IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Accurate Material Testing Ltd. v. Keshavarzi,* 2023 BCSC 1302

Date: 20230728
Docket: S230959
Registry: Vancouver

Between:

Accurate Material Testing Ltd.

Plaintiff

And:

Hassan Keshavarzi and Prima Testing and Engineering Ltd.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:	W. McMillan E. Coffin N. Chan
Counsel for the Defendants:	B. Duong H. Cook E. Adhihetty, Articled Student
Place and Dates of Hearing:	Vancouver, B.C. May 11-12, 2023
Place and Date of Judgment:	Vancouver, B.C. July 28, 2023

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Introduction

[1] The plaintiff, Accurate Material Testing Ltd. (“Accurate”), applies for an interlocutory injunction prohibiting the corporate defendant, Prima Testing and Engineering Ltd. (“Prima”), and the personal defendant, Hassan Keshavarzi, from providing any services to a defined list of companies and entities and directly or indirectly soliciting business from any suppliers, agents, or customers of the plaintiff with whom Mr. Keshavarzi had dealings with while employed with Accurate. The plaintiff also applies for an affidavit confirming that a diligent search of the defendants’ records has been made and that they have no further copies of any records downloaded from the Accurate customer management database in their possession or control.

[2] The application also included an order that copies of the documents downloaded from the Accurate customer management database be provided to Accurate. It was confirmed that on May 7, 2023, the defendants provided a link disclosing copies of all documents Mr. Keshavarzi downloaded. Mr. Keshavarzi says that on the same date he had all copies of the documents deleted from Prima’s databases and he deleted all copies from his personal computer. He confirmed that none of the information in the files he exported from Accurate databases remained in

his or Prima's possession. Accurate continues to seek that Mr. Keshavarzi confirm by an affidavit that he does not have any other copies of the documents.

[3] Accurate also sought an order that the defendants be prohibited from encouraging Accurate employees from leaving. During the hearing, it advised that it was not pursuing this order since no other employees had left since last summer.

[4] The application was served on the 11 companies and entities defined in Schedule A attached to the notice of application. None have taken any position on this application.

[5] The underlying action is for the misappropriation of Accurate's confidential client information.

[6] The defendants seek an order dismissing the application on the basis that Accurate cannot meet the test in support of an interlocutory injunction.

Relevant Facts

[7] Accurate is a construction materials testing company founded in October 2015 by Mazyar Rastbin. Accurate provides concrete, soil, and asphalt testing services; materials engineering services; specialty testing services; and concrete repair services.

[8] Mr. Rastbin hired Mr. Keshavarzi as an Accurate employer in early 2016.

[9] A shareholders agreement dated July 1, 2019 (the "Shareholders Agreement"), was entered into whereby Mr. Keshavarzi purchased 40% of the shares in Accurate from Mr. Rastbin for $105,000. Clause 9 of the Shareholders Agreement included a non-competition and confidentiality clause. The non-competition clause, being clause 9.2, provided that the shareholders were not to compete and not to solicit any business away from Accurate for as long as the shareholders owned shares and for six months after they ceased to be shareholders. The confidentiality clause provided:

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> 9.4 **Confidentiality.** A Shareholder or former Shareholder shall not use or disclose to any person, except to duly authorized officers and employees of the Company or its Subsidiaries, any trade secret, business data or other confidential or proprietary information acquired by reason of the Shareholder's involvement and association with the Company or any of its Subsidiaries.

[10] On the same day the Shareholders Agreement was executed, Mr. Keshavarzi became a director of Accurate.

[11] On February 1, 2020, Mr. Rastbin sold another 10% of his shares to Houman Akhlaghi, Mr. Keshavarzi's cousin, for $60,000.

[12] Mr. Keshavarzi became part of the senior leadership team and his role included managing staff, building relationships with existing and prospective clients, strategic direction, preparing and maintaining important engineering documents, liaising with Accurate's accountant and bookkeeper, and some limited on-site work. Mr. Keshavarzi says that he worked with approximately 70 different companies while at Accurate.

