

1988

S.H. No. 66203

**IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION**

BETWEEN:

ACTION BUSINESS MACHINES LIMITED

Plaintiff

- and -

**FRANK COADY, ROGER LANDRY, OWEN MacNEIL,
BRIAN McCOUBREY, FAYE COADY and
POS ATLANTIC LIMITED**

Defendants

HEARD: at Halifax, Nova Scotia, before the Honourable
Mr. Justice John M. Davison, in Chambers, on
Thursday, October 27th, 1988

DECISION: November 9, 1988

COUNSEL: James L. Connors, Esq., for the Plaintiff
Sandra B. MacPherson, Esq., for the Plaintiff
M. Lee Cohen, Esq., for the Defendants
Glen Johnson, Esq., for the Defendants

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Defendants

DAVISON, J.:

The Plaintiff is a supplier of point of sale technology and equipment to retail outlets in the Atlantic provinces. Until recent times, the Plaintiff also carried on business in Ontario but by reason of financial stress their office in that province was closed in 1987.

The individual Defendants are all former employees of the Plaintiff and are now employees of the Defendant, POS Atlantic Limited, which was incorporated in August of 1988. This Company was incorporated by several of the individual Defendants and in the last several weeks, all of the individual Defendants left the employ of the Plaintiff and became employees of the Defendant, POS Atlantic Limited.

This application is for an Injunction to:

- 1) restrain the Defendants from contacting, soliciting or competing with the Plaintiff for customers;
- 2) from soliciting the employees of the Plaintiff;
- 3) from contacting the creditors or suppliers of the Plaintiff;
- 4) from disclosing or disseminating information concerning pricing policies, supply policies, product line information, new product line information, problems with existing product lines, or other "confidential" information acquired by them in the course of their employment with the Plaintiff corporation;
- 5) require the Defendants to deliver to the Plaintiff all "file materials gathered while in the course of employment with the Plaintiff corporation for inspection by the Plaintiff corporation and for preservation by the Plaintiff corporation".

All of the evidence advanced on behalf of the Plaintiff was contained in two Affidavits of Timothy Adams, the President of the Plaintiff Company. Counsel for the Defendants elected not to cross-examine Mr. Adams. The Defendants submitted long Affidavits of Frank Coady, Faye Coady and Owen MacNeil, all of whom were cross-examined by counsel for the Plaintiff.

The time constraints on the Defendants did not permit early filing of the Affidavits and other material. I considered it necessary to reserve my decision to review this material.

The Affidavits are on file and because the nature of the application dictates an early decision, I will not review the facts in detail.

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

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

The granting of an interlocutory injunction is a matter of judicial discretion, but it is a discretion to be exercised on judicial principles. I have dealt with this matter at length because I wish to emphasize how important it is that parties should not be restrained by interlocutory injunctions unless some irreparable injury is likely to accrue to the plaintiff, and the Court should be particularly cautious where there is a serious question as to whether the plaintiff would

ever succeed in the action. I may put it in a different way: If on one hand a fair prima facie case is made out and there will be irreparable damage if the injunction is not granted, it should be granted, but in deciding whether an interlocutory injunction should be granted the defendant's interests must receive the same consideration as the plaintiff's.

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

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

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

STRONG PRIMA FACIE CASE

In J. W. Bird and Company Limited v. Levesque et al, (supra), I stated at p. 439:

I agree that there will be situations where it will be just to grant an injunction despite

the lack of proof of a prima facie case. Ultimately, the issue is whether it would be "just and convenient" and the judicial discretion required shouldn't be fettered with too many rules. Nevertheless, an injunction should be considered an extraordinary remedy and, 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.

It is the Plaintiff's submission that the individual Defendants, with the exception of Faye Coady, had positions with the Plaintiff company of such seniority as to give rise to a fiduciary duty as discussed by the Supreme Court of Canada in Canadian Aero Service Ltd. v. O'Malley (1973), 40 D.L.R. (3d) 371 at 381-2. In that case, the court distinguished between "top management" and "mere employees". The duty of the latter, in the absence of contrary contractual terms, was limited to respect for trade secrets and confidentiality of customer lists. Laskin, J. (as he then was) stated at p. 382:

... the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been

negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

In his Affidavit, Timothy Adams described Frank Coady as a Marketing Manager and a Director of the Plaintiff who managed the Sobey's account. Adams described Roger Landry as head of the New Brunswick and Prince Edward Island operations and Owen MacReid as Service Manager for the Plaintiff who arranged the servicing and supplies of all service contracts.

The Defendants minimized their positions of responsibility. In the cross-examination of Coady, it was established that he was a Director and had signed resolutions and other documents as a Director but he did not participate as a Director at any meetings and did not conduct any responsibilities as a director.

