

1987

S.H. No. 62843

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

**BETWEEN:**

**J. W. BIRD and COMPANY LIMITED**

Plaintiff

- and -

**MICHEL LEVESQUE, CORNERSTONE CONSTRUCTION  
PRODUCTS LIMITED and CORNERSTONE  
DEVELOPMENTS**

Defendants

HEARD: at Halifax, Nova Scotia, before the  
Honourable Mr. Justice John M. Davison,  
in Chambers, on December 30, 1987.

DECISION: February 3, 1988

COUNSEL: Colin D. Bryson, Esq., for the Plaintiff  
R. J. Ross Stinson, Esq., for the Defendants  
James P. Boudreau, Esq., for the Defendants

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DAVISON, J.:

This is an application for an interim injunction restraining the Defendants, and any companies owned or controlled by the Defendants, from directly soliciting the customers and suppliers of the Plaintiff and from inducing the employees of the Plaintiff to work for the Defendants.

The Plaintiff commenced an action by an Originating Notice and Statement of Claim issued on the 9th day of December, 1987, claiming, "for a reasonable period of time", an injunction the terms of which are consistent with that which was being sought on an interim basis and also for general damages.

In support of the application for an interim injunction, the Plaintiff filed the Affidavit of J. W. Bird, Chairman of the Plaintiff company, and the Defendants filed the Affidavit of Michel Levesque.

The Plaintiff is said to be in the business of supplying "specialty construction products" to parties involved in the construction industry in the Atlantic provinces. It is alleged that these products are not readily available in building supply stores and that the Plaintiff's advantage lies in its knowledge of suppliers for these products which knowledge has been accumulated over a number of years. The Plaintiff regards its knowledge of suppliers and customers and its relationship with them as privileged and confidential trade information which belonged to the Plaintiff.

The Defendant, Michel Levesque, was employed with the Plaintiff until November 30th, 1987, and had been employed with that company for over seven years as a sales representative. In his Affidavit, Mr. Bird says that Mr. Levesque was responsible for approximately 50 "key" accounts and that during his years with the Plaintiff company, Levesque had the opportunity of developing relationships with suppliers of the Plaintiff. Mr. Bird's Affidavit goes on to describe Mr. Levesque as one of four most senior people responsible

for specialty construction products in Nova Scotia who reported to the Nova Scotia Divisional Manager of Specialty Construction Products who in turn reported to Mr. Bird. Mr. Levesque was said to be in the top 10% of employees as far as remuneration was concerned and was earning a base salary of \$35,000 a year plus expenses and commissions.

It is alleged that Mr. Levesque, before he left the employ of the Plaintiff, approached one of the Plaintiff's suppliers and advised that he was going into business for himself and that Mr. Levesque also attempted to induce one Madelon Parker to leave the employ of the Plaintiff and join Levesque in his new venture. Madelon Parker was described as a temporary seasonal employee involved in revision of cost and price structures. It is also alleged that Levesque approached customers of the Plaintiff before his resignation with a view to securing them as his customers.

It is alleged that the Defendant, Cornerstone Construction Products Limited, was incorporated on November 9th, 1987, and that the name Cornerstone Developments was registered as a business name under the Partnerships and Business Names Registration Act, R.S.N.S., 1967, c.225 on May 14th, 1987.

It is alleged by Mr. Bird in his Affidavit that

solicitations by Mr. Levesque to the suppliers and the customers "may well have caused damage" to the Plaintiff but that "it is too early to know that with any certainty". It is also alleged that if the Defendants are permitted to continue to solicit the suppliers and customers of the Plaintiff, the solicitations will result in irreparable harm through lost business.

In his Affidavit, Mr. Michel Levesque stipulates that his employment with the Plaintiff was not the subject of a written agreement and that during his tenure with the company he had no involvement "at the managerial level" and performed no managerial functions. Mr. Levesque states that the business carried on by the Plaintiff was not unique or special to the Plaintiff company and that many other companies carry on a business of a similar nature. The Affidavit also stated that the knowledge and access to producers and suppliers were generally known throughout the construction industry. It is said that the identity of any customers or suppliers were readily attainable through references to the membership list of the Nova Scotia Construction Association or by visiting job sites and examining business directories.

Mr. Levesque went on to attest to the fact that when he resigned from the Plaintiff company by letter dated

November 16th, 1987, he returned all written documentation and customer lists and has not retained any copies of this documentation. He states that the contact that he has had with the customers and suppliers was initiated and based upon his knowledge and skill acquired during his time in the industry generally and was not based upon any written confidential information or customer lists. Mr. Levesque denies attempting to solicit business from the one customer referred to in the Affidavit of Mr. Bird and denies inducing any employees to breach their contract with the Plaintiff corporation. His Affidavit goes on to state that Madelon Parker had advised him that she had already tendered her resignation to the Plaintiff before entering into employment negotiations with the Defendant company. Mr. Levesque also denies making representations to any of the Plaintiff company's customers before leaving the employ of the Plaintiff company. He denies revealing confidential information or trade secrets about his former employer and states that any information of which he made use was based on his own personal skill and knowledge.