[13] As a result of a breakdown in the relationships between Mr. Rastbin and Mr. Keshavarzi, the parties undertook negotiations in respect to the sale of their shares. Initially, Mr. Rastbin was going to sell his shares to Mr. Keshavarzi and Mr. Akhlaghi in late 2021 for $350,000. A letter of intent was sent by Mr. Keshavarzi's lawyer to Mr. Rastbin on December 14, 2021 which contemplated that Mr. Rastbin would enter into a non-competition, non-solicitation, and confidentiality agreement that would operate for one year following the closing date.

[14] On December 29, 2021, Mr. Rastbin's lawyer wrote requesting a higher purchase price of $475,000 and sought to negotiate a change to the non-competition and non-solicitation clause to operate for a period of six months after closing.

[15] On January 28, 2022, Mr. Rastbin, Mr. Keshavarzi, and Mr. Akhlaghi signed a letter of intent. The price had increased to $450,000 and the non-competition clause was reduced to six months.

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[16] On the closing date, Mr. Rastbin demanded $600,000 for his shares. Mr. Keshavarzi and Mr. Akhlaghi countered with an offer of $500,000, which was not accepted and the deal collapsed.

[17] A letter of intent dated April 27, 2022, signed by Mr. Rastbin and Mr. Keshavarzi ("April LOI"), provided that Mr. Keshavarzi would sell his shares for $375,000 and states that:

> **7. Non-Competition, Non- Solicitation and Confidentiality**
>
> The provisions of paragraphs 9.2 of shareholder agreement dated July 1, 2019, shall not apply to Vendor, and the Purchasers agree to exclude the non-competition, non-solicitation, and confidentiality, etc. clauses. The Purchasers also waived any other restrictions for the Vendor's business activities in the future.

[18] On May 17, 2022, Mr. Keshavarzi sent an email from his work account informing all of his contacts from his address book of his departure and his intention to start a new company. On May 25, 2022, Mr. Keshavarzi forwarded a copy of the email to Mr. Akhlaghi.

[19] On May 24, 2022, a share purchase agreement was reached whereby Mr. Keshavarzi, described as the vendor, sold his shares to entities controlled by Mr. Rastbin and Mr. Akhlaghi for $375,000 (the "Share Purchase Agreement"). The Share Purchase Agreement states:

> **7. Non-Competition, Non- Solicitation and Confidentiality**
>
> The Vendor and the Purchasers explicitly agree that there shall be no Non-Competition, Non-Solicitation and Confidentiality Agreement, and the vendor shall not be obligated to any restrictions.

[20] On the same day the Share Purchase Agreement was signed, Mr. Keshavarzi resigned as a director of Accurate. Mr. Akhlaghi became a director of Accurate.

[21] Mr. Keshavarzi's evidence is that he agreed to sell his 40% share so long as he was not bound by the provisions in the Shareholders Agreement concerning competition, solicitation and confidentiality. He did not want any such restrictions on any future business activity because his plan was to set up a competing materials

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testing company. He wanted to be able to use whatever he retained from Accurate to start up his own business. He asserts that Mr. Rastbin was aware of his plan.

[22] At some point in time prior to Mr. Keshavarzi's departure, he deleted engineering documents including letters of assurances, from the Accurate files. Mr. Keshavarzi admits that prior to his departure he "engaged in a considered and targeted exercise of deleting only files [he] considered either duplicate or unnecessary". I understand from counsel that Mr. Rastbin made a regulatory complaint to the Engineer and Geoscientists BC association regarding this matter.

[23] In addition to deleting documents, Mr. Keshavarzi exported a number of Excel spreadsheets from HubSpot. Accurate's customer relations management software. Mr. Keshavarzi maintains that he believed that he was entitled to obtain this information in accordance with the terms of the April LOI and contemplated Share Purchase Agreement.

