer asked him questions, but very soon Ms. Porter and Mr. Wall were the center of his attention. He had no problem with Dwyer surrounding himself with his own people. He acknowledged that Don Fahie had a high profile and far more experience than himself.

[73] Even though he was the top producing sales rep, it was his understanding that some other sales reps were paid higher commission rates.

[74] When asked if he was an integral part of Trimar under Dwyer he replied that for the first few months he knew that he had the experience that Dwyer needed, but very quickly he became aware that he was not part of management’s plan for Trimar.

[75] On cross-examination, he acknowledged that during Dwyer’s ownership of Trimar, he was the sales leader. He acknowledged that he was in the office 80% of the time and out meeting customers other the other 20%.

Analysis

[76] Dwyer was often evasive and did not answer straight-forward questions in a direct manner. His evidence sounded like advocacy. I did not trust that I was getting complete and truthful answers to many questions, even when the answers would not likely have affected the outcome of this proceeding. It caused me to question his credibility and the reliability on all factual disputes unless his answers were corroborated by some independent evidence. Milner, on the other hand, was far more straight-forward, and often acknowledged facts that were detrimental to his defence; as one example, he acknowledged that he did take confidential records of Trimar before he left, even as he denied many of the inferences from documents (mostly emails from Milner's work and personal email accounts) that Plaintiff's counsel cross-examined him on. When Milner was confronted with differently worded answers to questions from his discovery, some of which were inconsistent with his answers at trial, his evidence at trial was straight-forward and added to his credibility. Where Dwyer's evidence differed from Milner's, I tended to prefer Milner's except where I specifically state otherwise.

[77] Milner owed Trimar duties of good faith, loyalty, and faithful service. I conclude that he was not bound by a higher order of fiduciary obligations. This determination does not depend upon preferring the evidence of Milner with respect to his role in Trimar to that of Dwyer, even though, to the extent that there are differences in their perspectives, I prefer the perspective of Milner over Dwyer.

[78] Milner was simply a long-time sales rep with Trimar. He had worked for Trimar for 14 years and was their top-performing salesperson. This made him valuable to Dwyer when Dwyer purchased the business.

[79] On the totality of the evidence it is clear from the beginning that Dwyer picked Milner's brain for whatever Milner knew about the business, but Dwyer came in with his own plan to develop Trimar. He immediately set out to carry out his plan. He converted the business from a paper-based business to a cloud business. Milner was not consulted and provided no advice or direction with respect to that move.

[80] Dwyer immediately engaged in hiring several other persons to expand the business including two close former associates, one in particular – Fahie, who he hired as sales manager and with whom he had a long-term association.

[81] Milner had no supervision over any employees. Fahie was appointed as the sales manager, even he did not supervise other inside or outside sales reps or employees.

[82] Milner had the same access to the sales records of all salespersons at Trimar, as the other sales reps had. He had no access to accounting, financing, or personnel records of the business.

[83] The fact that Dwyer picked Milner's brain for information when he first purchased Trimar, or that Milner had the same access to sales records as other sales reps, or that he was the top-performing sales rep, elevates him to the role of a fiduciary, as that role is described in any of the cases I cite or the relevant texts.

[84] He was clearly not a part of management. I accept Milner's statement that he was not part of the "inner circle". This is reflected in the fact that at the first national convention attended by Dwyer, he was accompanied by Fahie and Connor, and not his most valuable sales representative. Asking questions of the employees who have been in the business for a long time does not make these employees fiduciaries.

[85] Milner was a low-level employee, even if he was the top-producing salesperson. He was not the top compensated salesperson at Trimar. The Court has no evidence as to how highly Trimar paid Milner but based solely on the fact that his gross sales averaged $200,000.00 per year, suggests that he was not highly paid.

[86] I accept Milner's observation that it was apparent to him early on, based on Dwyer's major changes to Trimar, that he (Milner) did not have a future with Trimar.

[87] Dwyer relied upon Milner to work full time at the office (to open it early and close it late) and to sell products. Period.

[88] Milner did not have the authority to exercise any discretion or power over the conduct of Trimar's business affairs that would affect Trimar's legal or practical interests. Trimar was not vulnerable to or at the mercy of Milner. Dwyer was his own boss, had his inner circle, and had his own plan, which plan he implemented.

[89] In summary, the duty owed by Milner to Trimar was that of a non-fiduciary employee.

ISSUE #2: Did Milner breach any duty owed to Trimar and, if so, what was the nature and extent of the breach?

[90] Milner acknowledge that at some point he became disillusioned with working for Trimar under Dwyer.

[91] Because Milner apparently unknowingly left his personal e-mail account ("Gmail account") open on his work computer, Dwyer was able to surreptitiously access it in mid-May 2016. His technical personnel extracted several communications and records and produced them in this proceeding. Mostly through these e-mails, Trimar asks the court to draw inferences and conclusions as to when, and the extent to which, Milner made plans to leave Trimar and acted on these plans before he left Trimar. I infer that Milner likely never expected that Trimar would ever have access to his Gmail account.

[92] The primary factual issues are:

1. when Milner made an *arrangement* to go to and start working for Atlantic,

2. when he started to access and copy confidential Trimar business records,

3. when he started making arrangements with Trimar customers or suppliers, and

4. if and when he ceased accessing Trimar's records that he acknowledged he took before he left Trimar.

[93] I infer that, if there were more e-mails that implicated Milner in wrongdoing, Trimar would have produced them in this proceeding. Said differently, there are no other e-mails evidencing Milner's activities.

[94] The earliest e-mail produced was between two personal e-mail accounts of Milner on May 7, 2015. Attached to that e-mail were the names and e-mail address of about 200 persons (JEB, pp. 1 - 6). Dwyer testified that 80% of these people were clients of Trimar and that there was no need for Milner to maintain the list outside the Trimar system. On cross-examination, it was put to Dwyer that the list were a list of Milner's personal friends and family and unrelated to his work at Trimar. He disagreed but was only able to identify two names on the list that were customers of Trimar.

[95] Milner testified that the list was sent from an old personal e-mail account that he was closing (at accesswave.ca) to his new personal (Gmail) account. He testified

that they were his personal contacts. He denied that they were a Trimar contact list. He acknowledged that about half-a-dozen of the two hundred names would have at some point of time made purchases from Trimar. He was clear that they were names of family, neighbors, friends, golf, and tennis contacts, as well as other community contacts with whom he was active. He identified one address to be a supplier to Trimar who had also become his personal friend.

[96] I accept Milner's evidence with respect to the e-mail both on its face and based on the totality of the evidence heard at trial.

[97] JEB, page 11, consists of a December 18, 2015 e-mail from Milner's Trimar account to his Gmail account with a single e-mail address. Dwyer did not recognize the e-mail address. Milner testified that the e-mail was for a personal friend who worked in the industry. They had travelled and taken trips together, and at that time, he was planning another trip. I accept Milner's evidence and find that was unrelated to Milner's Trimar employment or this proceeding.

[98] JEB, page 12, is an e-mail of January 15, 2016, from a person who worked for a Trimar supplier in Ontario, addressed to Milner's Gmail account and Milner's reply – both of which were clearly intended to be confidential. The Ontario person indicated she had lost her job, complained about her employer, and was asking both for his advice and where she might find other employment. Milner's reply was clearly consolatory; he described her as one of the best customer services reps in the business. He added: "PS at trimar since mike sold it is a shit show!!!!". Milner insisted the e-mail was personal. He did not retract his comment, but he added that he believed it was unprofessional of him to have added the PS.

