SUPREME COURT OF NOVA SCOTIA

Citation: *Keltic Transportation Inc. v. David Montgomery*, 2014 NSSC 407

Date: 20141016
Docket: Hfx. No. 429987
Registry: Halifax

Between:

Keltic Transportation Inc. and Keltic Freight Services Inc.

Plaintiffs

v.

David Montgomery and Fulcrum Transportation Management Limited

Defendants

Judge:	The Honourable Justice Suzanne Hood
Heard:	October 14, 2014, in Halifax, Nova Scotia
Oral Decision:	October 16, 2014
Written Decision:	November 14, 2014
Counsel:	Rick M. Dunlop, for the Plaintiffs Jeff Aucoin, for the Defendants

By the Court: Orally

[1] Keltic Transportation Inc. and Keltic Freight Services Inc. ("Keltic") seek an injunction:

> (a) Restraining and enjoining the Defendants from contacting or soliciting business of any customers of Keltic who purchased services or requested a quote for services from Keltic during the six (6) months preceding the termination of Montgomery's employment with Keltic until December 4, 2104;
>
> (b) Restraining and enjoining the Defendants from servicing any customers of Keltic from whom it acquired business through unlawful conduct; and
>
> (c) Requiring return of all confidential information of Keltic in the possession of the Defendants forthwith.

[2] They have filed the required undertaking to indemnify the defendants for any losses caused by the interlocutory injunction if granted, in the event that the trial judge determines that the claim is not justified.

[3] The issue is whether the interlocutory injunction should be granted.

[4] Keltic provides what I will refer to as transportation services in Ontario and Atlantic Canada. Its Vice-President of Business Development is Jaime Farrah, who has filed two affidavits.

[5] David Montgomery is a former employee of Keltic and is now the president of the second defendant, Fulcrum Transportation Management Limited ("Fulrum").

He was employed with Keltic from January 2010 until June 2014. During his employment he signed two Confidentiality Non-Solicitation and Non-Competition agreements: the first in September 2010 and the second on January 21, 2014. He also filed an affidavit and he was cross-examined on his affidavit.

[6] It is the non-solicitation clause which is at issue here. Keltic says David Montgomery solicited work from Keltic's customers, contrary to the restrictive covenants, which provided in this regard:

> 4. I agree that during the term of my employment with Keltic and for a period of six (6) months following the date of termination of such employment for any reason whatsoever, I shall not, either directly or indirectly, for my own benefit or for the benefit of any person, enterprise or entity, solicit or attempt to solicit the business of any customer(s) of Keltic who may have made a purchase from or requested a quote for services from Keltic in the six (6) month period preceding the date of my termination of employment.

That is from the September 2010 agreement, but the wording of the 2014 agreement is the same.

[7] David Montgomery sent a letter of resignation to Keltic on June 4, 2014. He offered to stay on a further 90 days, but on June 6th he was advised that his employment was terminated effective the June 4th date. Fulcrum was incorporated on June 11, 2014.

Analysis

[8] The *Judicature Act R.S., c. 240,* provides in s. 43(9) that I may grant an injunction in circumstances where it is "just or convenient to do so".

[9] The leading authority of granting of injunctions is *RJR – MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311. In that decision at para. 48, the court set out a three-part test referring *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110).

> 48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits…

[10] The test was restated by Saunders J. (as he then was) in *Noreco Inc. (c.o.b. LaserNetworks) v. Laserworks Computer Services Inc.*, [1994] N.S.J. No. 408 (S.C.), at para. 21, when he said:

> 21 Whether they are (as put by Mr. Justice Beetz in Metropolitan Stores) separate "tests", or simply steps to be taken in resolving the application, I think any claim for injunctive relief will necessitate a three stage analysis:
>
> 1.an assessment of the strength of the plaintiff's case on either a "prima facie case" standard or on a "serious question" standard;
>
> 2. a consideration of irreparable harm;
>
> 3. a determination of the balance of convenience between the parties.

