IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *FLS Transportation Services Limited v. TRAFFIX Group Inc.,* 2024 BCSC 1078

Date: 20240613
Docket: S243885
Registry: Vancouver

Between:

FLS Transportation Services Limited

Plaintiff

And

TRAFFIX Group Inc., Craig Swain, Jack Heu, Michelle Spannier, Iliyaaz Ali, Graham Eastwood, Denise Mannette, Wilson Shing, Hannah Gale, William Sun, Wilson Lee, Sean Lowry, Aatif Agloria, Emma Chu, Maria Fernanda Duarte Chacon, Manuel David Ortiz Alvarez, Hayley Rawle, Zireen Shabnam Bibi, Mary-Anne Trinh, Haylee Mills, Carolina Lacerda Pereira Goncalves, Isis Roxana Zamudio Ibanez, and Ken Boyington

Defendants

Before: The Honourable Justice Thompson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A. Crimeni D. Bell J. Velji, A/S
Place and Date of Hearing:	Vancouver, B.C. June 12, 2024
Place and Date of Judgment:	Vancouver, B.C. June 13, 2024

[1] **THE COURT:** I made an Anton Piller order and a sealing order in this action late yesterday afternoon after an extended day of hearing. These are my reasons for doing so. As is invariably the case, these applications were made without notice to the defendants. In the course of the *ex parte* hearing, I indicated that the Anton Piller order will include a direction to the solicitors for the plaintiff to request a transcript of the hearing of the application, to be prepared on an expedited basis, so the defendants will be apprised in a timely way of what was said in court in their absence. Likewise, I now ask the solicitors for the plaintiff to order a transcript of these reasons for judgment – the reasons are caught by a temporary sealing order which expires tomorrow, but by the time I edit them to add citations and for readability, the sealing order will have expired.

[2] The plaintiff FLS Transportation Services Limited and the defendant TRAFFIX Group Inc. are large companies in the business of organizing and brokering ground delivery of freight. The plaintiff has been operating since 1987, and has 18 offices in Canada and the USA. Prior to the events giving rise to this action, FLS had 21 employees at its Vancouver branch. TRAFFIX has approximately 24 offices in North America, but until a month ago did not have an office in British Columbia.

[3] The defendant Swain began working at FLS in 2010, and at the time of his resignation in July 2023 was the executive senior vice-president of sales. About a week after the effective date of his resignation, he began working for TRAFFIX as an executive vice-president. He remains in this role. The plaintiff's case is that he, like the other individual defendants, has and continues to act in violation of his duties of confidence and fidelity to FLS.

[4] On 7 May 2024, two FLS employees, the defendants Spannier and Bishop, resigned effective 10 May 2024. On 10 May 2024, the remaining 19 defendants, each an FLS employee, resigned effective immediately. Each of these 21 defendants, i.e. every FLS employee in the Vancouver office, immediately started working for TRAFFIX.

[5] On 13 May 2024, TRAFFIX announced on its LinkedIn page that it had opened a new Vancouver office. The next day, FLS received a letter from solicitors for TRAFFIX advising that the solicitors were retained to act "with respect to the recent hiring of former employees of FLS." And, by 15 May 2024, many of the defendants had updated their LinkedIn profiles to advise they had begun working for TRAFFIX.

[6] The plaintiff alleges the individual defendants worked together with each other to orchestrate a coordinated mass departure from FLS in order to establish a competing business for TRAFFIX in Vancouver, including by soliciting FLS customers. Since the recent mass departure of its employees, FLS has assembled evidence of defendants contacting their former FLS clients to solicit business for TRAFFIX. FLS has also discovered that shortly before the departure, defendants variously transmitted FLS confidential information to their personal email accounts, downloaded confidential information to a USB device, and printed hard copies of confidential information. However, the evidence before me on this application supports the assertion by FLS that it does not have the ability to track or identify all instances in which defendants might have wrongfully acquired possession of or misused its confidential information.

[7] FLS has also learned that one of the defendants accessed its client information system in the hours leading up to their mass departure, and deleted and manipulated client account information. FLS submits that the only reasonable inference is that this was done to inhibit its ability to manage those accounts following the impending departures.