[99] This e-mail simply confirmed what Milner testified to in his oral evidence with respect to his unhappiness at Trimar, and the series of events that caused him to be unhappy. they included:

1. the significant changes made by Dwyer to the business operation,

2. the manner in which he hired new personnel and seemed to leave Milner on the outside,

3. the manner in which he handled the Kelly termination in 2014 (Kelly had been employed by Trimar for 17 years and Dwyer called the police to attempt to have Kelly charged with an offence. Milner thought there was wrong on both sides.),

4. Milner's own problems with his paycheques and T4 records, which always seemed to contain errors in favour of Trimar; and

5. his learning at some point that, even though he was the top producer at Trimar, others were being paid a higher commission than him, yet Dwyer had refused requests for more compensation.

[100] By January 2016, Milner was likely thinking about his employment options.

[101] On February 21, 2016, Milner e-mailed from and to himself on his Gmail account a two-page document: "Business plan for Atlantic Digital Promotions 2016" (JEB, pp. 15 - 17). The stated objective was to create a promotional division to make Atlantic Digital Promotions a full-service provider.

[102] Dwyer testified that Atlantic Digital Promotions was a print supplier to Trimar and did not have a promotional products division. He had heard that the owner of Atlantic, John Day ("Day"), may have tried to buy Trimar before Dwyer did. In July 2014, he visited Day. During his visit, Day told him that he had looked into it, but had other issues on his plate so he had not pursued it. Dwyer believed that Milner may have been aware of this.

[103] Milner acknowledged that in February 2016, he was preparing for what might happen and believed that Atlantic was a potential employer. He denied that he provided or discussed this proposal with anyone at that time. It was only a potential plan.

[104] Milner was asked why he left Trimar. Among the reasons he gave was that he had been thinking of retiring at age 60, when Mr. Monaghan owned the business, but Monaghan talked him into staying. Three or four years later, Dwyer bought Trimar. When Dwyer bought it, he thought he would stay a short time, but soon grew tired of it. He was selling more products, but other sales reps were getting higher compensation. When he raised it with Dwyer, Dwyer replied that he could not afford to pay him more. At first, he accepted Dwyer's reply, but subsequently became frustrated with this inequity.

[105] He further identified that he and Jerome Kelly had a problem with their monthly paycheques and T4 slips. The mistakes were always in favor of the company. They still were not correct at the end. In his view, when Kelly was terminated, Dwyer reassigned all of Jerome Kelly's customer's accounts to Ms.

Porter, Mr. Wall, and Ms. Christopher. He said he only got the odd client. It made him feel he was not needed by Trimar.

[106] Finally, at the beginning of 2016, he asked for and denied a raise again on the basis that Trimar was not making any money. It was at this point that he decided he would continue going to work but develop the business proposal so that "if I left, I had a plan".

[107] JEB, p. 13, is a February 12, 2016 from a Mr. Tse, to Milner's Gmail account referring to an attachment. Milner describe Mr. Tse as a personal friend. He did not know what items may have been attached to the e-mail.

[108] JEB, pages 110 to 113, contain an e-mail dated May 31, 2016 from Milner and a supplier indicating he had a customer ready to prepay for a delivery by June 21, 2016, a new account info form with that supplier for Atlantic dated June 1, and an Atlantic invoice dated June 2, 2016, to the customer for the promotional products. Dwyer stated that it takes two or three weeks to complete an order and bill it. The implication was the order was arranged before May 30, 2016. On cross-examination, Milner testified that the customer Ashrae Halifax Chapter was not an existing client of Trimar and that he knew Mr. Amirault personally. He stated that the invoice was prepared before the goods were delivered. He did not recall when Mr. Amirault contacted him for the products.

[109] JEB, page 21, is an e-mail exchange between March 24 and April 6, 2016, with Dalhousie University regarding an order for binders that were invoiced by Milner for Trimar in March. The Dalhousie rep was asking that the invoice be dated to a time after April 1st. Milner forwarded the e-mail to his home. Dwyer thought this was suspicious. On cross-examination, Milner stated that he did forward it to his home for future reference but because the rep was in a conference all day, he understood that he would be contacted at home later. On discovery Milner stated that it was for possible future use. Milner added that he never did contact Dalhousie for any business after he left Trimar for Atlantic.

[110] JEB, page 23, is an April 26th e-mail from Milner's Gmail account to Barry Hayes, a sales rep with Atlantic. It reads:

> hi Barry, just touching base on our Tshirt project. can we get together at your office on Thursday? Whatever time works for you.

[111] JEB, pages 24 to 27, are identical emails of April 27th and April 28th from Milner's Gmail account to his Trimar account, attached to which is Milner's February 21st Atlantic business proposal. Both Milner and Hayes testified at trial that there was no t-shirt project. Milner was cross-examined as to his discovery evidence in 2018 on this topic. He agreed both in discovery and at trial that he had started stockpiling Trimar records as early as February 2016.

[112] When asked whether the e-mails of April 27 and 28 from his Gmail account to his Trimar account were for the purpose of printing his Atlantic business proposal in light of his intended meeting with Hayes on Thursday, April 28th, he replied in discovery: "That's a possibility", and agreed with his discovery evidence at trial.

[113] When asked about setting up accounts before he left Trimar, he replied: "in the few days before I left, I may have set up a few accounts".

[114] When he was shown JEB, pages 101 to 104, emails dated May 20th and May 21st, he again acknowledged that, on those dates, he was setting up accounts but did not know how many he set up. He agreed that these e-mails were for days after his verbal notice to Dwyer but before his termination date.

[115] Milner was asked how he came to leave Trimar. He started his answer saying that while he was unhappy at Trimar, he had worked for Trimar for 15 years, did not really want to leave, and before he decided to give his notice he discussed his problems with Trimar with his wife. He initially thought he would take time off to play golf. On Thursday or Friday (May 12 or 13, 2016) he testified that he accidentally ran across Barry Hayes at Tim Hortons and told him he was giving his notice. They talked about the possibility of Milner joining Atlantic.

[116] On Monday, May 16th, Milner gave Dwyer his keys to the office, and verbal notice that he was resigning. In a short conversation, Dwyer told him that he could not pay him a high compensation or income. As a courtesy to Dwyer, Milner says he agreed to think about it overnight. The next day he emailed Dwyer:

> as per our conversation Monday, this email will confirm my 2-week notice to leave Trimar. My accounts & contacts are all recorded in ASI/ESP and on my computer email records. I will have all orders up to date and brief Glen on details.

Dwyer said that Milner told him that he was retiring. Milner denies this, and about a week later, when he saw a notice sent out to Milner's friends and customers, he objected and told him he was going to Atlantic. The May 17th email does not corroborate what Milner told Dwyer.

[117] On Wednesday, May 24, when Milner told Dwyer that he was going to Atlantic, he was told to immediately take his things and leave.

[118] Milner started with Atlantic officially on May 30th. Milner denied discussing anything with John Day (the owner of Atlantic) before he left Trimar.

[119] While I generally found Milner to be straight forward and prepared to admit facts that were not favourable to him (unlike Dwyer), I do not believe everything he told me. I may believe all, part, or none of what a witness says.