[24] The documents downloaded consisted of 10 Excel spreadsheets which Mr. Keshavarzi describes in his affidavit #1 sworn May 8, 2023 at para. 46 as:

> …containing summary information, which fall into two broad categories: first, lists of [Accurate's] contacts, including clients and prospective clients; and second, lists of all projects [Accurate] had bid on and whether [Accurate] had been successful, lost, was waiting a response, or had sent rate sheets in hopes of wining a bid….

[25] Mr. Keshavarzi denies taking any rate sheets, detailed sales records, bids, or communications with Accurate's clients.

[26] On June 8, 2022, Prima began operations.

[27] On September 2, 2022, Accurate's counsel sent a letter to Mr. Keshavarzi demanding that he cease using any of Accurate's confidential information. The counsel wrote:

> We understand that you have formed a new company, Prima Testing & Engineering Ltd. and that your new company is actively engaged in the same business as [Accurate].

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> While our client does not object to you being engaged in the business, it has come to its attention that you are using certain confidential materials, information and references that are the proprietary to [Accurate] which has led to some confusion that you are still associated with [Accurate].

[28] On September 28, 2022, Mr. Keshavarzi's counsel emailed Accurate's counsel, and suggested that Accurate's allegations amounted to "an attempt to renegotiate key terms of a transaction that was completed in May" and further that "[t]he Share Repurchase Agreement indicates expressly that there are no obligations on Mr. Keshavarzi related to non-competition, non-solicitation, or confidentiality."

[29] There was no response to the September 28, 2022 email until the notice of civil claim was filed on February 8, 2023.

Legal Principles

[30] As an overarching principle, an injunction is an extraordinary remedy: *Vancouver Coastal Health Authority v. Adamson,* 2020 BCCA 145 at para. 31. In an application for interim injunctive relief, the court must consider the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The three factors to be considered are:

1. whether the petitioner has presented a serious issue or question to be tried;

2. whether the petitioner would suffer irreparable harm if the injunction were refused; and

3. whether the balance of convenience favours granting the injunction.

R. v. Canadian Broadcasting Corp., 2018 SCC 5 at para. 12 [*Canadian Broadcasting*]; *RJR-MacDonald* at 334–35.

[31] The Court of Appeal for British Columbia in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 346 (C.A.), aff'd [1991] 1 S.C.R. 62 [*Wale*], references a two-part test where irreparable harm and the other factors in the balance of convenience factors are considered together. There is no difference

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in substances in the two approaches: *Belron Canada Incorporated v. TCG International Inc.*, 2009 BCSC 596 at para. 32, aff'd 2009 BCCA 577 [*Belron Canada*]; *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 37 [*Vancouver Aquarium*].

[32] The first factor of a serious issue or question to be tried is not used where the injunction seeks to place restrictions on a person's ability to engage in their chosen vocation and earn a livelihood. In those circumstances, the strong *prima facie* standard is used: *Capital Direct Lending Corp. v. Blanchette*, 2019 BCSC 1068 at paras. 31–35 [*Capital Direct*].

[33] In *Canadian Broadcasting*, the Supreme Court of Canada set out the various formulations courts have used to describe what a strong *prima facie* case means. These formulations include "almost certain", a "strong and clear chance of success", and a "high degree of assurance" of success. The Court went on to explain at para. 17:

> Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
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> [Emphasis in original.]

[34] Where the standard of a "serious question to be tried" applies, the chambers judge must undertake a preliminary investigation of the merits to determine that the application is neither frivolous nor vexatious: *Canadian Broadcasting* at para. 12.

[35] Under the second factor, a finding of "irreparable harm" requires a demonstration that damages would be an inadequate remedy: *RJR-Macdonald* at 341. It requires a solid evidentiary foundation beyond mere speculation: *Vancouver Aquarium* at para. 60.

