

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Smith v. Hussman Canada Inc.*, 2002 NSSC 263

Date: 2002/12/06
Docket: S.H. 179726
Registry: Halifax

Between:

Brenton Smith of Lower Sackville, in the Halifax Regional
Municipality, Province of Nova Scotia, and Mark Doubleday,
of Nine Mile River, in the Province of Nova Scotia
Plaintiffs/Respondents

v.

Hussman Canada Inc., a body corporate, duly incorporated
under the laws of the Province of Ontario and registered to
carry on business in the Province of Nova Scotia
Defendant/ Applicant

Judge: The Honourable Justice M. Heather Robertson

Heard: October 16 and 28, 2002, in Halifax, Nova Scotia

Counsel: Barry J. Mason, for the plaintiffs/respondents
Lisa M. Gallivan, for the defendant/applicant

By the Court:

[1] This is an application for an interim injunction restraining the respondents from making use of confidential information acquired by them when they were in the employ of Hussman Canada Inc. (“Hussman”).

BACKGROUND

[2] The applicant, Hussman Canada is an Ontario company registered to carry on business in Nova Scotia. It is a subsidiary of Ingersoll-Rand.

[3] Hussman is a major supplier in the area of refrigeration and air-conditioning equipment and service. The respondents were employed as service

technicians for Hussman. Mark Doubleday and Brenton Smith were laid off in early December 2001, due to a shortage of work. Alex LeBlanc left the employ of Hussman in February 2002. Smith and Doubleday commenced an action for wrongful dismissal. Smith and Doubleday incorporated a new company Doubleday Mechanical Limited and began offering a refrigeration repair service to companies in this community. They say that this is the only job for which they are trained and that they are trying to mitigate their losses, following termination. LeBlanc joined their company after he left Hussman.

- [4] All three gentlemen say that they approached a wide group of potential customers, some of whom were Hussman customers. They admit freely that they are now doing work for some former Hussman customers and say that due to their small overhead they can offer more favourable rates to these customers.
- [5] None of these three gentlemen signed a non competition or non solicitation agreement with Hussman. Two of them, Smith and Doubleday did sign a Code of Conduct, in September 2001. They say that all employees were required to sign the document and given no time to review it. Mr. LeBlanc did not sign the Code of Conduct.
- [6] The Code of Conduct contains the following provision:

Confidential Information

The unauthorized release of confidential information can cause the loss of a critical competitive advantage, hurt relationships with customers and embarrass or harm fellow employees.

Confidential information is any information or knowledge created, acquired or controlled by Ingersoll-Rand that the company has determined should be safeguarded from improper public disclosure. Confidential information may include, but is not limited to, financial records, business plans, sales and marketing data, employee records, such as medical records and salary data and technical information.

Each of these confidential areas covers a range of information. For example, technical information may include designs and drawings; engineering and manufacturing know-how and processes; company business and product plans with outside vendors; a variety of internal data bases; patent and trademark applications; and copyrighted material, including software.

Each employee, whether an originator, custodian, user or recipient of confidential information, must ensure that company information under his or her direction and/or control is properly safeguarded in accordance with company policies and instructions. These policies include limiting access to confidential information only where there is a valid business need and only then as specified in company policies and instructions; and refraining from using company information for personal benefit or other noncompany purposes.

Unauthorized releases of confidential information, whether intentional, unintentional or suspected, should be reported immediately to the Law Department of Woodcliff Lake. Questions on whether information is confidential should be directed to the Law Department or the Patent Department at Phillipsburg, New Jersey. Additional guidance is contained in the Ingersoll-Rand Corporate Engineering Standards and Procedures Manual and the Ingersoll-Rand Information Security Policy.

- [7] Hussman says that the confidential information improperly used by the respondents were their customer lists and pricing lists.

JURISDICTION

- [8] The court's jurisdiction to grant interim injunctions is found in the *Civil Procedure Rules* and the *Judicature Act*, R.S.N.S., 1989, c. 240, s. 43(9). *Civil Procedure Rule* 43.01(1) provides that in urgent cases, an application may be sought and granted even before the commencement of proceedings.