[8] Not surprisingly, FLS has noticed a drop-off in business from the customers serviced by the Vancouver office since their local employees all resigned to work for their competitor. FLS pleads conspiracy. I accept there is a strong *prima facie* case that the individual defendants worked in concert to carry out a wrongful plan to leave *en masse* to work for a competitor and make use of confidential FLS information to the disadvantage of FLS and to the advantage of their new employer. The notice of

civil claim claims damages and also alleges, *inter alia*, breach of contract, inducing breach of contract, and breach of confidence.

[9] FLS submits that without the extraordinary remedy it seeks, it will not be able to determine the nature and extent of the misuse of and reliance upon its confidential information by the defendants (which goes to both liability and damages) or to uncover email, text, or other correspondence between the defendants which it seeks as evidence of the alleged conspiracy. FLS submits that usual document discovery procedures, even supplemented by injunctive relief to attempt to preserve electronic data and other documents, is insufficient because there is a real possibility the defendants may destroy such evidence. They point to the secretive way in which the defendants apparently orchestrated their exodus after obtaining confidential business information, including customer contact information, pricing, and contract details useful for acquiring FLS clients.

[10] An Anton Piller order is an extraordinary remedy. It is highly intrusive. I accept the wise guidance in the authorities to approach search-order applications with caution and prudence. The order in this case authorizes the search of the Vancouver business premises of TRAFFIX, and the seizure of data on computer devices including, notably, the defendants' phones. The wide range of intensely personal information that may well be associated with the defendants' phones makes the order profoundly intrusive. While they have been held to be constitutional, orders such as this have been described as being at the "absolute extremity" of a court's powers.

[11] The leading case in Canada is *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36. In order for the Court to acquire the discretion to invoke this pre-trial equitable remedy, the plaintiff must demonstrate a strong *prima facie* case; the damage to the plaintiff resulting from the defendants' alleged misconduct must be very serious; there must be convincing evidence the defendants have incriminating documents or things in their possession; and it must be shown there is a real possibility the defendants may destroy such materials.

[12] I am persuaded that the plaintiff has established each of these elements. There are two branches of the tort of conspiracy. Where the actions that advanced the purpose of a conspiracy were lawful, the plaintiff must prove that the predominant purpose of the conduct was to cause injury to the plaintiff. Where the acts themselves were unlawful, an intention to injure is not necessary where the conspirators knew or should have known that injury to another was likely to result. See *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 at 471-472; *Bank of Montreal v. Tortora*, 2010 BCCA 139 at para. 39.

[13] I find FLS has shown a strong likelihood that it will ultimately succeed in its unlawful-means conspiracy claim that all the individual defendants engaged in unlawful conduct, including conversion of and misuse of confidential business information, and that this conduct was directed toward the plaintiff in circumstances where they knew or should have known that injury to the plaintiff was likely to result. There is a strong *prima facie* case that the defendants combined or conspired with each other to carry out of common design or means of achieving a common objective that, when implemented, injured the plaintiff.

[14] I acknowledge that I do not have evidence or submissions from the defendants, and experience teaches that it is a rare case without two sides of a story. However, the evidence that I do have provides cogent support for the unlawful-means conspiracy claim, including:

a) In the days and weeks leading up to 10 May 2024, many of the departed employees began to remove, divert, and misappropriate confidential FLS information without FLS consent or knowledge;

b) Other than the defendant Swain, the departed employees all resigned in a coordinated fashion, effective 10 May 2024, contrary to their contractual notice obligations and with the knowledge that such an action would leave FLS with no employees remaining to operate the Vancouver branch;

c) TRAFFIX opened a new office in Vancouver on 13 May 2024;

d) On May 15th, many of the departed employees updated their LinkedIn profiles indicating they had begun their new employment with TRAFFIX; and

e) Beginning that week, many FLS Vancouver customers, clients, and suppliers began to cancel requests for FLS services or significantly reduced their requests for same.

[15] I also conclude that the plaintiff has a strong *prima facie* case that all of the individual defendants had access to and likely made at least some unauthorized use of confidential FLS business information. Misuse of confidential information after an employee leaves an employer is a breach of the duty of fidelity, an implied term of every employment contract: *Cruise Connections Canada v. Cancellieri*, 2012 BCSC 53 at paras. 205-208; *Zoic Studios B.C. Inc. v. Gannon*, 2012 BCSC 1322 at para. 189, appeal allowed in part on other grounds, 2015 BCCA 334; *Billows v. Canarc Forest Products Ltd.*, 2003 BCSC 1352 at para. 126.