[36] Irreparable harm can be established in a number of ways:

> [106] There are other means by which an applicant can establish that the harm it will suffer will be irreparable in nature:

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a) Permanent loss of market share: *Schluter-Systems KG v. Dollar Tile Distributors Ltd*., 2013 BCSC 2508 at para. 13.

b) Loss of actual and potential customers: *J-Tech* at para. 19.

c) Loss of the ability of the plaintiff to exploit a market opportunity with the advantages of being the first entrant into the market without competition from the DR Defendants' similar product offerings: *SkyCope* at para. 25, citing *Omega digital Data Inc. v. Airos Technology Inc.* (1996), 32 O.R. (3d) 21 (Ont. Ct. (Gen. Div.)) at paras. 34–36.

d) General use of the plaintiff's confidential information: *SkyCope* at para. 24 citing *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 37.

e) The defendants' questionable ability to pay damages if an injunction is not granted: *Global Internet Management v. McLeod et al*, 2003 BCSC 652 at para. 60.

EnWave Corporation v. Dehydration Research, LLC, 2022 BCSC 637 at para. 106, leave to appeal to BCCA ref'd 2022 BCCA 347.

[37] Under the third factor, considerations relevant to determining the balance of convenience are numerous and will vary from case to case. The following list is often considered:

- the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
- the likelihood that if damages are finally awarded they will be paid;
- the preservation of contested property;
- other factors affecting whether harm from granting or refusal of the injunction would be irreparable;
- which of the parties has acted to alter the balance of their relationship and so affect the *status quo*;
- the strength of the applicant's case;
- any factors affecting the public interest; and
- any other factors affecting the balance of justice and convenience.

526901 B.C. Ltd. v. Dairy Queen Canada Inc., 2018 BCSC 1092 at para. 29 [*Dairy Queen*].

[38] The applicant's undertaking regarding damages is a foundational requirement for any interlocutory injunction. Without an undertaking, an injunction should not be

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issued unless the court has formally relieved the applicant of the required undertaking: *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20 at para. 9.

[39] The injunction test is a flexible one and the ultimate focus must be on the justice and equity of the situation at issue: *Vancouver Aquarium* at para. 38; *Dairy Queen* at para. 13. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Garcha Bros Meat Shop Ltd. v. Singh*, 2022 BCCA 36 at para. 116.

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Analysis

[40] I note that the *RJR-Macdonald* factors are not a checklist or a series of hurdles. Rather, these factors guide the consideration of whether an injunction would be fair and just in all the circumstances: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29 at para. 19.

[41] I will approach the analysis using the *RJR-Macdonald* factors as this is a private dispute: *RFSP Equipment v. Singh*, 2022 BCSC 538 at para. 27. The first issue is whether the first part of the test should be on the more stringent standard of strong *prima facie* case.

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[42] The injunction sought is a very broad one. It seeks to prohibit the defendants from providing any services to 11 companies and entities and to stop the defendants from soliciting business from any suppliers, agents or customers of the plaintiff that Mr. Keshavarzi had dealings with, which according to Mr. Keshavarzi would be in the range of 70 different companies. On the face of this wording, this would even prevent the defendants from continuing contracts already entered into with customers.

[43] In *Capital Direct*, there was a restrictive covenant that prevented the defendant from “soliciting, serving, referring, directing, receiving business from, contacting or continuing any form of communication with any clients or active

prospect of Capital Direct with whom she had contact or knowledge of during her employment with Capital Direct": *Capital Direct* at para. 1. The Court found that the strong *prima facie* standard extended beyond cases involving the enforcement of restrictive covenants and to any injunctions that are intended to place restrictions on a person's ability to engage in their chosen vocation and earn a livelihood: *Capital Direct* at paras. 31–36. Further support for this approach is provided by the Ontario case of *FLS Transportation Service v. Charger Logistics Inc.,* 2016 ONSC 3652 at para. 18:

> In assessing whether there is a serious question to be tried, a court need only find that the claim is not frivolous or vexatious. However, where an employer seeks to place restriction on a person's ability to engage in their chosen vocation and to earn a livelihood, then a strong *prima facie* case must be shown. In such cases, the moving party must show that its claim is almost certain to succeed. In my view the strong *prima facie* standard applies regardless of whether the basis for the restriction on an employee is based on a contract or a common law cause of action such as a breach of fiduciary duty or breach of confidence.
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> [Citations omitted.]