[11] He also cautioned against too ready use of interlocutory injunctions. He said in para. 27 (referring to the wording in the *Judicature Act):*

> 27 ...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 hightened [sic] risk of error when applications are limited to affidavit evidence which may or may not be tested by cross-examination...

[12] He also cautioned at para. 31:

> 31 I recognize that it is not my function at this stage to attempt to resolve conflicts of evidence or decide difficult questions of law which call for full argument and careful consideration. Those are subjects properly left for trial. I refrain from elaborating on the factual matters in dispute except insofar as is necessary to decide the application.

[13] Therefore, I must be careful not to easily grant this drastic remedy. I must be satisfied that this is one of the those extraordinary cases to which Saunders J. referred, and that the evidence is clear that it is absolutely necessary to grant it.

Prima Facie Case

[14] In cases involving employment, the old test of "*prima facie* case" has been used. In *J.G. Collins Insurance Agencies Ltd. v. Elsley,* [1978], S.C.J. No. 47, Dickson J. (as he then was) distinguished between a restrictive covenant entered

into on the sale of a business and one in a contract of employment. He said at paras. 15 and 16:

> The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment, is well-conceived and responsive to practical considerations. A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.
>
> A different situation, at least in theory, obtains in the negotiation of a contract of employment, where an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. Again, a distinction is made. Although blanket restraints on freedom to complete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information and trade connections of the employer.

[15] In *Front Line Safety Ltd. v. MacKenzie* 2003 NSSC 15, LeBlanc J. had to decide whether the test in that case was "a serious issue to be tried" or "*prima facie* case". He quoted from *Noreco, supra,* in para. 20, where Saunders J. had said:

> ...A too rigid application of one test over the other might well lead to an unjust result. The particular circumstances between the parties should always be considered in deciding whether it is just and equitable to grant an interlocutory injunction.

[16] LeBlanc J. continued in para. 21 to say that in the case of employment contracts the trend is to use the "*prima facie* case" test. He said:

> ...there is a general trend towards the application of the 'prima facie' test in cases involving restrictive covenants in employment contracts.

> See *Jet Print Inc. v. Cohen,* 1999 O.J. No. 2864 (Ont. S.C.J.) at para. 10, where Justice Nordheimer held that:
>
> ...in cases involving restrictive covenants in employment contracts, courts have generally adopted the higher threshold that the plaintiff must establish a strong *prima facie* case before injunction relief will be granted...

[17] In paras. 22 and 23 of *Front Line Saftey, supra,* LeBlanc J. referred to two texts: S.R. Ball in *Canadian Employment Law* (Aurora: Canada Law Book, 2002) and Sharpe, *Injunctions and Specific Performance* (Aurora: Canada Law Books, 2001). From the former he quoted the text as follows (p. 22-4):

> Special considerations arise in the employment context as to the appropriate threshold test that should be utilized in deciding whether an injunction should issue. An examination of the relative strength of each party's case may be appropriate where the likelihood of delay in obtaining a hearing date for trial of the action will mean that the time which an employee can effectively be restrained will expire before trial. If an interlocutory injunction will effectively dispose of the action, there has been strong judicial sentiment to look at the merits of the case. Depending on the likelihood of a trial taking place, it may become necessary for the court to determine more than whether there is a serious issue to be tried, despite the fact that the court seeks to discourage prolonged interlocutory battles based on contradictory affidavit evidence.
>
> In *Jet Print, supra,* Nordheimer J., also noted at para. 11 that "when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong prima facie case is the more appropriate test to be applied."

[18] LeBlanc J. also quoted from what he said was the authoritative text: *Injunctions and Specific Performance.* Robert Sharpe, (now Sharpe, J.A. of the Ontario Court of Appeal) said at para. 2:310:

> Indeed, in cases falling within this category, factors other than the strength of the case are truly irrelevant.