[120] I accept that he became unhappy with his treatment at Trimar for the reasons already noted in early 2016. I find that he started to think about his employment future, even though he was 63 years old.

[121] While he prepared a business plan to set up a promotional products division at Atlantic in February 2016, I find as a fact that it is not likely that he did anything about the business proposal at that time. If he had, I am sure I would have seen something on his Gmail account. Further, it is inconsistent with the subsequent e-mails.

[122] I accept that Milner intended to meet with Barry Hayes, who was a sales rep with Atlantic with whom he had done business - not an owner or officer of Atlantic, to pitch his business proposal. I accept as likely the Plaintiff's submission that Milner e-mailed his business plan to Trimar's office early on April 28th to print a copy for his intended meeting with Hayes later that day (as described in the April 26th "tshirt" e-mail).

[123] Based on subsequent e-mail exchanges in evidence, and the absence of e-mails on his Gmail account, it is not clear that Hayes and Milner actually met on April 28th, and, if they did, that anything happened in furtherance of Milner's proposal.

[124] In part, I say this because the next e-mail in evidence (JEB, p. 50) is from Barry Hayes to John Day on May 12, 2016 at 3:38 p.m. The e-mail reads:

> I will be meeting with Greg in the afternoon Friday as he has expressed an interest to join the team. He is leaving Trimar Monday as he does not want to stay. He has not told them at this point.
>
> He said he will set up our clothing department and he has a fair amount of clients as he has been in the industry a long time. He can also get us set up with the correct suppliers moving forward.

> He said he would like 2500.00 a month (Or something like that) and he wants to work 30 hours a week. I guess we need to decide if we want to try this as I told him we would have a 3month probation period. On another note he mentioned that he is 63 and only will be working a few more years. (Could help us get a foot in the door in this business)
>
> Thoughts

[125] This is an important e-mail for a couple of reasons:

1. I am satisfied that the May 13th meeting between Milner and Hayes was not accidental as Milner testified.

2. The most reasonable interpretation of the e-mail is that it was exploratory in nature and does not indicate that nothing had yet occurred, nor any concrete decisions had yet been made by either Milner nor Atlantic, in furtherance of Atlantic possibly hiring Milner.

[126] This e-mail is not consistent with a meeting on April 28th; alternatively, if a meeting took place on April 28th, it was only exploratory between Milner and Hayes, an employee of Atlantic. There is no evidence that the owner or management of Atlantic was aware of Milner's interest in joining Atlantic before May 13th, nor that Atlantic's owner or management had seen or was aware of Milner's business plan.

[127] In addition to Milner's admission at discovery and at trial that he was starting to collect Trimar business records as of February, it is clear that in May 2016 he was collecting business records of Trimar. Trimar's security records (JEB, p. 52) confirms that on Sunday, May 15, 2016, two days after Milner met with Hayes and the day before he gave his notice to Dwyer, he entered Trimar's office twice, first from 9:22 to 11:22 a.m., a second time from 9:00 p.m. to 11:00 p.m. While Dwyer did not produce the security videos to corroborate what he says he saw on them, I conclude that Milner was making copies of, or making notes from, confidential business records of Trimar for future employment purposes.

[128] Milner acknowledged in cross-examination that he started setting up a few accounts in late May. This is consistent with the JEB e-mails. These emails show that, after May 16, 2016, Milner was in contact with suppliers and potential customers using his Gmail account. This is further confirmed by his e-mail exchange with Barry Hayes on May 20 and 21, 2016, found at JEB, pages 102 to 104. They read:

Milner:

> On May 20, 2016, at 5:01 PM, Greg Milner < … > write:

> Jeff seems to want me to stay. so starting early is out but I am working on setting up some accounts. Heads up…. I am getting a different cell #, will advise next week. Do you need my assistance next week on any projects?/

> have a great long weekend.

Hayes:

On Sat, May 21, 2016 at 10:00 AM, Barry Hayes < … > wrote:

He offering you anything good.

Have a great weekend

Looking forward to working with you.

Milner:

05/21/2016 2:18:24 PM

he did offer a few things to stay. but I had enough. He's in the red so not much he can do.

[129] In summary I conclude:

1. Milner and Hayes met to explore the possibility of Milner joining Atlantic on Friday, May 13, 2016. This was before he gave his notice on May 16th.

2. Milner finalized his decision to leave Trimar as a result of his discussions with Dwyer on May 16 and 17th, after he received no increased compensation.

3. From at least early May 2016, including particularly on May 15, 2016, Milner was collecting confidential business records of Trimar for use in possible future employment purposes.

4. After May 16 and by May 20, 2016, Milner started setting up a few accounts for Atlantic.

5. There was no agreement or commitment for future employment by Milner or Atlantic before Milner gave his notice to Trimar on May 16, 2016.

[130] On June 2, 2016 (JEB, p. 114), Dwyer e-mailed Milner. In part, the e-mail reads:

> I am writing to you today as a courtesy to advise you that Trimar Promotional Products (Trimar) must consider taking action against you for illegal activity and failure in your fiduciary responsibility while an employee of Trimar.
>
> We are aware that while you were employed by Trimar, you took information regarding the fulfilment of contracts with our clients – specific order details, contact information, art work – and sent this information to your personal email account. Further, we are aware that having been informed that you were retired, at lest one of your clients contacted you about fulfilling an order and you instructed them to wait a week until you were in the employment of Atlantic Digital Reproductions Incorporated (Atlantic Digital) at which time you would be able to fulfill their order.
>
> … We have definitive proof that you had been stealing client information since March of this year in anticipation of your move.
>
> … There is nothing you can do, at this point, other than advising me in writing that all of the proprietary information that you have stolen has been destroyed and not shared with Atlantic Digital, R & M Rubber Stamp Limited, or any other competitor or potential competitor of Trimar.
>
> In the meantime, I will be assessing the current damages, increased costs of making this situation and future financial damages that your actions have done to Trimar with the intent of seeking redress for the damages that we identify.

[131] In direct, Milner testified that when he received this letter he was upset, destroyed the records he had taken, and had reduced any contact he had with former Trimar clients.

[132] On cross-examination, Milner was directed to JEB, pages 15 to 17, his business plan. He described it as a template that he had considered that he had considered when dissatisfied with his employment at Trimar. Atlantic was one company that he might approach. It was a possible option, and he did not intend to act on the plan until if and when he left Trimar.

[133] It was put to him that he would have discussed this with Hayes on or about February 21st and referred to his discovery examination on December 17, 2018. He denied that he discussed it with Hayes in February. His reply was, he was not 100% sure, but it was very unlikely. He acknowledged that he and Hayes had worked together for 10 years (one with Trimar, the other with Atlantic). He said it was

possible that he may have casually discussed with Hayes the possibility of working together on or two time over the file years before 2016. This would have included the time of the ownership of Monaghan and Dwyer.

[134] Milner confirmed his discovery evidence, in which acknowledge that he had begun to stockpile records that he might use in future in a new job in February 2016. While he said it was possible that he sent his business plan to be printed on the Trimar office in February, he did not agree on cross-examination that it was probable or likely. He acknowledged that his February plan was very similar to what eventually occurred.

[135] He testified that in the few days before he left Trimar, he set up a few accounts with Atlantic – he said, possibly on or two.