43.01. (1) An application for an injunction may be made by a party before or after the commencement of a proceeding, whether or not the claim for the injunction was included in the party's statement of claim, counterclaim, third party notice or originating notice. [E. 29/1(1)]

(2) Except in a case of urgency when an application for an injunction may be made ex parte, an application for an injunction shall be made upon notice. [E. 29/1(2)]

(3) When an urgency exists, an intended plaintiff may make an application for an injunction before the commencement of a proceeding, and an interim injunction may be granted on terms providing for the commencement of the proceeding and such other matters as are just. [E. 29/1(3)]

(4) An application for an interim or interlocutory injunction may be granted, refused or otherwise dealt with by the court on such terms as are just.

- [9] Section 43 (9) of the *Judicature Act* provides that an injunction may be granted “in all cases in which it appears to the Supreme Court to be just and convenient that such order shall be made.”
- [10] The applicant must establish:
- (a) that there is a serious issue to be tried;
 - (b) that a refusal to grant interim relief will result in irreparable harm to the applicant; and
 - (c) that the balance of convenience favours the granting of the injunction.
- [11] Counsel for the parties have differing views of the threshold test for an interlocutory injunction. Counsel for the applicant relies on *American Cyanamid Company v. Ethicon Limited*, [1975] A.C. 396. Lord Diplock stated:

The use of such expression as ‘probability’, ‘a prima facie case’, or ‘a strong prima facie case’ in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried ...

So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

- [12] This standard was accepted by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. at p. 335:

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a “strong *prima facie* case” on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that “the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried”. The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

- [13] Counsel for the respondents suggests that significant evidence must be put forward in order to grant extraordinary remedies such as an interim injunction relying on two Nova Scotia cases. In *Noreco Inc. v. Laserworks*

Computer Services Inc. et al (1994), 136 N.S.R. (2d) 309; 388 A.P.R. 309, Justice Saunders at para. 27 stated:

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

- [14] In *J. W. Bird and Co. v. Levesque* (1998), 82 N.S.R. (2d) 435 Justice Davison stated:

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

- [15] Both of the above cases predate *RJR MacDonald* which addressed the issue as follows:

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

- [16] Both *Noreco* and *J.W. Bird* address the risks of error where applications are limited to affidavit evidence, in circumstances where the rights of one party are sought to be curtailed before a full trial, on the issues. These cautions are not diminished by the decision of *RJR MacDonald*. The interlocutory relief sought is an extraordinary remedy that if granted could severely limit the livelihood of the respondents from now to the trial date. Obviously, I am not in a position to appreciate all of the evidence that may be advanced at

trial. However, I must be satisfied, on the evidence before me, that there is a serious question to be tried. In making that assessment, I have considered the prospects of the applicant in succeeding in its claim for a permanent injunction at trial. I have had the benefit of reviewing discovery evidence in addition to the affidavit evidence.

- [17] Although the threshold is a low one, the applicant must show the court that it has at least some prospect of success at trial, to justify the granting of an interim remedy of such serious consequence. Once the court is satisfied that the threshold test has been met, it may proceed to the second state analysis respecting irreparable harm and balance of convenience.

SERIOUS ISSUE TO BE TRIED

- [18] The applicant says that:

Hussman Canada's business is dependent upon the relationships that it develops with its customers, the sales it can generate based upon this relationship, and its reputation. The conduct of Smith, Doubleday and LeBlanc, in establishing a competing business, contacting Hussman Canada's two largest customers and using confidential information to undercut Hussman Canada's prices, was done with the intention of causing deliberate damage to Hussman Canada's business. This conduct amounts to an unlawful interference with Hussman Canada's economic interests and economic relations and cannot be condoned.

- [19] The duty of confidentiality owed to Hussman both during and after their employment is at issue. As well their conduct in approaching Hussman's two largest customers and whether it constitutes a breach of confidentiality is also at issue.
- [20] A leading authority on question of breach of confidence is *International Corona Resources Limited v. LAC Minerals Limited*, [1989] 2 S.C.R. 574. Justice La Forest addressed the issue of breach of confidence at p. 635:

The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows at p. 47:

In my judgement, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the

Saltman case on p. 215, must “have the necessary quality of confidence about it.” Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it