[19] I conclude that the proper test is "*prima facie* case". In my view it does not matter whether the restrictive covenant is a non-competition clause or a non-solicitation clause. Both are part of an agreement signed in the employment context with the imbalance of power often found in such situations. Although to a lesser degree a non-solicitation clause does affect an employee's ability to work after leaving the former employer. In my view the result is that the first step for an injunction in this case is establishment of a *prima facie* case.

[20] Although I am not to make findings of fact or do more than make a preliminary assessment of the merits, I conclude I must determine if Keltic has made out a *prima facie* case based upon the old test before *American Cyanamid Co.v. Ethicon* [1975] A.C. 396.

[21] Quinn J. in *Sheehan & Rose Ltd. v. Northwood,* [2000] O.J. No. 716, said the following in para. 19:

> 19 How does one quantify a "strong prima facie case"? If a plaintiff has a prima facie case, it means that he will succeed at trial on his evidence if that evidence is not rebutted; and, to succeed at trial, he must establish his case on a balance of probabilities. Thus, I gather that a strong prima facie case is one where the probability of success (in the absence of rebutting evidence) is better than 51% (but how much better I do not know).

[22] Restrictive covenants are enforceable only if they are reasonable and not contrary to the public interest. The onus is on the employer for the former and on

the former employee for the latter. I refer to para. 26 of *J.G. Collins Ins. Agencies Ltd. v. Elsley*, *supra* .

[23] However, before I can consider the reasonableness of the restrictive covenant or whether it is contrary to public policy, I must determine if there is a *prima facie* case for its validity.

Consideration for restrictive covenant

[24] The defendants say the restrictive covenants are invalid because no consideration was given for their execution. The first was signed approximately nine months after David Montgomery commenced work at Keltic and the second was signed in January of 2014. In his affidavit, Mr. Montgomery says with respect to the latter:

> 23. In January, 2014 Mr. Stephen appeared in my office with a confidentiality/non-solicitation agreement and asked me to sign. He said Mrs. Farrah had sent it to him and asked him to get the whole office to sign it immediately. I took the agreement from Scott and contacted Mrs. Farrah immediately to inquire about why this was necessary. She made it very clear it was a condition of my employment at Keltic. I signed it, as a condition of employment, to retain my job.

[25] Case authorities seem to go two ways on the issue. In some, the courts have said that continued employment is not valid consideration because the employer

was already required to continue to employ the employee. In other cases, the courts have said that continued employment is valid consideration.

[26] I do not rely on the authorities which dealt with restrictive covenants in the context of the sale of a business. In *Guay Inc.v. Payette*, 2013 SCC 45, Wagner J., concluded the restrictive covenant was related to the sale of the business.

[27] In my view, the better line of authorities are those referred to and explained in *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418. Molloy J. considered *Maguire v. Northland Drug Company Limited*, [1935] S.C.R. 412, *Techform Products Ltd. v. Wolda,* [2001], O.J. No. 3822 (C.A.), and *Francis v. Canadian Imperial Bank of Commerce,*[1994], O.J. No. 2657 (C.A.). Although they came to different results on the issue of consideration, Molloy J. said the principles are the same but the facts differed from those in the decision before her.

[28] In *Maguire, supra,* the defendant could be given a short period of notice of termination of employment, and in the case of *Techform, supra,* termination of his consultancy contract. In *Maguire, supra,* a longer notice period was given by the employer and in the latter, Techform's evidence was that it would have terminated the contract if the agreement was not signed by the defendant. That evidence was

accepted by the trial judge. The courts concluded there was consideration for the signing of the agreements in those cases.

[29] In *Francis, supra,* and *Kohler, supra,* the court concluded in each case that there was no consideration. In *Francis, supra,* an employment agreement containing a restrictive covenant was executed after an offer of employment had been made and accepted.

[30] In *Kohler,* Molloy J. concluded in para. 40:

> In the case before me, there was no consideration flowing to Mr. Porter in exchange for his promise to give up the right to work for any competitor of Kohler for a one year period post employment. The stated consideration of continued "employment status with Kohler and the payment of salary during such employment" are things that Mr. Porter was already entitled to under his existing employment relationship with Kohler. The non-competition clause was clearly an amendment to the existing employment relationship that was adverse to the employee. As such, the employer is required to give something of value to the employee in exchange for that promise, beyond continued employment to which the employee is already entitled under the original contract.