The court's jurisdiction to grant interlocutory injunctions is found in s. 39(9) of the Judicature Act S.N.S. 1972, c.2. It may be granted when it appears to the court that it would be just and convenient to do so. The discretion in the court is wide.

The interlocutory injunction has been used as a procedure for maintaining the status quo prior to the trial of an issue. As the rights of parties are affected prior to a full trial the remedy has been considered, and in my view, should still be considered an extraordinary remedy.

The traditional factors required of an applicant for attaining an injunction, which seemed to have been crystallized by the House of Lords in J.T. Stratford & Son Ltd. v. Lindley, [1965] A.C. 269, were to prove by way of a prima facie case that there has been an infringement of his rights and that irreparable harm will ensue which could not be compensated by damages. The Applicant usually must show that the inconvenience he will suffer, if the remedy is refused, is greater than the inconvenience to the Defendant if the injunction is granted.

Ten years after the Stratford case, the House of Lords handed down the decision in American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316. In that case, Lord Diplock rejected the suggestion that the Plaintiff was required to prove a prima facie case and went to say at page 323:

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.

This apparent conflict between two judgments of the House of Lords left the Bar in England and the Court of Appeal, when deciding Fellowes & Son v. Fisher, [1975] 3 W.L.R. 184, in a quandary. Lord Denning, M.R. pointed out that the House did not refer to the Stratford case in its judgment in the American Cyanamid case and goes on to reconcile the two cases by finding that the Fellowes case fell within the exceptional cases referred to by the House as involving "special factors to be taken into consideration in the particular circumstances of individual cases". Denning, M.R. added that these individual cases are important and numerous. Browne, L.J. rationalized the difference in the two cases by pointing out that the House in the Stratford case adopted a principle which was common ground between counsel whereas in the American Cyanamid there was direct decision on the point. There is no doubt the Court of Appeal had difficulty with the reasoning of the House of Lords including the imposition of "rigid rules" for a discretionary remedy.



The American Cyanamid test has received a mixed reaction in Canada. In Ontario, the courts, initially, appeared reluctant to follow the rules laid down by Lord Diplock and Holland, J. in Cradle Pictures (Canada) Ltd. v. Penner (1976), 63 D.L.R. (3d) 440 stated at p.443:

In my view, for me to make an order enjoining Anne Penner and Penner Studio Ltd. from carrying on the activities above described I must first be satisfied that the plaintiff has made out a strong prima facie case that Mrs. Penner and this company are in fact carrying on this business under the direction, supervision and control of Mr. Penner. In American Cyanamid Co. v. Ethicon Ltd., [1975] 2 W.L.R. 316, the House of Lords appeared to indicate that this is no longer the test; the test being only whether there was a serious question to be tried. In Fellowes & Son v. Fisher, in which judgment was delivered by the Court of Appeal in England on May 2, 1975, members of the Court expressed the view that the decision of the House of Lords in the American Cyanamid Co. case on the principles to be applied when Courts were asked to grant an interlocutory injunction, not only was at variance with the approach of the House until that time but also represented a complete departure from the practice in England up to that time.

Whatever may be the law of England at the present time it certainly appears to me that the test I have outlined above is the law of Ontario at the present time.

Other cases in Ontario cast a different complexion and I refer to Bernard v. Valentini (1978), 18 O.R. (2d) 656 and Labelle v. Ottawa Real Estate Board (1977), 16 O.R. (2d) 502.

The Manitoba Court of Appeal in Lambair Ltd. v. Aero Trades (Western) Limited (1978), 87 D.L.R. (3d) 500 rejected the American Cyanamid approach whereas a single judge in British Columbia adopted it in Bowman Products (Canada) Ltd. v. Fach (1976), 24 C.P.R. (2d) 282.

In Nova Scotia, Mr. Justice Burchell conducted an incisive review of the relevant principles in McFetridge v. Nova Scotia Barristers Society (1981), 48 N.S.R. (2d) 323 and applied the test in the American Cyanamid case. An appeal was allowed but on the grounds other than the issue raised by the American Cyanamid case.

On the other hand, it is clear from Mercator Enterprises Ltd. v. Harris & Mainland Investments Ltd. (1978), 29 N.S.R. (2d) 691 and United Rubber, Cork, Linoleum and Plastic Workers of America v. Michelin Tires (Canada) Ltd. (1979), 35 N.S.R. (2d) 104, both of which were decided subsequent to the American Cyanamid case, that the law in Nova Scotia requires the Plaintiff to "ordinarily" show a strong prima facie case.

Hallett, J., of our Court, in Lintaman v. Goodman (1982), 54 N.S.R. (2d) 320 expressed the view that the decisions of the Appeal Division in Mercator and in Aspotogan v. Lawrence (1976), 14 N.S.R. (2d) 501 don't limit the

approach the court should take in granting an injunction and the important question is whether it is "just and convenient" to do so.

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.

Before leaving this subject, I would refer to the recent judgment of the Supreme Court of Canada in Aetna Financial Services Limited v. Feigelman [1985] 1 S.C.R. 2 which dealt with a Mareva injunction. Early in his

judgement, Estey, J. spoke of interlocutory injunctions generally and 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.