[136] He denied meeting with Hayes before the Tim Horton's meeting on May 13, 2016.

[137] He did not recall either on discovery or at trial what the April 26, 2016 e-mail with Hayes was about. He stated that there was no t-shirt sale made.

[138] On discovery, in December 2018, Milner stated that he met Hayes at Tim Hortons after he told Dwyer he was quitting. At trial, he said that he was wrong at discovery and he had met with Hayes on May 13, 2016. He agreed with his discovery evidence that the e-mail addresses he e-mailed to his Gmail account on May 13, 2016, and May 14 (JEB, p. 51) were for the purpose of competing with Trimar. He agreed that he took records from Trimar's office on May 15th but denied that he knew he was going to work with Atlantic at that time. He stated that he printed the records of sales that he had made while with Trimar.

[139] In addition to Trimar's records, he intended to rely upon his personal records of sales that he had made over his several years with Trimar.

[140] Milner acknowledged that sale records are important but did not agree that they were critical.

[141] After Dwyer e-mailed him on June 2nd, he destroyed all the records he had taken and made up his own list of contacts from his memory. He acknowledged that he tried but failed to download on a thumb drive Trimar records early on May 16, 2016 (Exhibit #7).

[142] He acknowledged in discovery that on May 20th he downloaded a design file for Steele Mazda. At trial, he stated that that client was his brother in law. He intended to transfer the file, but not for the purpose of getting an advantage over Trimar. He said that Trimar did not create the logo that he downloaded but did acknowledge that it was in Trimar's file. He acknowledged that in July 2016, Atlantic used that logo for work on behalf of Steele Mazda.

[143] He acknowledged that on May 20th he e-mailed to his Gmail account from Trimar's records copies of ads of Trimar suppliers (JEB, pp. 83 - 100).

[144] He testified that he told some of the Trimar staff that he was not retiring but acknowledged that he did not correct Dwyer's belief that he was retiring until May 24th.

[145] Respecting the Dalhousie University e-mail exchange of April 6, 2016, he denied – contrary to his discovery evidence, that the reason he forwarded the e-mail to his Gmail account was for future competition purposes. He added that he did not try to contact, nor did he do business with Dalhousie University, after he left Trimar.

[146] He testified that Ashrae was not a current customer of Trimar at the time he set up an account with them for Atlantic. When Ashrae was a client of Trimar, he had been the account manager.

[147] He denied having discussed with John Day the evidence John Day had made an earlier inquiry of Mr. Monaghan when Mr. Monaghan was seeking to sell Trimar. He was aware after the fact from Mr. Monaghan. He did not know why Atlantic did not buy Trimar before Dwyer did.

[148] Milner acknowledged receiving the June 2nd e-mail from Dwyer (JEB, p. 114) and a subsequent letter from Dwyer's lawyer (which letter was not in evidence). Milner identified two e-mails that he sent to Barry Hayes on July 4 and July 5, 2016 (Exhibits #12 and #13 respectively) in response to a letter from Dwyer's lawyer that was not in evidence in this proceeding. The contents of those e-mails acknowledge breaches of his duties to Trimar. I find that Milner was bring truthful in his e-mails with Hayes, and the e-mails are consistent with the candor with which Milner gave his evidence at trial, even it was contrary to his best interest. Before identifying Exhibits #12 and #13, Milner had said that he had destroyed all those records he had taken from Trimar when he was planning to leave.

[149] When presented with Exhibits #12 and #13, Milner repeated when he received Trimar's letters, he went into his Gmail account and destroyed everything to do with Trimar. He reiterated this in reply examination.

[150] I accept Milner's statements to the effect that he admitted to filling two outstanding orders with Trimar clients before he started work at Atlantic (that is with GeoSpectrum and Ashrae), that he destroyed his Trimar records upon receipt of the letters from Dwyer and his lawyer, and that he relied upon his personal memory in respect of potential memories and suppliers, based on his 15 years in the business during his period of employment with Atlantic, as well as his evidence that he refrained from contacting former clients from Trimar who did not independently contact him.

[151] I found Milner to be candid, even when his evidence incriminated himself. It was consistent with the documents, mostly consisting of e-mails from his private Gmail account, and other independent evidence. When he disputed inferences of disloyal conduct that are not clear from the e-mails or other independent evidence, I accept, with few exceptions, his explanations.

[152] By February 2016, Milner had decided that he would likely leave Trimar at some point. He began to forward Trimar records respecting his clients to his private Gmail account. He contemplated his options, one of the obvious ones being to approach Atlantic with the business proposal found at JEB, pages 15 to 17. Atlantic had been a supplier to Trimar and worked with Trimar. In particular, Milner had a long working relationship with Barry Hayes of Atlantic.

[153] At some point before May 13, 2016, Milner mentioned to Hayes (his contact at Atlantic) an intention to leave Trimar and likely expressed his interest in setting up a promotional products division for Atlantic. This may have been as early as April 26, 2016. Based in part on the wording of Hayes' e-mail to John Day (JEB, p. 50) of May 12, 2016, and on the totality of the evidence of Milner and Hayes, I conclude that this meeting of May 13th was nothing more than a follow up to an earlier conversation about Milner's desire to leave Trimar and possibly set up a new division at Atlantic.

[154] Based in part on the e-mail exchange between Milner and Hayes on May 20th and 21st (JEB, pp. 102 – 104), I conclude that no firm agreement between Milner to join Atlantic was made at that meeting although momentum was moving in that direction. By May 20th and 21st, Hayes was inquiring of Milner if Dwyer was "offering you anything good" and that he [Hayes] was "looking forward to working

with you". To this Milner replied, "he did offer a few things to stay, but I had enough". It is likely at this time that a firm commitment crystallized as far as Milner was concerned to join Atlantic.

[155] After the May 13th meeting between Hayes and Milner, Milner upped his steps to collect Trimar records. He spent four hours on Sunday, May 15th in the Trimar office collecting records, and early on May 16th he tried unsuccessfully to download more records onto a thumb drive, before he met with Dwyer to advise him that he was quitting.

[156] Whatever Dwyer told Milner at that meeting on May 16th caused Milner to think about his decision to quit overnight. The next day, he confirmed his decision in an e-mail to Dwyer (Exhibit #2).

[157] I accept that he set up a few accounts for Atlantic sometime on or after May 20th.

[158] I accept Milner's evidence, corroborated in his personal e-mails to Hayes on July 4th and 5th (Exhibits #12 and #13) as truthful statements of his actions and intentions relevant to this proceeding.

[159] I find that between the date of Dwyer's June 2nd e-mail to Milner, and the subsequent lawyer's letter, Milner destroyed the Trimar records he had taken while still at Trimar.

[160] I find that Milner was the promotional products division of Atlantic and did not use Trimar's records after receipt of Dwyer's and the lawyer's letter in June 2016.

[161] Milner's breach of his duty of loyalty to Trimar included:

1. taking Trimar's customer records between February and May 2016;

2. taking contacting information for some of Trimar's suppliers on May 20, 2016 (JEB, pp. 83 to 100); and,

3. setting up one or two ("a few") contracts for Atlantic in late May 2016, a few days before he started his employment with Atlantic.