She then concluded the agreement was not enforceable and the injunction was denied.

[31] In this case the first agreement was signed nine months after Mr. Montgomery started work. There is no evidence of any consideration for that agreement. The only evidence of consideration for the January 2014 agreement

was in Mr. Montgomery's affidavit quoted above. He was told everyone had to sign it and he did so to "retain my job."

[32] This is a similar situation to that which was posited by Rosenberg J.A., in *Techform, supra,* at para. 26 where he said:

> Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say "sign or you'll be fired" and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.

[33] I am not satisfied that Keltic has established a *prima facie* case that there was consideration for the restrictive covenant and, therefore, I cannot be satisfied that there is a *prima facie* case for its validity.

[34] The defendants have also said that the restrictive covenant is unenforceable because it is unreasonable. The onus is on Keltic to establish its reasonableness. Although I need not deal with this in light of my conclusion above, I will say in any event that its length does not appear to be unreasonable. A six month period would be a reasonable time to allow Keltic to contact its customers and try to establish or re-establish the relationship it had with them through David Montgomery.

[35] Failing to specify a geographic area in these circumstances may not be unreasonable either in light of the nature of the transportation business which is not restricted to a limited geographic area. As the Supreme Court of Canada said in *Guay, supra,* with respect to a non-solicitation clause:

> 73 Moreover, I am of the opinion that a territorial limitation is not absolutely necessary for a non-solicitation clause applying to all or some of the vendor's customers to be valid, since such a limitation can easily be identified by analyzing the target customers. In *World Wide Chemicals Inc. v. Bolduc*, 1991 CarswellQue 1157, *L.E.L. Marketing Ltée v. Otis*, [1989] Q.J. No. 1229 (Que. S.C.), and *Moore v. Charette* (1987), 19 C.C.E.L. 277 (Que. S.C.), for example, the Superior Court noted that a non-solicitation clause does not require a geographic limitation. Finally, in the context of the modern economy, and in particular of new technologies, customers are no longer limited geographically, which means that territorial limitations in non-solicitation clauses have generally become obsolete.

[36] In my view, specifying a geographic area is a requirement where a non-competition cause is in issue since it affects where a former employee may work. But in my view that is not the case for a non-solicitation clause.

Fiduciary

[37] Keltic's alternate argument is that David Montgomery was a fiduciary and has breached his duties as such. Keltic says David Montgomery was a fiduciary because of his role in Keltic's business. Mr. Montgomery says his role was more limited than that of someone found to be a fiduciary.

[38] The leading case on fiduciaries is *Frame v. Smith*, [1987] 2 S.C.J. No. 49. In that decision, Wilson J., in dissent, set out the characteristics of a fiduciary relationship. Her test, however, has been widely accepted since that decision in 1987. She said in para. 60:

> 60 Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[39] These characteristics have been described otherwise in the authorities to which Wilson J. referred in para. 64 of her decision. In that paragraph, she quoted from *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417, a decision of the Australian High Court where Gibbs, C.J. said at p. 432:

> ... there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is... analogous to a trust. Secondly, ... the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power.

[40] Wilson J. also quoted in para. 64 from a further portion of that decision at p. 454:

> ... the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

[41] Wilson J. also referred in para. 64 to the Nova Scotia Court of Appeal decision in *H.L. Misener and Son Ltd. v. Misener* (1977), 77 D.L.R. (3d) 428 (N.S.C.A.), where MacDonald J.A. said at p. 440:

> The reason such persons [directors] are subjected to the fiduciary relationship apparently is because they have a leeway for the exercise of discretion in dealing with third parties which can affect the legal position of their principals.