[44] Justice Robert J. Sharpe*,* in *Injunctions and Specific Performance*, 2nd ed (Toronto: Thomson Reuters, 2022) at § 2:6.50, explains it in this fashion:

> It is now firmly established that [*American Cyanamid Co. v. Ethicon Ltd.,* [1975] A.C. 396 (H.L.) adopted in *RJR*-MacDonald] does not alter the onus on the plaintiff to show a strong *prima facie* case to obtain an interlocutory injunction to restrain a breach of covenant in restraint of trade, including covenants in the employment context, or a "springboard" injunction to prevent a party from gaining an advantage from improper use of information or property belonging to the plaintiff.

[45] I find that the heightened test should be applied for the following reasons:

a) the requested injunction would prohibit Prima for contacting not only customers, but also suppliers. According to the evidence before me, there is only one company in Vancouver that provides testing equipment, meaning the injunction would impact Mr. Keshavarzi's ability to engage in his chosen vocation and earn a livelihood;

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b) the injunction could lead to a final result, as it would prohibit Prima from carrying out its work to the extent it would likely destroy the business and require it to be shut down with the resultant termination of its employees; and

c) the closing of Prima would impact Mr. Keshavarzi's living, his ability to pay his mortgage, he could potentially lose his home, and have to declare bankruptcy.

[46] I now turn to the three factors.

Has Accurate established a strong *prima facie* case?

[47] Of some significance is that there existed in the Shareholders Agreement the non-competition, non-solicitation, and confidentiality clauses. It is clear that the parties were alive to whether those restrictions should continue by virtue of the various negotiations they entered into. The evidence before me supports that the parties agreed that these clauses would not apply and would not bind Mr. Keshavarzi in the operation of his new competitor company. There were no contractual terms prohibiting Mr. Keshavarzi from operating Prima and using the information he obtained while working at Accurate.

[48] The plaintiff argues that Mr. Keshavarzi owed the plaintiff fiduciary duties while acting as a director, officer and vice-president of Accurate. In addition, Mr. Keshavarzi was a member of the senior management team and as such owes fiduciary duties: *Inprotect Systems Inc. v. Davies*, 2010 BCSC 1287 at para. 15 [*Inprotect*]. The law is clear that a director owes a duty to act honestly in good faith with a view to the best interests of the company: *Business Corporations Act*, S.B.C. 2002, c. 57, s. 142(1)(a); *Roussy v. Savage*, 2019 BCSC 1669 at paras. 306–307, aff'd 2021 BCCA 441.

[49] The plaintiff submits that Mr. Keshavarzi, after his resignation as a director and as a senior manager, continued to be prohibited from soliciting customers, relying on *Inprotect* :

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> [23] Fiduciaries may compete but are not entitled to actively solicit former customers. This duty flows from the position of the former employee as a fiduciary and not from any contract. Fiduciaries are more restricted in their conduct than employees because they have an ongoing residual obligation not to actively harm the company.
>
> [24] The ability to use and trade on the former employer's confidential information merely enhances the vigilance with which the court will approach this kind of obligation. The parties agree that the industry is a highly competitive one. Mr. Davies is familiar with Inprotect's confidential information such as pricing strategies and underlying supplier costs. It is virtually impossible for Mr. Davies to work in the industry without making use of that confidential information.