[162] I find that Milner did not breach his duty of loyalty to Trimar by:

1. preparing plans to leave Trimar, including preparing, as one option, a business proposal for Atlantic to hire him to set up a promotional products division; and,

2. meeting with Hayes, who was his contact at Atlantic, and not an officer or director of Atlantic, to express his interest in joining Atlantic possibly in late April and certainly on May 13, 2016.

[163] To repeat, Milner and Hayes talked about Milner joining Atlantic on May 13th, but there was no "deal" or agreement formalized at this time. A deal only occurred after Milner tendered his resignation on May 16th and confirmed it by e-mail on May 17th.

[164] Exploring alternative employment before tendering one's resignation and entering into an agreement after tendering his resignation did not constitute a breach of Milner's duty of loyalty to Trimar. Taking records and setting up "a few" accounts in the few days after May 20, 2016, was a breach of his duty of loyalty.

[165] Milner's breach of his duty of loyalty was very limited in time and limited in scope and effect. The extent of his competition – setting up a few accounts after May 20th and using the contact information for his former customers and suppliers at Trimar, for less than a month is limited.

[166] I conclude that Milner's 15 years as the top sales rep at Trimar, dealing with customer and supplier accounts, gave him the ability to succeed at Atlantic without taking the records that he took and that after Dwyer's demand, Milner did destroy those records. The evidence at trial clearly showed that many of those customers and suppliers were either, or became, personal friends during his employment at Trimar.

[167] Trimar has not established that the damage to it by Milner's breach of his duty of loyalty was substantial. Issue #5 in this decision addresses the remedy for Milner's breach.

Issue #3: Did the Atlantic Defendants knowingly assist Milner in breaching a fiduciary duty owed by Milner to Trimar?)

[168] The Plaintiff cites three decisions:

1. *Imperial Parking Canada Corp v. Anderson*, 2016 BCSC 468, at paragraphs 22 to 24 ("*Imperial Parking"*);

2. *Trophy Foods Inc. v. Scott*, [1995] NSJ No. 145 (NSCA), at paragraph 22 ("*Trophy Foods*"); and,

3. *Premium Weatherstripping Inc. v. Ghassemi*, 2017 BCSC 2191, at paragraphs 69 to 75 ("*Premium Weatherstripping*").

[169] The starting point for the law in Canada is *Air Canada v. M & L Travel Ltd.*, [1993] 3 SCR 787 (SCC) (*"Air Canada")*. Michael Ng in *Fiduciary Duties: Obligations of Duties of Loyalty and Faithfulness*, Ch. 11.20.10 – "Knowing Assistance" (Thompson Reuters Proview, 2021), contains a thorough analysis of the caselaw. Among the many decisions reviewed by him and relied upon by the Court are:

1. *Air Canada,*

2. *Harris v. Leikin Group Inc.,* 2011 ONCA 790 ("*Harris*"),

3. *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, the dissent in which was adopted by the Supreme Court of Canada at 2019 SCC 30, ("*DBDC Spadina*"), and

4. *Caja Paraguaya de Jubilaciones y Pensiones del Personal de Itaipu Binacional v. Obergon*, 2020 ONCA 412 ("*Caja*").

[170] In *Harris*, at paragraph 8, the Court wrote:

> There is no dispute concerning the constituent elements of the tort of knowing assistance in breach of fiduciary duty: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; (3) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct: *Air Canada v. M & L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 S.C.R. 787; *Gold v. Rosenberg*, 1997 CanLII 333 (SCC), [1997] 3 S.C.R. 767. The knowledge requirement for liability based on this tort is actual knowledge, which, as the Supreme Court confirmed in *Air Canada*, at para. 38, includes recklessness and wilful blindness. As this court observed in *Keeton v. The Bank of Nova Scotia*, 2009 ONCA 662, 254 O.A.C. 251, at para. 82, "to found liability [on knowing assistance in a breach of fiduciary duty], the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach".

[171] All the subsequent decisions apply the same analysis for the tort of knowing assistance in breach of fiduciary duty.

[172] As is apparent from *Harris*, the first element of knowing assistance is that the Court determine that Milner had a fiduciary duty to Trimar. I have already determined that he was an ordinary employee and not a fiduciary and did not owe a fiduciary duty to Trimar.

[173] In the cases cited by the Plaintiff, it is clear that the defendants were characterized as a fiduciary in respect of the plaintiff, unlike the matrix in this case. In *Imperial Parking*, Menzies was the CFO of the Plaintiff. In *Premium Weatherstripping*, the Defendant Ghassemi was the General Manager of the Plaintiff. *Trophy Foods* was a little more complicated, but Scott was the president and controlling shareholder of Scottco, a food broker who acted as food broker for JRI, which merged with Trophy Foods. Scott was found to hold the traditional broker/agent fiduciary obligation to his principal, the Plaintiff.

[174] None of these cases apply to the matrix of the proceeding before this Court. Milner was not a fiduciary to Trimar. That should end the analysis.

[175] If for any reason I am in error, there is little evidence that Atlantic, John Day, Michael Day or Barry Hayes had actual knowledge or were wilfully blind before Milner ceased using Trimar's confidential information that he had breached a fiduciary duty. The earliest evidence of communication between Milner and anyone associated with Atlantic is his meeting on May 13th with his friend and colleague Barry Hayes, a salesperson at Atlantic. This followed the May 12, 2016 e-mail (JEB, p. 50) cited above. Nothing in that e-mail suggests that the Atlantic Defendants at that point were doing any more than exploring the possibility of hiring Milner and nothing in the e-mail suggests any actual knowledge, or willful blindness to the fact that Milner was collecting some records with respect to his clients since February 2016.

[176] The Court notes that the primary evidence with respect to breach of Milner's duty of good faith, loyalty, and fidelity occurred after the May 13th meeting and include:

1. his May 15th four-hour foray into Trimar's office,

2. his downloading of supplier brochures to his Gmail account on May 17th (JEB, p. 133),

3. his setting up accounts of some supplier accounts (JEB, p. 102), and

4. contacting a few of his clients in the last few days before commencing employment on May 30th with Atlantic.

[177] There was no oral or documentary evidence that Milner communicated this to anyone at Atlantic, except a possible interpretation from his e-mail to Hayes late on May 20th that he was setting up some accounts (which statement, without further information, would not imply that this was done using confidential information).

[178] John Day, the owner of Atlantic, did not testify. The Plaintiff tendered as Exhibit #9 excerpts from Day's discovery. In it, Day denied having ever discussed with Milner afterwards whether he had taken sales records from Trimar and stated that he was not interested as "we have our own clients and I didn't need anyone else's". After Dwyer's letter and discussion with Day in July, he did not ask Milner whether he brought records into the Atlantic system "because I had never seen any". He never directed "him" (the Court infers "him" was a reference to Milner) to make sure no Trimar information was brought into the Atlantic digital system.

[179] At discovery, Hayes was referred to e-mails of May 30th and 31st to a supplier. He acknowledged that Atlantic did not have promotional product supplier contacts before May 30, 2016. When asked if Milner told him that he had taken Trimar records, he replied no. When he received Milner's e-mails of July 4th and 5th (Exhibits #12 and #13), he did not talk to Milner about Trimar's records or any steps to remove Trimar records from Atlantic's system. He acknowledged that he met with Milner on May 13th. He thinks he spoke with Craig Day, not John Day, after that meeting.