[42] More recently in *Survival Systems Training Ltd. v. Survival Systems Ltd.*, 2012 NSSC 202, Edwards J. considered whether the plaintiff's former employees owed fiduciary duties. He considered their job duties and with respect to one he said at para. 38

> 38 ... Comeau, as Special Projects Officer, was a manager with SSTL and worked together with Carroll to develop and implement business strategies, market SSTL's services to clients and maintain client relations. ...

He concluded he owed fiduciary duties.

[43] Edwards J. also concluded a number of other employees were key employees who owed fiduciary duties. At para. 39 he cited *GasTOPS Ltd. v. Forsyth*, 2009 CarswellOnt 5773 (Ont. S.C.J.) where Granger J. described a key employee and the factors in determining if someone is a key employee. In para. 39 Edwards J. quoted at length from the *GasTOPS* decision, paras. 82 to 85:

> 82 [...] A key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure.
>
> [...]
>
> i. What were the employee's job duties with the former employer?
>
> ii. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
>
> iii. Was the employee the primary contact with the customers and (or) suppliers?
>
> iv. To what extent was the employee responsible for sales or revenue?
>
> iv. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
>
> v. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?
>
> ...
>
> 84 After identifying an employee as "key", further determining whether that employee is a "fiduciary" is a difficult endeavor. According to James D'Andrea, "generally, a fiduciary is one who is empowered to act on behalf of and for the benefit of another with the ability to affect that other's interest through the use of discretion" (Employment Obligations in Canada, looseleaf (Aurora Ont.; Canada Law Book 2006))
>
> 85 The jurisprudence has imposed fiduciary obligations on employees in a number of different factual circumstances and in so doing have considered:
>
> (a) whether the employee has scope for the exercise of some discretion or power, the employee can unilaterally exercise that power or discretion so as to

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

[44] Keltic says David Montgomery's duties answer the questions posed by Justice Granger in *GasTOPS, supra,* with the result that he was a fiduciary.

[45] Keltic also referred to the decisions in *Edgar T. Alberts Ltd. v. Mountjoy*, 1977 CarswellOnt 48 (Ont. H.C.J.), and in *White Oaks Welding Supplies v. Tapp*,

1983 CarswellOnt. 915 (Ont. S.C.), both of which cited *Canadian Aero Service Ltd. v. O'Malley,* [1973] S.C.J. No. 97.

[46] In the former, Mountjoy was the chief executive of the plaintiff. At para. 13 Estey C.J.H.C. (as he then was) said of Mountjoy, he:

> ...in effect managed the business as a sole proprietor. That is not to say he had authority to hire and fire or interfere with the capital assets of the business, but it is clear that operationally he reported to nobody.

[47] In finding that Mountjoy had owed fiduciary duties to his former employer, Estey C.J.H.C. referred to the nature of the business, saying in para. 31: decision:

> 31 Thus, the substantial business asset of the plaintiff, namely, its trade attachment with its clients, is a vulnerable asset exposed to the depredations of competition in all forms and particularly competition from ex-employees. Accordingly, it is not surprising to find a fiduciary duty arising in former employees for the protection of the undertaking of the former employer.

[48] He continued at para. 34 with respect to the particular business of the plaintiff

> 34 The vulnerable and exposed asset of the plaintiff in this case is, of course, the opportunity to obtain renewal commissions when the contracts of insurance of the plaintiff's clientele came up for renewal in the future. That attachment, left undisturbed, represented the earning power of the plaintiff. The entire details of the existence and nature and extent of the attachment between each of its customers was, of course, completely and properly within the knowledge of the defendant Mountjoy and to a lesser extent the defendant Butt.