Although recognizing the doubts cast on the "prima facie" rule, Mr. Justice Estey refrained from endorsing those doubts. On the other hand, he clearly indicated the need for good and valid reasons before the remedy is granted.

I now turn to the substantive issues raised by the Plaintiff in the action and in submissions made before me. I need not review the law in great detail but must give consideration to whether the Plaintiff has convinced me it has a prima facie case.

It is the position of the Applicant that:

- (a) the information that the Defendant took when he left the employ of the Plaintiff constituted "trade secrets";
- (b) Alternatively, the relationship the Defendant had with the Plaintiff was fiduciary in character and the Defendant has breached that trust;
- (c) If the relationship was not fiduciary, the Defendant made improper use of confidential information belonging to the Plaintiff and should be restrained. In this respect, the Plaintiff relies on the judgment of O'Leary, J. in Monarch Messenger Services Ltd. v. Houlding (1984), 2 C.P.R. (3d) 235.

At the outset, this case must be distinguished from those where employees have entered contracts with employers restricting activities following departure from employment. We are not concerned with the very basic struggle between freedom to contract and the right to be free from restraints on trade.

The Defendant denies taking any confidential documents. There is no suggestion that he left the employ of the Plaintiff with any thing other than the additional knowledge and skill with respect to the products sold by the Plaintiff and knowledge of the customers and suppliers which, in my view, cannot be considered "trade secrets" in the sense that processes or procedures peculiar to the Plaintiff would be considered "trade secrets". Most sales organizations have customers and suppliers and the identity of these customers and suppliers are not peculiar to the individual sales organization. In the absence of a contract prohibiting solicitation or in the absence of a fiduciary relationship, there should be no restriction on persons who wish to engage in trade with customers or suppliers.

When an employee reaches a senior level of employment, a fiduciary relationship develops with his employer prohibiting the employee, upon leaving the employment, from breaching the trust by soliciting business

from customers of the former employer. It arises because of the obvious conflict of interest situation in which the former employee finds himself. There is no duty upon other employees to refrain from competing with a former employer. For a better understanding, I refer to Alberts v. Mountjoy (1977), 16 O.R. (2d) 682; Hudson's Bay Company v. McClocklin, [1986] 5 W.W.R. 29; Canadian Aero Service Ltd. v. O'Malley (1973), 40 D.L.R. (3d) 371 (S.C.C.)

I am not convinced by the Affidavit evidence before me that the Defendant had such a position with the Plaintiff or that he assumed the responsibility of the strict ethic imposed on senior employees or directors as that ethic is described by Laskin, J. (as he then was) in the Canadian Aero Services Ltd. case (supra).

In my view, the Plaintiff has not established a prima facie case. If one applied the American Cyanamid test, I would have greater difficulty saying that the competing Affidavits did not raise a serious question to be tried but that test, in my view, could be satisfied in all but the most frivolous of applications.

I agree with the submission of counsel for the Plaintiff that damages of the Plaintiff would be difficult to calculate. For that matter, the same could be said of

the damages of the Defendant should the injunction be granted. The fact that damages are difficult to calculate does not eliminate the responsibility of the court to assess them but it may render damages an inappropriate remedy.

In any event, it is my view that one of the most important factors in determining whether an injunction is "just and convenient" is the weighing of the balance of convenience. When I consider the evidence of Mr. Bird that the alleged action of the Defendant "may well have caused damage" to the Plaintiff in contrast to that of Mr. Levesque wherein he attests that an injunction would "effectively shut down" his business resulting in irreparable damage, I have no difficulty in finding that the balance of convenience strongly favors refusal of the injunction.

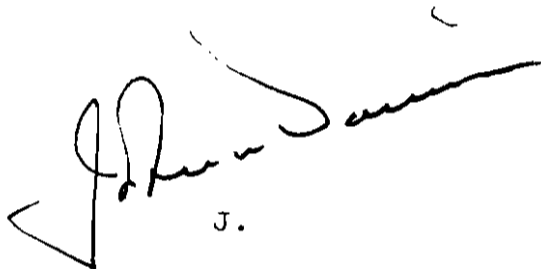
There remains for consideration the allegation of the Plaintiff that the Defendant, Levesque, has induced an employee to leave her employment with the Plaintiff and that an injunction should be granted to prevent similar acts in the future. The Defendant denies inducing any employees to breach their contract of employment and states that the specific employee referred to by Mr. Bird, who was a temporary seasonal employee, had tendered her resignation to the Plaintiff company before entering negotiations with the Defendant company.



The Plaintiff has not adduced evidence to indicate the Defendant has started a campaign to lure employees from the Plaintiff or that there is danger the Defendant would take similar steps with other employees.

Even if it could be said the Plaintiff has advanced sufficient facts to warrant the remedy sought and even if it could be said the application was not premature, and I have doubts with respect to both counts, I have not been convinced that irreparable harm would result and that damages would be inappropriate.

The application is dismissed with costs to the Defendants in any event of the cause.



J.

Halifax, Nova Scotia  
February 3, 1988