[180] Hayes testified that he did not make an offer of employment to Milner. He understood that John Day was involved in the arrangements for, and terms of, Milner's employment at Atlantic. At discovery, he added that the only arrangements made prior to May 30, 2016 between Milner and John Day was that Milner was going to "start as a regular salesman".

[181] The Court has already recited in this decision Milner's acknowledgment of acts which the Court finds breaches his duty of good faith, loyalty, and fidelity. Other than a possible interpretation of his e-mail of May 20th telling Hayes that he was setting up a few accounts, there is no evidence that he communicated any of his wrongdoing to the Atlantic Defendants.

[182] The Plaintiff has not proven that Milner breached a fiduciary duty or, if he did, that the Atlantic Defendants had actual knowledge or were willfully blind as to both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct, nor that any of the Atlantic Defendants participated in or assisted with the fiduciary's fraudulent and dishonest conduct. The Plaintiffs have not proven this cause of action.

[183] Finally, in a decision primarily about remedies, *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 SCR 142 ("*Cadbury*"), the Court noted, in a circumstances where a licensee appropriated a confidential memo (similar to an employees appropriation of a employer's confidential information), as follows:

> While the law will supplemental the contractual relationship by importing a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character.

[184] In *Cadbury*, the licensee was held not to be a fiduciary.

Issue #4: Did the Defendants commit the tort of civil conspiracy against Trimar?

[185] In its pretrial brief, the Plaintiff's cites *FCI Concrete v. Buttcon Limited*, 2017 ONSC 3266 (*"FCI Concrete"*), at paragraphs 11 to 13, and, *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 ("*NBFL v. Barthe Estate*"), at paragraphs 395, for a description of the tort of civil conspiracy.

[186] It submits that the Defendants' actions constituted an "unlawful conduct" conspiracy in that:

1. the defendants intended to establish a competitive business;

2. John Day intended to recapture to the opportunity to buy Trimar that he lost in 2014;

3. the conduct was unlawful because of Milner's breach of his fiduciary responsibilities to Trimar;

4. the Atlantic Defendants were alert to Milner's conduct – the use of confidential information and existing contacts; and

5. by working together, the Atlantic Defendants directed their conduct at Trimar and knew injury was inevitable.

[187] In its post-trial brief, the Plaintiff submits that the Atlantic Defendants' actions consisted of:

1. Knowing after May 16, 2016, that Milner had not told Trimar of his steps to establish a new promotional products business at Atlantic, the Atlantic Defendants did nothing to stop his activities.

2. Michael Day of Atlantic received Dwyer's e-mail of May 24 announcing Milner's retirement and circulated it to John Day and Hayes, but did nothing to have Milner "be honest with Trimar";

3. They took advantage of the efforts of Milner and Hayes "through the weeks leading up to Milner's departure";

4. John Day, having approved the hiring of Milner, must have been appraised of Milner's business plan "throughout all of their dealings"; and,

5. Twice Trimar advised that Milner took confidential records: first on June 2nd, a second time in early July, but Milner communicated with Trimar clients until July 4.

[188] The seminal decision on the tort of conspiracy in Canada is *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 (BCCA) ("*Canada Cement"*). An excellent outline of unlawful conduct conspiracy, and the danger of defining "unlawful conduct" too broadly, is found in *Agribrands Purina Canada Inc. v. Kasamekas et al*, 2011 ONCA 460 ("*Agribrands Purina*"), beginning at paragraph 24.

[189] The law is thoroughly canvassed by **Lewis N. Klar** in *Remedies in Tort*, Chapter 3 – Conspiracy (Thomson Reuters Proview, 2021). The following excerpts from Klar summarize the relevant law:

> §1 A conspiracy is an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. In Canada, the tort of conspiracy is committed if: i) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or ii) where the conduct of the defendant is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result. In situation ii) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known

> that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. …
>
> §4 There is authority to the effect that an action for conspiracy cannot be maintained in respect of a combination to commit an act which is itself actionable in tort, on the basis that the agreement merges in the tort. … The theory behind merger is that once the planned tort is actually committed, the harm flows from the tort and the pleading of conspiracy is therefore redundant. … the Supreme Court of Canada decision in *Hunt v. T & N plc*, concluded that the doctrine of merger should not be applied at the pleading stage. The court held that the law supports applying the doctrine of merger only at the end of the trial when it is known if the plaintiff has been fully successful on the nominate torts and whether anything is added by the conspiracy claim. …
>
> §14 … The plaintiff must show an agreement on the part of the defendants to pursue the course of action which has resulted in damages to the plaintiff. … The requisite agreement is not an agreement in the contractual sense, but rather a joint plan or common intention to do the action which is the object of the alleged conspiracy.
>
> §15 It is necessary that the facts of the alleged agreement be known and that the defendant intend to be a party to the combination. Mere knowledge or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view of furtherance of the common design and purpose.
>
> §16 The agreement may be proved by direct evidence or may be inferred from the facts where the facts cannot fairly admit of any other inference being drawn. …
>
> §18 … what is required to meet the "unlawful conduct" element of conspiracy is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. …

[190] The Plaintiff claims that the Atlantic Defendants conspired with Milner in an unlawful act conspiracy.

[191] The Plaintiff has not established on a balance of probabilities that any of the Atlantic Defendants were aware, before Milner started work at Atlantic on May 30, 2016, that Milner had breached his duty of good faith, loyalty, and fidelity to Trimar. John Day's discovery evidence; Hayes' discovery and oral trial evidence; nor the e-mails from Milner's Gmail account, establish that the Atlantic Defendants were aware of Milner's breaches of his implied duties of good faith, loyalty, and fidelity to Trimar.

[192] In a May 20, 2016 e-mail exchange between Hayes and Milner, Milner mentions that he was setting up a few accounts, but he gives no particulars of what or how.

[193] The fact that Milner:

1. determined that he would likely leave Trimar by February 2016;

2. examined his future options, including preparing a plan to create a promotional products division at Atlantic;

3. discussed his proposal with Hayes on or about May 13th;

4. sought employment at Atlantic at the same time he gave his notice to Trimar; and

5. did not disclose to Trimar his intention to seek employment or obtain employment with Atlantic,

did not constitute breaches of his implied duty of good faith to Trimar.

[194] Milner's breaches consisted of:

1. forwarding to his private Gmail account contact information for his/Trimar's clients between February and May 2016;

2. securing more confidential Trimar records on Sunday, May 15, 2016;

3. securing supplier contact information after May 16, 2016;

4. using that confidential information to set up a few supplier accounts shortly before May 30th; and

5. using those confidential records to conduct clients when he joined Atlantic on May 30th (until he destroyed those records in early July).

[195] There is no evidence to support the Plaintiff's pretrial brief submission that John Day intended to recapture the opportunity he lost in 2014 to buy Trimar (quite the contrary) or that the Atlantic Defendants were alert to Milner taking and using confidential Trimar records before he commenced employment with Atlantic on May 30th.

[196] The Court infers constructive knowledge by Atlantic and Hayes that Milner's ability to set up supplier accounts and arrange the GeoSpectrum and Ashrae sales immediately upon joining Atlantic were likely based on access to confidential Trimar records. There is no evidence that the confidential records Milner took from Trimar were ever entered into Atlantic's "system", as opposed to being retained Milner. Day's discovery evidence is that he did not see any and had no interest in Trimar client records.