- [21] There is no non competition or non solicitation agreement, signed by the respondents. The Code of Conduct, signed by two of them, Smith and Doubleday, is on its face a document that was intended to govern their conduct while employees of the company.
- [22] The respondents are entitled to compete fairly in the marketplace having left the employ of Hussman. *E.M. Plastic & Electric Product Ltd. v. Hobza* (1992), 43 C.P.R. (3d) 74, supplementary reasons at 43 C.P.R. (3d) 74 at p. 128, varied 52 C.P.R. (3d) 166. However, general knowledge and information that they may have acquired while working there will not constitute a breach of confidence.
- [23] The respondents rely on two Nova Scotia cases which define employees’ rights upon leaving their employer. In *Maritime Office Systems Ltd. v. Burt* [1986] N.S.J. No. 383, Justice Tidman, relying on the Ontario High Court of Justice’s decision in *Dominion Al-Chrom Corp. Ltd. v. Stoll* put forward the following:

It is settled law that a servant, having left his master's service, may, without fear of legal consequences, canvass for the custom of his late master's customers, whose names and addresses he has learned during the period of his service, so long as he does not take a list of them away with him: ...

- [24] Justice Tidman went on to state:

That statement of the law has been applied in Canadian cases as well and in some cases as it has been expanded. I think the principle still applies that a former employee can certainly use any knowledge that he has in his head when he leaves his former employer. It is not information that he should dismiss from his mind but is information that he may properly use in pursuing his own occupation after he has left the employ of the employer during which time he acquired that information.

- [25] In *J. W. Bird and Company v. Levesque, supra*, Justice Davison reviewed situations where a fiduciary relationship existed. Justice Davison stated as follows:

...When an employee reaches a senior level of employment, a fiduciary relationship develops with his employer prohibiting the employee, upon leaving

- the employment, for breaching the trust by soliciting business from customers of the former employer...There is no duty upon other employees to refrain from competing with the former employer.
- [26] In *J. W. Bird and Company v. Levesque*, Justice Davison held that the defendant, a sales representative with the plaintiff company, was not standing in a fiduciary relationship. The applicant agrees that no judiciary relationship existed.
- [27] I have considered the cases cited by the applicant, particular *Sun-Can Development Ltd. v. Korea Exchange Bank et al* (1992), 11 O.R. (3d) 265 (Ont. Gen. Div.) and *Monarch Messenger v. Houlding* (1984), 5 C.C.E.L. 219 (Alta. Q.B.) 13 C.C.E.L. (Alta. C.A.). These cases can be distinguished. *Sun-Can Development* is distinguished on its facts as the real estate agent obtained confidential information by ruse and used it in breach of confidence to secure lucrative real estate commissions. *Monarch Messenger* is closer to the case at bar, in that a former contract employee who provided messenger and courier services, left his employment and used confidential information including, customer lists and pricing lists, in setting up his own courier business. However, the employee formed the intent to set up a competing business prior to his leaving, in the light of the knowledge he would eventually be required to sign the company's non competition agreement or be fired. The day following termination he solicited Monarch's customers. In this case several months following their termination, Smith and Doubleday established a competing business.
- [28] From the affidavit evidence before me, supported by discovery evidence filed with the court, I make the following findings respecting the conduct of the respondents.
- [29] The respondents did not use confidential customer lists in soliciting customers in their new business. They never had possession of such a list nor did they take a list of Hussman customers with them upon their departure from the company. Indeed, the refrigerators in the Sobeys and Loblaws' stores (Atlantic Super Stores) bear the Hussman Canada sticker. The refrigeration market is well defined and includes all the large retail food stores as well as smaller convenience stores. The respondents would logically solicit all of these outlets. There would be no necessity for the respondents to rely on a customer list of their former employer.
- [30] The preferential price list for the Sobeys', Loblaws' accounts were not available to the respondents. These customers had a good credit rating. They were invoiced for work done. The office completed the invoices. The