I find that the Plaintiff has established, by the Affidavits of Timothy Adams, a prima facie case. I hasten to say that I found Frank Coady's evidence credible when he gave testimony which would suggest he was a nominal director only but I did not have the opportunity of observing Mr. Adams on the stand. It would be unfair to foreclose the Plaintiff from a remedy on the basis of conflicting Affidavits. In this situation, the strength of the Plaintiff's case should be determined by the trial judge. For the purposes of this application, I find the Plaintiff has advanced sufficient evidence

to establish a prima facie case.

IRREPARABLE DAMAGE

It is the position of the Plaintiff that the continued solicitation of customers, employees, creditors and suppliers will cause the Plaintiff irreparable harm. In particular, the Plaintiff refers to the decrease in revenue if it loses major accounts such as Sobey's Ltd. and Atlantic Wholesalers Limited. Mr. Adams says the loss of these accounts would place the Plaintiff "in a serious financial loss position, which given last year's loss, I do not believe the corporation would be able to sustain."

Dealing with the request to prohibit solicitation of customers and suppliers, I would note that situation is different from that which faced me in J. W. Bird v. Levesque, (supra). Here, the Plaintiff's concern is the loss of a few major customers. Any damages which may arise from that event in the form of lost revenue would be calculable in damages.

It is true that the courts have granted injunctions where it has been shown the Act complained of would put the Applicant out of business. The evidence before me falls short of convincing me that the Plaintiff will be forced to close its business but even if I was convinced that the solicitation of customers and suppliers would have such a serious effect on the

Plaintiff, I would have difficulty precluding the Defendants from carrying on their trade.

On the other hand, it is clear from the evidence that the Plaintiff has certain key people in its employ with specific knowledge of the industry. In my view, the Defendants should be restrained from approaching these key people and from attempting to seduce them into the employ of the corporate Defendant. The loss of these employees could cause damage which could not be calculated in money terms.

There is a direct conflict in the evidence submitted by Affidavit concerning the use of documents of a confidential nature. Adams states that files in connection with the Plaintiff's business with major customers, service information on a product of Telxon, quotations to customers, information on pricing policies and product information were missing following the departure of the Defendants. The Defendants Coady and MacNeil deny taking any documents.

There is an allegation in the Affidavit of Mr. Adams to the effect that Brian McCoubrey is in possession of confidential information concerning software programmes and system configurations for customers. I did not receive an Affidavit of Mr. McCoubrey.

I cannot make a determination on the accuracy of the allegations of the Plaintiff with respect to confidential documents based on the conflicting Affidavits. I will assume some documents are in the hands of the Defendants and make an Order accordingly. If such documents are not in the possession of the Defendants, the direction in the Order will be meaningless but no harm will have been done.

BALANCE OF CONVENIENCE

The court should be slow to grant injunctions which restrain trade in the absence of contractual terms to that effect or other good reason.

The Defendants are commencing a new enterprise in a business in which they are knowledgeable as a result of many years of labour. A restraining order would probably terminate this business. I am not convinced, on the evidence before me, that the Defendants' efforts in the industry would have a similar effect on the Plaintiff.

In my view, the balance of convenience, with respect to the application to restrain the Defendants from approaching customers and suppliers, favours the Defendants.

CONCLUSION

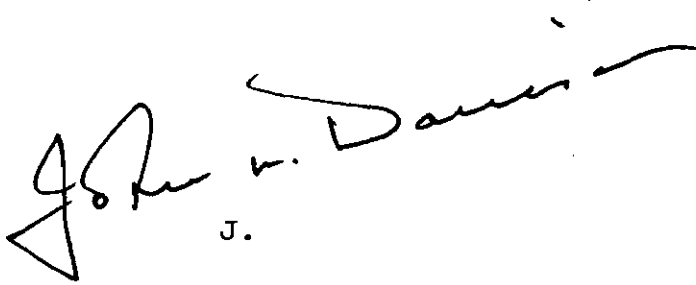
I will sign an Order which:

- (1) restrains the Defendants from approaching the present employees of the Plaintiff with a view to enticing those persons to leave their present employment. Naturally, the Order would not restrain the employees of the Plaintiff from leaving their present employment and taking a job with the corporate Defendant if the move is done through the initiative of the employee.
- (2) disclosing or disseminating information concerning pricing policies, supply policies or other information of a confidential nature as it relates particularly to the business of the Plaintiff and which is the property of the Plaintiff. This would not restrict the Defendants from making use of general knowledge of the industry and products of the industry acquired during the employment experience.
- (3) return to the Plaintiff any file material or documents owned by the Plaintiff.

I recognize the danger that my directions may cause confusion and further difficulties and, in the interest of better certainty, I state that I am requiring the Defendants to return documents and to refrain from disclosing information which could be termed "confidential information" of the Plaintiff's. The enjoiner does not relate to information generally known in the industry or documents acquired by the Defendants which are personal

to them.

As there has been divided success, there will be no costs of the application.

A handwritten signature in black ink, appearing to read "John W. Davis". The signature is written in a cursive style with a large, stylized initial "J". Below the signature, the letter "J." is printed in a small, plain font.

Halifax, Nova Scotia
November 9, 1988