[197] The Plaintiff's post-trial brief suggests that it was unlawful for Milner to not disclose his intention to work for Atlantic until May 24th , and that it was part of an unlawful act conspiracy for the Atlantic Defendants to be aware of this on May 24th and not urge Milner to "be honest with Trimar". Milner did not breach an implied duty of good faith by failing to advise Trimar that his next employer would be Atlantic.

[198] The Plaintiff's post-trial brief submits that the Atlantic Defendants took "advantage of the efforts of Milner and Hayes through the weeks leading up to Milner's departure". This is an exaggeration. Milner and Hayes met on May 13th. Hayes' May 12th e-mail suggests this was an exploratory meeting. The next e-mails were on May 20th, and Milner was terminated on the morning of May 25th, after he told Dwyer on May 24th that he was going to work for Atlantic.

[199] The Plaintiff's post-trial brief submits that it is reasonable to conclude that John Day was appraised of Milner's plan "through all of their dealings". I conclude that Milner's business plan was given to Hayes on or about May 13th and that an agreement by Atlantic to hire Milner occurred after May 13th. Milner's business plan did not, on its face, imply that Milner intended to, or had, breached his implied duty to Trimar. I conclude that the extent of Atlantic's knowledge of any unlawful conduct by Milner would likely have arisen during the first month of his employment, when it should have been apparent that Milner was relying upon Trimar records respecting clients and suppliers in order to be able to set up the early accounts. I accept the evidence of Milner that he destroyed the records that he took from Trimar when he received Trimar's demand to do so. I find that by the first week of July, Milner had stopped using confidential Trimar records and consequently, Atlantic ceased benefitting from Milner's breach of his duty to Trimar.

[200] As noted in Paragraph 15 of Klar's article: "[m]ere knowledge or approval of or acquiescence in the act is not sufficient to establish the existence of a common

plan or design. The defendants must have intentionally participated in the act with a view of furtherance of the common design and purpose."

[201] I conclude that to the extent that any of the named Atlantic Defendants were, or should have been, aware of Milner's unlawful gathering of confidential Trimar records that it only occurred when he joined Atlantic, and did not extend beyond "[m]ere knowledge or approval or acquiescence". The claim involving the tort of conspiracy is dismissed.

Issue #5: What damages is Trimar entitled to recover?

[202] In its pretrial brief, the Plaintiff seeks three categories of remedies:

1. to recover the commission income it paid to Milner between February and May, 2016;

2. to recover the net profits from Atlantic's sales to Trimar's (Milner's) customers for the first year of operation, and for that purpose to order that a referee conduct an accounting of the net profits earned by Atlantic; and,

3. punitive damages.

[203] In its post-trial brief, the Plaintiff clarifies that it is seeking an accounting pursuant to *Civil Procedure Rules 66* on the basis that if the Defendants are liable, the Defendants have control over the sales records and can account for the net profit earned in the first year of operation of Atlantic's promotional products division. It seeks a Court appointed referee to carry out the accounting at the Defendant's cost based on the names of Trimar clients represented by Milner as set out in a spreadsheet prepared by Dwyer (JEB, pp. 139 – 145).

First Claim - Recovery of Milner's earnings – February to May 2016

[204] With respect to the first claim, recovery of Milner's earnings for the period of February to May 2016, the Plaintiff cites no law. Factually, most of Milner's breaches of good faith (collecting confidential information) occurred after May 13, 2016 and the misuse of that confidential information occurred during the first month that Milner worked for Atlantic. Factually, Milner continued to do his job as a sales rep for Trimar up until he was locked out on May 25th. His income was solely commissions for sales he effected for Trimar. His breach was taking confidential information and, after his employment with Trimar ended, misusing it for his new

employer. He did not fail to carry out his day-to-day sales responsibilities for Trimar. This claim is denied.

Second Claim - Recovery of earnings from Atlantic sales to Trimar's customers

[205] The second claim is for recovery of earnings from Atlantic of sales to Trimar's customers for the first year of its promotional products operations, including a direction for an accounting by Atlantic, whom it says benefitted from its involvement in the breach of Milner's fiduciary duty, and Milner's breach of his duty of confidentiality. It cites three cases:

1. *Tourangeau v. Taillefer,* [2000] OJ No. 184 ("*Tourangeau*"), at paragraphs 23 to 42,

2. *Catalyst Capital Group Inc. v. Moyes*, 2016 ONSC 5271, paragraphs 68 to 75, and,

3. *Consolidated Compressor CO v. Northwest Equipment Ltd*., 2012 ABQB 222, ("*Consolidated Compressor*"), paragraphs 62 to 68.

[206] The Court notes that in all three of these decisions, the defendant was determined to have been a fiduciary, unlike the Court's finding in this case. The case law and texts impose a different analysis on fiduciaries than on ordinary employees in terms of the remedies available to the former employer for breaches of their good faith duty during employment, and, to some degree, their misuse of confidential information after their employment ended. The Steele-Thornicroft text previously cited, at Chapter 12, discusses remedies in the context of the obligation of fiduciary employees, of ordinary employees (owing an implied duty of good faith), and obligations to preserve confidential information by all employees.

[207] For ordinary employees, the remedy is generally limited to recovery of any actual damages suffered as a result of the employee's breach of his or her contract; that is, the profits the employer would have otherwise earned if the employee had not breached their good faith obligation. Awards are based on the losses actually suffered by the employer, not on the profits earned by the former employee thereafter. If the employer is unable to prove damages that it suffered, the action is dismissed, or nominal damages are awarded.

[208] Unlike an employee's implied duty to serve the employer with good faith, the obligation to refrain from misusing confidential information survives the termination

of the employment relationship. Where the employee has wrongfully appropriated confidential information, the employer may maintain an action for damages related to the employee's or the former employee's misuse of confidential information. Depending on the unique facts of the case, the employer may be entitled to an accounting of profits earned by the employee through misuse of confidential information, injunctive relief, and in rare cases, punitive damages.

[209] The guiding principle respecting damages in this situation is the *Cadbury Schweppes* decision. Justice Binnie rejected a claim for breach of confidence based on either a fiduciary relationship or a fiduciary duty arising out of a non-fiduciary relationship. He noted "[w]hile the law will supplement the contractual relationship by importing a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character."

[210] The potential loss to Trimar was the net profits it lost as a result of the misuse by Milner of its confidential information. It is not the fact that, after Milner left Trimar, he worked for Atlantic. Ronald Synder and Harvin Pitch in the text, *Damages for Breach of Contract*, 2nd edition, Chapter 1 §3 & §4 - Claiming and Calculating Loss of Profits (Thomson Reuters Proview, 2021) provides guidance:

> The governing principle in the calculation of damages for breach of contract is causation. The general rule is that the plaintiff is entitled to recover all losses caused by the breach of contract, subject to remoteness, mitigation, and the right of parties to expressly limit the type or quantum… Simply put: a defendant can only be held liable for the harm that results from his or her wrongdoing, and for no other harm; a loss that the plaintiff incurs regardless of whether the defendant breaches or performs the contract is not attributable to the defendant. Although trite, keeping this basic principle of "caused damages" in mind helps avoid mistaking a business accounting calculation of "net profit" for a legal damages calculation of "lost profit".

