CITATION: Lewis v. Uber Canada Inc., 2023 ONSC 5134
COURT FILE NO.: CV-21-00659095-00CP
DATE: 20230912

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lewis

AND:

Uber Canada Inc. et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *Lucy Jackson*, for the plaintiff

Dana Peebles and Geoff Hall, for the defendants

HEARD: September 11, 2023

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff in this putative class action seeks damages because, he alleges, the defendants, which operate the food delivery platform UberEats, improperly charge sales tax on the regular purchase price of food orders when promotional discounts are applied. The plaintiff's certification motion is scheduled to be heard on September 27 and 28, 2023.

[2] In advance of the filing of the certification motion material, the defendants seek a protective order. Specifically, they seek a protective order to protect their best evidence about the number of members in the class, which includes evidence about different promotions the defendants offered in different time periods, and the take up of those promotions. The evidence at issue is evidence that the defendants are required to give by virtue of s. 5(3) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6.

[3] The plaintiff does not oppose the motion.

Legal Principles Relevant to a Protective Order

[4] In *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 1, the Supreme Court of Canada wrote:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[5] The Court confirmed the "strong presumption in favour of open courts", but allowed that exceptional circumstances arise in which competing interests justify a restriction on the open court principle. In such cases, the applicant must demonstrate first, "as a threshold requirement, that openness presents a serious risk to a competing interest of public importance" – a high bar that serves to maintain the strong presumption of open courts: *Sherman Estate*, paras. 2, 3, 37.

[6] The court has inherent jurisdiction to make a confidentiality order, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make an order sealing documents.

[7] The legal test to grant a confidentiality order is set out by the Supreme Court of Canada in *Sherman Estate* at para. 38. There are three prerequisites that a party must establish when it is asking a court to exercise its discretion in a way that limits the open court principle:

a. Public disclosure would pose a serious risk to an important public interest;

b. No reasonable alternative means would prevent this risk; and

c. The benefits of the order outweigh any negative effects.

[8] The Supreme Court of Canada held that only when all of these prerequisites are met can a discretionary limit on openness be ordered. The test applies to all discretionary limits on court openness, such as publication bans, sealing orders, an order excluding the public from a hearing, or a redaction order, subject only to valid legislative enactments: *Sherman Estate*, at para. 38.

Would public disclosure of the alleged confidential information pose a serious risk to an important public interest in this case?

[9] This branch of the test requires that the interest the moving party seeks to protect be one that can be expressed in terms of a public interest in confidentiality: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 55.

[10] In *MediaTube Corp. v. Bell Canada*, 2018 FC 355, at para. 22 ("*MediaTube FC*"), Locke J. held that, where a party is compelled by the rules of discovery to divulge sensitive and confidential information, there is a strong public interest in that party being able to maintain the confidentiality of that information, or else no confidential information is safe.

[11] *MediaTube FC* was quoted recently with approval by Associate Justice Robinson in *MediaTube v. Bell Canada*, 2022 ONSC 342, at para. 32 ("*MediaTube SCJ*"). Associate Justice Robinson went on to conclude that "there is an important public interest in ensuring that parties

who are brought into litigation are able to maintain confidentiality over commercially sensitive and confidential information that they are compelled to divulge in order to defend themselves or comply with discovery obligations": see *MediaTube SCJ*, at para. 34.

[12] Defendants have no choice but to be joined in litigation. In class proceedings, defendants have no choice but to adduce their best evidence about the number of class members. To the extent that this requirement forces a defendant to divulge commercially sensitive information, I am satisfied that there is a strong public interest in keeping that information confidential, to promote the integrity and fairness of class proceedings.

[13] In this case, the evidence the defendants seek to protect includes data demonstrating the relative success of different types of promotional offers, which is data a competitor could use to its advantage, and to the defendants' disadvantage.

[14] I also note that the record establishes that the defendants take significant measures to maintain confidentiality over this information, including by maintaining technical and administrative controls to protect the information. These controls limit access to the data to only those employees who require it to do their work. They also require employees to sign confidentiality agreements to keep the data confidential both during and after their term of employment. They monitor access to the data and investigate violations of their data policy. Violations are cause for termination.

[15] The defendants also maintain physical security measures at their headquarters, including through the use of proximity cards, requiring visitors to sign in and taking their photographs, and requiring visitors to sign non-disclosure agreements.

[16] In my view, the first branch of the test is met, in that the principle of court openness poses a serious risk to the strong public interest in keeping confidential commercially sensitive information that the defendants are forced by statute to disclose. I am satisfied that the information at issue is commercially sensitive, and the commercial interests of the defendants could reasonably be harmed by disclosure of it.

Will reasonably available alternative measures prevent the risk?

[17] In my view, no other available alternative measures will prevent the risk in this case. The protective order proposed by the defendants is narrowly tailored to focus only on the commercially sensitive information. The information proposed to be redacted is not at the heart of the contest between the parties on the certification motion, and forms only a small part of the record. The second branch of the test is met.

Is the sealing order proportionate?

[18] At this stage in the analysis, the court asks whether the benefits of granting the sealing order outweigh any deleterious effects: *Sherman Estate*, at para. 106.

[19] As I have already noted, the protective order posed is tailored to the confidential information only. The bulk of the record would remain available, and the ability of the public to understand the issues on the certification motion would not be hampered.

[20] On the other hand, failing to grant the protective order would expose the defendants to a serious risk of harm from their competitors.

[21] In these circumstances, I conclude that the third branch of the test has been met.

Conclusion

[22] I grant the defendants' motion for a protective order. The order shall go in accordance with the draft I have signed.

J.T. Akbarali J.

Date: September 12, 2023