CITATION: Programmed Ins v. Stoneridge Ins, 2024 ONSC 40
COURT FILE NO.: CV-23-00711350-0000
DATE: 20240102

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
PROGRAMMED INSURANCE BROKERS INC.	)	Chris Hubbard, Akiva Stern, and Melina Zaccaria for the Plaintiff
Plaintiff	)	
	)	
– and –	)	Michael Wilson, Ben Hackett and Meg De Snoo, for the Defendants
STONERIDGE INSURANCE BROKERS PREFERRED INSURAMCE GROUP LIMITED THEODORE A. PUCCCINI CHRIS OVECKA EVELYN KONECNY DAN O'BRIAN SARAH PEPPER LAURA VAN BOXTEL DEBBIE VAN HELDEN KACY WARWICK MIRANDA NEGRI	)	
Defendants	)	
	)	
	)	**HEARD:** January 2, 2024

AKAZAKI, J.

REASONS FOR DECISION

[1] The plaintiff brought a motion for interim injunctive relief pending the hearing of the interlocutory motion scheduled for February 21, 2024. In the hearing of that motion, the plaintiff will seek to restrain the defendants from using confidential information about its client base and from soliciting business of the plaintiff.

[2] The plaintiff is an insurance brokerage and former employer of the individual defendants apart from Theodore Puccini. The corporate defendants are rival brokerages, and Mr. Puccini is their principal. The action concerns the plaintiff's book of business consisting of commercial and personal lines insurance clients in the Chatham area.

[3] In April 2023, the former employees of the plaintiff resigned *en masse*, giving various reasons for doing so but none of them the fact they were recruited by the defendant brokerages. A "whistle-blower" filed an affidavit stating that one of the former employers provided him and the others with their client lists from the plaintiff brokerage and told him they were expected to solicit the business from their former employer. Only two of the former employees, including the whistle-blower, had formal non-solicitation clauses in their employment contracts with the plaintiff. The whistle-blower, feeling uncomfortable about these instructions, quit and became an agent for an insurer.

[4] The defendants, through an undertaking in its officer's responding affidavit, contend the defendants have no interest in using confidential information from the plaintiff. They argue an injunction is unnecessary because the undertaking can be enforced by court order.

[5] The defendants nevertheless argue that the plaintiff's motion is abusive in that it has known about a transfer of business to the defendants since last May when it started receiving "broker of record" change notices. The plaintiff contends that it has been responsible in avoiding a precipitous motion until the whistle-blower's evidence landed in its lap.

[6] Discovery or accrual of facts and evidence has always been tied to the timing of litigation, whether the issue is a limitation period or laches. It has always been preferable for plaintiffs to know not only that they have been aggrieved but also how they have been aggrieved, before pulling the litigation trigger. In any event, where the issue is the misappropriation or misuse of confidential information, timing of the motion is immaterial because the unentitled possessor never gains a right to keep it.

[7] For the reasons that follow, I will grant the interim relief sought with respect to the confidential information because it was essentially unopposed at the hearing. I need not

grant the interim relief regarding the solicitation of clients, because of the formulation of the order against using the confidential information.

LAW REGARDING INTERIM INJUNCTIONS

[8] The rationale for the remedy I have granted stems from the law of interim and interlocutory injunctions. At its root, the law requires a practical tool that maintains a status quo while exercising restraint by limiting prohibitions against clearly unlawful conduct.

[9] A motion for an interim injunction differs from a motion for an interlocutory injunction in two material respects. The argument is intended to be limited. The duration of the injunction is limited. See: *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd*., 2014 ONCA 125 (CanLII), at paras. 51-52. Beyond these differences, the nature of the legal test the moving party must meet remains the same for both types of motions: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, at 334-42. In particular, the plaintiff must show:

1. The claim is not frivolous or vexatious – that there is a serious question to be tried.

2. Irreparable harm to the moving party if the injunction were not granted.

3. The balance of inconvenience favours it and not the defendants.

SERIOUS QUESTION TO BE TRIED

[10] The defendants conceded that the evidence on the motion raised a serious question to be tried. It was also evident that it did not matter whether this standard applied or whether the higher standard of the "strong *prima facie* case" applied. The higher standard is no longer in use. (*RJR*, at 344)

[11] In employment cases involving restrictive covenants, the higher standard has lingered where the effect of the injunction would deprive the defendant of the ability to earn a living. In my view, this adjustment of the burden should logically be a factor in the second or third elements of the test, and not in the first.

[12] The reason why the applicable test did not matter was that if the defendant employees would be substantially put out of work resulting from the lack of access to the former client base, the more the evidence would tend to prove that their new employment depended on the information obtained from their employment with the plaintiff. In other words, the strength of the plaintiff's case would ramp upwards in proportion to the threat of the injunction to the ability to work.

[13] I therefore find that the first element of the *RJR* test has been established for the purposes of this interim motion.

IRREPARABLE HARM

[14] Irreparable harm refers to the nature of the harm and not its magnitude. The harm is irreparable if it either cannot be quantified in monetary terms or it cannot be cured by an award of damages. (*RJR*, at 341)

[15] The defendants argued that the plaintiff's loss, if any, can be readily quantified by tracking the clients that have not renewed their insurance with the plaintiff and have instead renewed it with the defendants. The ability to track this may prove imponderable in the long term, because the plaintiff will never know how long the clients would have remained with it. However, in the time between now and February 21, 2024, any damage could be measured.