- respondents were service technicians who only had access to pricing for C.O.D. customers. There is no suggestion that the respondents took any pricing lists from the office during their employ or took any materials with them upon leaving Hussman's employ. Whatever information they could have used would be from their recollection.
- [31] The question of markups charged by Hussman, over and above the cost of service would constitute confidential information. The evidence of the respondents is that they called a variety of competitors for quotes for service work, to determine the going rate among them. They also say (LeBlanc discovery evidence) that Carl Jay of Sobey's reported that the Hussman markup was in the 100-110 percent range. Mr. LeBlanc however, did acknowledge he had access to some rates through warranty work, completed by them as service technicians. Hussman regularly quotes service rates over the phone to customers and potential customers making inquiries. Rates vary from a \$50 preferential rate to a \$62 - \$75 range per hour for other customers or members of the public making inquiries.
- [32] Knowledge of C.O.D. pricing would not help the respondents to unfairly complete as this is only a small portion of the refrigeration service business Hussman does and are rates at the higher end of the scale.
- [33] That the respondents have been quite forthright in their discovery evidence in explaining how they approached potential customers, presented their business cards and pricing lists. Mr. Doubleday agreed that he may have told Carl Jay of Sobey's that "he could do better than Hussman or could do better prices, we figured without low overhead and that, yeah, we could." He says "I believed that \$46 per hour would be lower than Hussman's rate, yeah." Mr. Doubleday named four other competitors with whose rates they made comparison in setting their own rates.
- [34] I conclude that while it is possible that the respondents' recollection of at least some of Hussman's pricing information was helpful to them in setting their own prices for Doubleday Mechanical Limited, I can see no clear evidence of the unauthorized use of this information in circumstances where they would have an obligation to Hussman, that extended beyond their employment with them.
- [35] The applicant has not presented a strong case requiring the imposition by an interim injunction. The respondents were employees of Hussman, who bore no fiduciary responsibility to the employer. Once laid off, they began a competing business, the only business they know. They set prices after researching a variety of their competitors' pricing strategies, all of which

seemed fairly well known within the industry. From the evidence before me I concluded that refrigeration service is a very competitive business. If Doubleday Mechanical Limited achieved a pricing advantage, it would result more from the advantage of their low overheads as a small company, than from any advantage gained from former knowledge of Hussman pricing. Store managers anxious to reduce costs were willing to give these gentlemen a try.

- [36] Had I been satisfied that the threshold test was met, the applicant would still fail to meet the second stage criteria.

IRREPARABLE HARM

- [37] I must be satisfied that the loss suffered cannot be remedied by a monetary award made by the court at the end of trial. I am not so satisfied. I do not accept that “the loss of customers threatens the continued survival of Hussman Canada’s business.”
- [38] Throughout the course of this application, I have been provided with a profile of Hussman’s business. Much of this information is gleaned from Mr. Michael Dunik’s discovery evidence. He is the service manager for Hussman. The greater part of their refrigeration business comes from the construction side, the installation of new refrigeration units in grocery stores. This business is thriving. Hussman employs 18-20 service technicians in this area. On the service repair side, they employ 12-14 technicians.
- [39] Hussman has two major customers on the service side. They are Sobeys and Loblaws. They have retained the Loblaws’ business and many of the Sobeys’ stores. They have encountered competition for the Sobeys’ business, from Doubleday Mechanical and from other companies such as Carmichael Engineering.
- [40] Loss of market share has been found to be irreparable harm. However, the refrigeration business is cyclical, peaking in the summer month. Hussman has only laid off one technician. I acknowledge that Mr. Dunik has advanced some evidence of a reduced market share. However, I am not satisfied as to the degree of loss or that this has occurred because of the wrongful acts of the respondents.
- [41] The applicant has not demonstrated that it will suffer irreparable harm that is not compensable in damages if the action is not granted. The applicant further did not advance cogent evidence relating to any loss of business reputation.

BALANCE OF CONVENIENCE

- [42] Clearly, the balance of convenience rests with the respondents. The applicant is a large national corporation. Their Nova Scotia operation is a successful and healthy business. They have encountered some competition in the service/repair side of the company. The respondents have begun a fledging new business. Smith and Doubleday had little option in this matter. They were laid off by Hussman and have carried on in the only work they know, the only skill for which they were trained. Mr. LeBlanc chose to join this undertaking. They are the only three employees of the company. They seek to compete in the grocery store refrigeration market. The order sought would effectively prevent them from contacting any of Hussman's present or former customers. Although the applicant says it does not wish to shut them down, their inability to contact or solicit local grocery stores such as Sobeys or Loblaws, would quite likely cause their business severe harm.
- [43] The application for an interim injunction is dismissed with costs. Failing agreement by counsel, I am prepared to hear submissions, as to costs.

Justice M. Heather Robertson