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[50] The defendants rely on the Supreme Court of Canada's decision in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at 167, that fiduciary duties and duties of confidentiality are subject to and can be negated by contract:

> Just as a contractual term can limit or negative a more general duty implied by the law of tort, so too can a contractual term that deals expressly or by necessary implication with confidentiality negate the general obligation otherwise imposed by equity: *337965 B.C. Ltd. v. Tackama Forest Products Ltd.* (1992), 91 D.L.R. (4th) 129 (B.C.C.A.), per Southin J.A., at p. 176, leave to appeal to this Court refused, [1993] 1 S.C.R. v. The ability of parties to contract out of, or limit, general duties otherwise imposed by law has been labelled "private ordering", and the general principles applicable here would be analogous to the principles considered by this Court in the context of concurrent remedies in tort and contract in *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) at p. 27:
>
> > ...the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

[51] I accept that Mr. Keshavarzi was in a fiduciary position with Accurate. He was not only one of the company's directors, but was in a key management position. As noted in *Inprotect*, the law presumes that fiduciary obligations attach to directors and senior managers: at para. 15. However, that presumption is rebuttable. While Mr. Keshavarzi resigned as a director on March 24, 2022, a fiduciary duty can survive resignation: C*an. Aero v. O'Malley,* [1974] S.C.R. 592 at 607.

[52] I accept that there is an argument that the terms of the Share Purchase Agreement contractually remove the residual fiduciary duty Mr. Keshavarzi had as a

former director and senior manager not to actively solicit former customers: see *Cadbury Schweppes Inc.* at para. 36; *Dehydration Research LLC v. EnWave Corporation,* 2022 BCCA 347 at paras. 76–79; *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2 at para. 65. The terms of the Share Purchase Agreement explicitly state that the non-confidential, non-solicitation and confidentiality clauses do not apply and waived any other restrictions for Mr. Keshavarzi's business activities in the future. I find that Accurate has not established a strong *prima facie* case on the evidence before me at this stage of the proceeding.

[53] I further accept that there exists a significant dispute on whether the information that was downloaded from HubSpot had the necessary quality of confidence attached to it. The initial evidence of the plaintiff, as set out in affidavit #1 of Estelle Fitz-Morris made on April 25, 2023, was that the documents that were exported included highly confidential information, such as detailed sales records, rates, bids, and the history of communication with clients. It turns out that Ms. Fitz-Morris was under the erroneous belief that the entire HubSpot database could be exported. She confirms in her affidavit #2 made on May 10, 2023 that entirety of the HubSpot database cannot be exported.

[54] The documents that Mr. Keshavarzi did export have now been provided to the plaintiff. I am not persuaded on the evidence before me that the various Excel sheets have the necessary quality of confidence attached to them. I do not accept that information about ongoing development projects and the names of key personnel is confidential in light of the evidence before me that this is public and easily accessible.

[55] The plaintiff argues that rate sheets are confidential, yet the rate sheets are provided to developers and shared with competitors. As the defendants point out, Ms. Fitz-Morris was able to obtain and exhibit one of Prima's rate schedules obtained from a developer. I accept that rates will vary depending on the project. In any event, there is no evidence before me that supports that Mr. Keshavarzi was

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able to download the particular rate schedules provided for potential projects that Accurate had bid on. He denies doing so.

[56] The final issue is whether there is evidence that supports that Mr. Keshavarzi misused any confidential information he received. He denies doing so. I am not persuaded on the evidence before me that the misuse of any information has been made out on a *prima facie* basis. Mr. Rastbin asserts that Prima received jobs from a number of construction companies that were in Accurate's business development pipeline. He has further examined Prima's website to identify names of developers that Accurate has previously performed work for.

[57] The evidence supports that Prima successfully bid on some contracts but was unsuccessful on others. Some of the unsuccessful projects were obtained by Accurate. The evidence before me is not persuasive that Mr. Keshavarzi obtained the various projects based on the misuse of confidential information.

[58] I will briefly consider the other factors.

Irreparable Harm

[59] Reviewing the factors listed in *EnWave Corporation* for assessing irreparable harm, in my view, the evidence that Accurate will suffer irreparable harm if an injunction is not granted in this case is not persuasive.

[60] Accurate claims that if the injunction is not granted it will suffer the loss of key clients, the lowering of prices, reputational damages, and ultimately may have to dismiss some of its work force. It claims that the transfer of work from Accurate to Prima has had a devastating effect on Accurate's business.