[16] The problem with this argument, as it pertains to the alleged breach of confidence, is that the confidential information remains alienated from its rightful proprietor. Although its misuse can be contained by locking down the electronic media on which it is stored, its continued existence in the working memories of the former employees also poses a

problem for the defendants: *2158124 Ontario Inc. v Pitton*, 2017 ONSC 411, at para. 43. Like the Apple of Discord plucked and tossed by Eris, the goddess of strife, confidential information can prove more a liability than an advantage.

[17] In the absence of clear and convincing evidence that no use of confidential information would occur, its unveiling to those prohibited from exposure to it presumes prejudice to the holder of the privilege: *Celanese Canada Inc. v. Murray Demolition Corp*., 2006 SCC 36, [2006] 2 SCR 189, at para. 42. See also *Pitton*, at para. 57.

[18] Ultimately, it is the prevention of harm by an injunction against its use that will burden the defendants without the need to invoke a prohibition against solicitation of business. The subtle distinction between the harm from solicitation and from misuse of confidential information, described in *Pitton*, at paras. 68-69, is ultimately a distinction without a difference if the remedy is clear that the injunction applies both to the misappropriated documents and to the mental memory of the data stored on those documents. The defendants' task of navigating around the edges of a potential contempt of court will prove more of a burden than the potential reward is worth. If, as the plaintiff argued, the defendants cannot be trusted to abide by their undertaking, that is all the more reason why the remedy should prove effective in preventing harm at least until the full argument of the motion next month.

BALANCE OF INCONVENIENCE

[19] The balance of inconvenience test consists of a determination of which of the two parties will suffer the greater harm, from the granting or refusal of an interim injunction. (*RJR*, at 342)

[20] The nature of the injunction against the misuse of confidential information is that any deprivation to the party not entitled to it is legally inconsequential. The potential and presumed harm to the party from whom the information has been alienated does create an

identifiable risk of harm. Therefore, the balance of inconvenience in breach of confidence cases invariably favours the moving party.

SOLICITATION ISSUE - OVECKA

[21] The plaintiff argued that, even if the non-solicitation order cannot be extended to all the defendants, it should be applied to Chris Ovecka. His employment contract with the plaintiff contained a non-solicitation clause.

[22] The non-solicitation clause captures clients of the plaintiff with whom Mr. Ovecka had dealings during the year prior to his departure and continues for the year after it. It prohibits such approaches to the clients "either directly or indirectly." In the event he is found liable, the corporate defendants have agreed to indemnify him – meaning his legal jeopardy is theirs. The clause also contains an acknowledgement of irreparable harm, but I am not bound by it.

[23] Because this was a motion for interim relief, I am reluctant to enter into a more detailed contractual exegesis of the employment agreement, lest it fetter the task of the motion judge hearing the interlocutory motion. If, as the plaintiff has shown at least provisionally, the plaintiff's client lists and proprietary data have been circulated among the defendants, any contact with the clients conspicuously close to policy-renewal time could be used as a sword against the defendants, including Mr. Ovecka, in the litigation, including a contempt motion. Provided the wording of the order against use of the information includes solicitation, an order mirroring the language of the employment contract could create unnecessary ambiguity frustrating the purpose of the order.

CONCLUSION

[24] The plaintiff has satisfied me that an interim injunction should issue with respect to the confidential information, and the defendants did not oppose it at the hearing, as follows:

> 1. THIS COURT ORDERS the Defendants, and anyone else having notice of the Court's Order, to deliver up to the Plaintiff's lawyers any documents, however stored or maintained, which contain the Plaintiff's confidential information, or which contain copies of, or emanate from, the Plaintiff's files or endeavours;
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> 2. THIS COURT FURTHER ORDERS that the Defendants, and anyone else having notice of the Court's Order, are prohibited from disclosing to any person any private, confidential or proprietary documents, information or trade secrets of the Plaintiff, including information and documents relating to the Plaintiff's clients and business opportunities and including information acquired mentally or by memory from or in the course of employment with the Plaintiff;
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> 3. THIS COURT FURTHER ORDERS that the Defendants, and anyone else having notice of the Court's Order, are prohibited from using for their own purposes (including solicitation of clients in the documents or information), or for any purposes other than those of the Plaintiff, any documents or information referred to in paragraphs (1) or (2);
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> 4. THIS COURT FURTHER ORDERS that the Defendants, and anyone else having notice of the Court's Order, are prohibited from altering, destroying, copying, removing or transferring any documents or information referred to in paragraphs (1) or (2) without the express written consent of the Plaintiff;

[25] The substantive difference in the motion was a fifth provision containing a non-solicitation order uncoupled from the confidential information. While I have not granted the order in that provision, it may yet be granted by the motion judge hearing the interlocutory motion.

[26] The plaintiff has been successful in obtaining the interim order. Had it not brought the motion, it would not have obtained it and would likely not have obtained the undertaking contained in the affidavit filed in response to the motion. Therefore, I grant the plaintiff its agreed-upon costs of this motion fixed in the amount of $50,000, all-inclusive, payable within 30 days. This costs order may be included in the formal order, at the option of the plaintiff's counsel.

Akazaki, J.

Released: January 2, 2024