[49] In *White Oaks Welding Supplies v. Tapp, supra,* Osler J. distinguished the facts from those in *Can Aero, supra,* and *Edgar Alberts, supra,* but went on to conclude Tapp was a fiduciary saying in para. 15:

> ... Nevertheless, the defendant, with his encyclopaedic knowledge of the plaintiff's customers, his unrestricted access to all customer lists and information concerning such customers, and his personal contact with and responsibility for a large proportion of the plaintiff 's customers, was a senior employee with a fiduciary relationship to his employer of the same type and on the same plane as those discussed in those cases. His obligation was not simply that of every employee to refrain from taking with him material related to his former employer's business and making use of such material. The obligation of Tapp was of an altogether higher nature and was to refrain, not from competition, but from deliberately soliciting customers of the plaintiff, other than as part of the general customer public to whom general solicitation might be made.

[50] To the contrary, the defendants refer me to *Can Aero, supra.* In that case, two of the defendants were president and executive vice president of the plaintiff and Laskin J. (as he then was) said of them:

> ...They were "top management" and not mere employees whose duty to their employer,.... consisted only of respect for trade secrets and for confidentiality of customer lists.

[51] He continued that:

> ... their positions as senior officers of a subsidiary,... charged them with initiatives and with responsibilities far removed from the obedient role of servants.

[52] The defendants also referred to *Phytoderm Inc. v. Urwin*, [1999] O.J. No. 383 (Ont. C.J.) where Low J. concluded that not all sales representatives are fiduciaries. She said in para. 17:

> … it cannot be said that an employee becomes a fiduciary simply because he or she has had knowledge of and contact with the employer's customers and has been engaged in promoting and selling the employer's goods. If that were all that were required, every sales representative would be a fiduciary. It is axiomatic that a corporate employer can only interact with its customers through individuals and that sales and marketing employees are crucial to selling an employer's products, but not every salesperson is a fiduciary, and in the absence of a role as director, officer or a very senior managerial position such as to put the employee into a position of intimate knowledge and control over the employer's operations, the assumption is that an employee is not a fiduciary unless special circumstances exist.

[53] In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2003] B.C.J. No. 2700 (S.C.), Holmes J. concluded that investment advisors, although key to the operations of the bank branch, did not owe fiduciary duties. She said in para. 45:

> … To characterize as a fiduciary every employee who is necessary to an operation and who is difficult to replace would be, in my view, to extend the reach of a fiduciary relationship beyond its proper scope as contemplated in Frame v. Smith.

[54] Nor did she conclude that the branch manager was a fiduciary, even though she set out his duties as follows in para. 55:

> As branch manager, Mr. Delamont was responsible for running the day-to-day operations of the Cranbrook branch, for hiring, coaching IAs, supervising and disciplining employees, ensuring compliance with regulatory requirements, representing the firm in the local community, arranging for local advertising, and (subject to some constraints discussed below) setting the budget for the branch. He was privy to the confidential information of all of the clients of the branch. He was the highly-regarded leader of the branch, and was a role model, coach, and mentor to many of the IAs.

[55] However, she concluded in para. 58:

> However, I am unable to conclude that Mr. Delamont's larger role and responsibilities were sufficient to imbue him with fiduciary status.

[56] Holmes J. said he lacked final authority to hire and fire; prepared the branch budget but based upon a so-called template from head office; had no responsibility for the leasing of the premises and related activities; and had little direct involvement in setting company policy.

[57] So the question for me is whether Keltic has satisfied me that it has a *prima facie* case that David Montgomery owed a fiduciary duty. Much turns on the facts and they are disputed. Applying the law to facts that are to be determined is in my view a matter for trial.

[58] Keltic is not a small company like Survival Systems nor is David Montgomery running Keltic's office much like a sole proprietor as Mountjoy was in the *Edgar Alberts* case. He did have the sort of knowledge and contacts with customers that Mr. Tapp had in the *White Oaks Welding* case. However, I note that both *White Oaks* and the *Edgar Alberts* decisions were made before the Supreme Court of Canada decision in *Frame v. Smith, supra*. *Phytoderm* and *RBC Dominion Securities* both were decided after *Frame v. Smith, supra*.