[61] The defendants submit that all Accurate's claims of irreparable harm are mere bald assertions or speculations lacking any corroborating evidence.

[62] Based on the evidence before me, I am unable to find that Accurate has lost business as a result of the actions of Prima. There is evidence that supports that Accurate successfully obtained a number of contracts that both companies bid on.

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[63] Accurate says that it has lost actual or potential clients. It claims that Cressey Development ("Cressey") exclusively used Accurate from 2017 until 2023, when Cressey began to send jobs to Prima. It further claims that from 2016 until early 2023, Trillium Project Management ("Trillium") used Accurate as its sole materials testing firm. There were no documents produced that support such assertions. Mr. Rastbin submitted a further affidavit explaining that the work with Cressey and Trillium were not "exclusive per se" but that these companies would call and ask for a rate sheet for sole-source projects. The evidence supports that on a number of projects Cressy and Trillium had from 2017 to date, Accurate was not engaged to do the concrete testing. There is no evidence that supports any type of exclusive relationship that Accurate had with any developer.

[64] It appears that Accurate may have lost out on bids for certain projects, but there is no evidence of a permanent loss of market share which is what is required: *Inprotect* at para. 53. The plaintiff conceded that it did not have the evidence to support a permanent loss of market share.

[65] Accurate had between 13 to 24 employees as of May 2022. It currently has approximately 30 employees, both full and part-time. It is not clear to me why Accurate has expanded its workforce since Mr. Keshavarzi left. This action alone does not support that there has been a substantial decline in revenue. In addition, there is no evidence on what Accurate's current revenue is.

[66] The potential damages the plaintiff has claimed can be easily quantified. The contracts that Prima has successfully bid upon can be determined. If the evidence establishes that these contracts were obtained through the improper use of confidential information, then the value of those contracts will be quantified. I do accept that there is evidence to question the defendants' ability to pay damages if an injunction is not granted. This one factor favours the plaintiff.

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Balance of Convenience

[67] The third factor to be considered is which of the parties will suffer greater harm from granting or refusal of the remedy pending a decision on the merits: *Vancouver Aquarium* at para. 69.

[68] I am persuaded that the balance of convenience does not support that an injunction be granted. In my view, the harm to the defendants in granting the injunction outweighs the harm to the plaintiff. The terms of the injunction are so broad it will, in essence, shut down the operation of Prima with severe financial consequences to Mr. Keshavarzi and Prima's employees. The granting of the injunction would result in irreparable harm to Prima, whereas if the injunction is not granted Accurate will still be in a position to submit bids on various construction projects. As noted in *Belron Canada* at para. 96: "The prevention of irreparable harm is the driving rationale behind the court employing the extraordinary measure of enjoining a party before there has been an adjudication of that party's rights at trial".

[69] I am not persuaded that Accurate will suffer any reputational harm on the evidence before me. There is no evidence that Accurate was in an exclusive relationship with any developer nor that its reputation has been harmed by the actions of the defendants.

[70] In all of the circumstances, I find that it is just and equitable not to grant the injunction.

Should Mr. Keshavarzi be Required to Provide a Further Affidavit

[71] Accurate sought an affidavit from Mr. Keshavarzi confirming that neither he nor Prima possess any copies of the documents downloaded from the customer relationship management database. I see no need to make that order since affidavit #1 of Mr. Keshavarzi already contains that information.

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Disposition

[72] The application of Accurate is dismissed. The parties sought leave to make costs submissions after these reasons were pronounced. The parties are granted leave to provide written submissions respecting costs on the following schedule:

a) The submissions of defendants will be served and provided to the Court within 30 days of these reasons being released;

b) The reply submissions of the plaintiff will be served and provided to the Court within 15 days of receipt of the defendants' submissions; and

c) Any reply submissions of the defendants to the reply submissions of the plaintiff will be served and provided to the Court within 7 days of receipt of the plaintiff's reply submissions.

[73] If no written submissions are received, the defendants are entitled to their costs of the application in the cause.

"The Honourable Justice Forth"

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