[211] In the text, S.M. Waddams, **The Law of Damages** (Toronto: Canada Law Book, loose-leaf to November 2012), Chapters 13 to 15 discuss certainty, remoteness, and mitigation in proof of loss extensively. At §13.10, Waddams writes:

> The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed. (At §13.170, he notes that where a wrongdoer refuses to reveal facts within his knowledge, the court may presume facts adverse to the wrongdoer) . . . In many cases the loss claimed by the plaintiff depends on uncertainties; these are of two kinds: first, imperfect knowledge of the facts that could theoretically be known and secondly, the uncertainty of attempting to estimate the position the plaintiff would have occupied in hypothetical

> circumstances. . . [continuing at §13.30] In Anglo-Canadian law . . . the courts have consistently held that if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim was sound, the omission will tell against the plaintiff.

Ratcliffe v Evans, [1892] 2 QB 524 (CA), is most often cited in Canadian cases as the appropriate principle.

[212] Milner throughout admitted to collecting confidential information, beginning in February 2016, but most particularly after May 13, 2016. The Court accepts his oral evidence as corroborated by Milner's Gmails extracted and produced by the Plaintiff, and by Exhibits #12 and #13. Because I found that Milner was not a fiduciary, and I found that his misuse of Trimar records lasted about one month, I decline to order a accounting by a court-appointed referee to calculate the net profits earned by Atlantic from Milner's sales to former clients while at Trimar. The relevance of a court ordered referee accounting to calculate the net profits earned by Atlantic during the period Milner misused Trimar's confidential information is of little consequence and value in trying to estimate what the actual pecuniary loss to Trimar was during the one-month period after Milner started employment with Atlantic. In addition, I infer that the cost of such an accounting would likely far exceed the total of any net profit that Atlantic may have earned during that one-month period.

[213] Missing from the Plaintiff's evidence is any evidence of any sale by Milner to any former client of Trimar after July 4, 2016, let alone the circumstances under which such a sale originated. Also missing is any evidence of what net profit Trimar made from Milner's sales while he was a salesperson at Trimar leading up to May 2016. The Court notes that Dwyer complained when Milner asked for a raise in 2016 that he could not afford to increase his income, as Trimar was not making any money. The only indirect evidence is the 2016 gross sales target for Milner, set by Dwyer (JEB, pp. 38-39) showing the revised target of $214,500.00 for the year (under $18,000.00 per month). No evidence is before the Court as to what Milner's gross sales were at Trimar before he left, or generally what it's net profit from sales was in or about 2016 or, in particular, what Trimar's net profit, if any, from Milner's gross sales were, or would likely have been.

[214] The Court declines to order an accounting by a referee pursuant to *CPR 66* for the following reasons:

1. The period that Milner misused confidential information from which Atlantic may have earned a net profit, was about one month: from May 30, 2016 to not later than July 4, 2016.

2. It is unclear what relationship any net profit Atlantic may have earned from its promotional products division in that period would have on what Trimar actually lost in net profits in that period.

3. In Trimar's pre-trial brief, it states that at discovery in December 2018, Milner testified that he had made sales of $12,000.00 to his Trimar clients (over a period not disclosed in the brief). This was not evidence at trial. Dwyer's gross sales target for Milner for 2016 was less than $18,000.00 per month. This, combined with whatever sales Trimar made to Milner's former clients during the month of June, suggests that the actual pecuniary loss to Trimar (said differently, net profit) was likely significantly less than Milner's approximate $18,000.00 monthly gross sales target.

4. The likely cost of a court appointed referee to calculate Atlantic's net profit from promotional product sales to former Trimar clients in June 2016 would likely greatly exceed the amount of any lost net profit, despite the fact that Atlantic's net profit may not be particularly relevant to the calculation of Trimar's loss.

5. Trimar seeks to use its spreadsheet (JEB, pp. 139-145) prepared by Dwyer and Wendy Porter as the basis for the accounting. Dwyer's cross-examination on that document caused the court to question its reliability and accuracy of both the names and the revenue derived by Trimar from the listed clients.

[215] Despite Dwyer's apparent complaint that he was making no money from Trimar as its owner, I estimate, with great uncertainty, that the net profit that Trimar might have earned from Milner's misuse of its confidential information during June 2016 was not more than 25% of the monthly target for gross sales set for Milner in early 2016, or the sum of $4,500.00. I am not convinced that the appointment of a referee to do an accounting of the possible net profit to Atlantic from its promotional products division would likely have exceeded the net profit based on the gross sales target Dwyer set for Milner in early 2016.

Third Claim – Punitive Damages

[216] The Court agrees with the statements of law cited by the Plaintiff in its pretrial brief. The case law is clear that the discretion to award punitive damages should be most cautiously exercised and courts should only resort to punitive damages in exceptional cases. Punitive damages require proof of conduct that amounts to an independent, actionable wrong, typically seen as so shocking as to depart markedly from the ordinary standards of decency. The aim is to punish the defendant, not to compensate the plaintiff.

[217] The quantum is proportionate to the blameworthiness of the defendant's conduct and includes consideration of a list of factors described by the Supreme Court of Canada and cited in the Plaintiff's brief. A very high threshold must be met before there is an award for punitive damages.

[218] The Plaintiff claims $30,000.00 from Milner and $15,000.00 from each of the other Atlantic Defendants.

[219] The Court has already determined that the other Atlantic Defendants did not knowingly assist Milner nor commit the tort of conspiracy. At best, they knew and acquiesced in Milner's misuse of confidential information, which they learned about when he joined them on May 30, 2016.

[220] The Plaintiff has not satisfied the Court that the very high threshold and exceptional circumstances exist to award punitive damages against any of the Defendants.

[221] In *RBC Dominions Inc. v. Merrill Lynch Canada Inc.*, [2008] 3 SCR 79 (SCC), punitive damages in the amount of $5,000.00 were awarded for a much more serious breach of a former employee's obligations to his employer.

[222] The claim for punitive damages is dismissed.

Cross Claim by Atlantic

[223] Atlantic sued Trimar in Small Claims Court. That action was stayed, and Atlantic counter-claimed in this proceeding. During the trial, Trimar agreed, based on Exhibits #11, #14 and #15, that Trimar owed Atlantic $2,897.92 before Milner left Trimar. Judgment is entered against Trimar in favor of Atlantic in the amount of $2,897.92, plus pre-judgment interest at 2.5% from May 30, 2016.

[224] Trimar claimed prejudgment interest at the rate of 2.5% per year, calculated annual not in advance. The Court awards pre-judgment interest to Trimar as claimed from May 30, 2016.

Summary

[225] The summary of the determinations I have made is:

1. The Defendant Greg Milner shall pay to the Plaintiffs $4,500.00 in damages, plus prejudgment interest at the rate of 2.5% per year, calculated annually, not in advance, from May 30, 2016 to the date of this decision.

2. There is no punitive award against any of the Defendants.

3. The Plaintiff shall pay to Atlantic Digital Reproductions Inc. the sum of $2,897.92, plus prejudgment interest at the rate of 2.5% per year, calculated annually, not in advance, from May 30, 2016 to the date of this decision.

[226] In light of the divided success, the Court is not inclined to award either party costs, but should either party seeks costs, then counsel will provide written submissions of not more than 10 pages to my attention within 30 days of receiving this decision.

Warner, J.