[59] In my view there is a real question about David Montgomery's scope for exercise of discretion so as to affect Keltic's interest. He was the business

development manager and attended at least one high-level meeting of the most senior executives at Keltic. This in my view raises a serious question for trial, but the test is whether this establishes a *prima facie* case. I am not to make findings of fact or delve too closely into the merits in deciding whether or not the injunction should be granted. It may be that Keltic will succeed on this issue at trial but it also may not.

[60] I therefore cannot say that Keltic has made out a *prima facie* case on this issue. Accordingly, I do not grant the interlocutory injunction, the first step of the test not having been met.

[61] Although I do not need to do so, Keltic having failed on the first part of the test, I will deal very briefly with the issues of irreparable harm and balance of convenience.

Irreparable harm

[62] If a *prima facie* case had been established, the issue of irreparable harm would have had less importance. In this case, the issue is whether damages can be ascertained.

[63] Keltic must produce evidence of irreparable harm. It says it has suffered a loss of market share, a loss of goodwill and a permanent loss of business. It says that these are not compensable by damages.

[64] Keltic also points to the difficulties caused by the loss of information from David Montgomery's Blackberry and computer, which were returned wiped clean of data containing all customer files. Some of the files had been recovered but Keltic says that it cannot be certain that it has all of them.

[65] The defendants say that the damages can be ascertained if Keltic is successful at trial. They cite authorities which state that in circumstances such as these damages have been determined after trial. They say that difficulty in doing so is not a reason to conclude Keltic would suffer irreparable harm.

[66] I conclude, based on a review of the authorities, that in the case of a non-solicitation clause, although it may be difficult to assess damages, there is no irreparable harm which cannot be compensated by damages. A good source of the information which would be necessary to make this determination, in the event of success, is the books and records of the defendant Fulcrum.

Balance of convenience

[67] On the issue of balance of convenience I prefer, as Quinn J. did, in *Sheehan, supra,* to refer to this as the balance of inconvenience since that is really what is being considered.

[68] Keltic has lost the opportunity to make contact with its customers and try to retain them. That was the purpose of the non-solicitation clause. David Montgomery has not denied wiping clean the Blackberry and the computer he used at Keltic. Keltic is not saying that Mr. Montgomery and Fulcrum cannot compete with them, they say they are simply trying to protect their own customer base.

[69] On the other hand, Fulcrum is a new company. David Montgomery says that if it was prevented from contacting former customers of Keltic it "could not operate sustainably." Implicit in this is an acknowledgement that Keltic's former customers form a large part, at least, of Fulcrum's business.

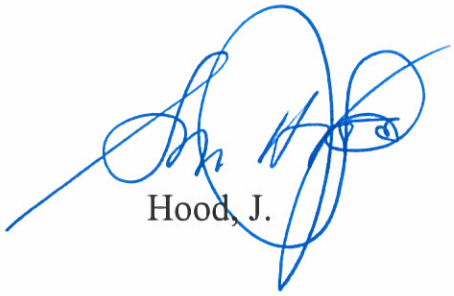
[70] Keltic is an established company. Its website lists its head office as Moncton with Oakville, Ontario and Mount Pearl offices. The Dartmouth office where David Montgomery worked is no longer listed on the Keltic website. Keltic's website also lists other people as business development managers, the title David Montgomery had.

[71] I also note that David Montgomery brought many customers with him when he joined Keltic, that being the reason Keltic hired him. Therefore it appears that Keltic, in hiring David Montgomery, did what David Montgomery has now done – take customers from a former employer for its own business.

[72] In all the circumstances, I conclude it would be more harmful to the defendants if the injunction were granted. If a non-solicitation clause was found at trial to be unenforceable and David Montgomery found not to be a fiduciary, it may be determined that there was no prohibition on him contacting Keltic's customers. If the injunction is granted, the effect on the defendants will likely be to put them out of business. Keltic on the other hand, if successful, can be compensated in damages for the actions of David Montgomery and Fulcrum. The balance, in my view, clearly falls in favour of the defendants.

CONCLUSION:

[73] The interlocutory injunction is not granted. Costs are to be determined after receipt of written submissions of counsel.



Hood, J.