[16] With regard to the degree of damage to the plaintiff of the defendants' alleged misconduct, I find that FLS has established that the substantive and procedural impact is very serious. The sudden and coordinated departure of all of its Vancouver office employees is bound to seriously impair the local FLS operation for a time. And, I agree with the FLS submission that evidence of unauthorized removal, diversion, appropriation, and misuse of confidential information is vital to the plaintiff's ability to prove that the defendants breached their duties of confidence and its claim for damages in respect thereto, and that communication between the defendants exposing details of the alleged unlawful plan is important to the proof of the conspiracy case.

[17] I turn to the requirement for convincing evidence that the defendants have in their possession incriminating documents or things. This is no “fishing expedition.” The evidence that some defendants have secured confidential information, including by transmitting such information to their personal email accounts in the days before their departure, and that defendants are apparently soliciting FLS customers is a sound and convincing foundation for believing that incriminating evidence will be

found. Further, it seems highly likely the orchestrated mass departure will be the subject of communications between the defendants.

[18] I am also persuaded that there is a real possibility that the defendants may destroy incriminating documents or things in their possession. Courts have inferred a risk of destruction from the surrounding circumstances. The strong *prima facie* case of conspiracy and breach of confidence, based on the facts that I have outlined, drives me to the conclusion that there is a real possibility of destruction if the search order is not granted. And, the transient nature of electronic evidence makes it especially easy to move or eliminate: *DIRECTV, Inc. v. Gray*, 2003 BCSC 1509 at para. 67; *Yaghi v. WMS Gaming Inc.*, 2003 ABQB 680 at para. 79.

[19] I am satisfied the order is necessary to enable the plaintiff to gather evidence in circumstances where it appears, on the evidence currently available, that the defendants have acted wrongfully toward the plaintiff and have done so secretly and in concert. What gave me particular pause in the exercise of the equitable discretion is the intensely intrusive nature of seizure of the defendants' phones. The order provides the data on the phones will be imaged by independent persons, and is subject to being held in the custody of the independent supervising solicitor without access for search or inspection by the plaintiff or its solicitors or anyone else until further order or agreement of all parties. The seizure of phones and copying of data will be alarming. However, it is important to emphasize that while the data will be preserved, there will be no inspection or search of the data unless authorized by agreement or order.

[20] Further, the order provides that first priority is to be given by the search team to imaging the data on mobile devices or smart phones and returning the devices or phones to their owners. If it is necessary to remove any devices or phones from the TRAFFIX premises for imaging, the devices or phones must be returned to the premises by 5:00 p.m. on the day following the premises search. If a defendant reasonably requires access to the device while it is under seizure, the order empowers the independent supervising solicitor to allow access under supervision.

[21] I am cognizant of the disquieting impact that the seizure of the defendants' phones is likely to have. However, this must be weighed with my finding that the defendants likely have in their possession, via their phones, data that is likely to afford evidence of conspiracy and breach of confidence. In my opinion, the model order as altered, together with the ongoing supervision of the Court regarding access to the phone data, mitigates the invasion of the defendants' privacy to the extent reasonably possible in the circumstances. I was provided with a copy of the Anton Piller order that was made by Justice Dillon in *Equustek Solutions Inc. v. Jack*, Vancouver Registry S112421. It provided for the independent supervising solicitor to take custody of computers, smart phones, or other devices. Of course, each case depends on its facts, but the *Equustek* order shows there is precedent in this jurisdiction for Anton Piller remedies to extend to seizure of smart phones.

[22] For the reasons expressed by Justice Warren in *Regal Ideas Inc. v. Haus Innovations Inc.*, 2016 BCSC 1883 at paras. 30-31, I order the court file sealed until Friday, 14 June 2024, to allow for execution of the Anton Piller order. Affidavit no. 2 of Robert Hemker filed on 12 June 2024, is sealed until further order because the exhibits contain confidential business information that meets the criteria described by the Court of Appeal in *Dempsey v. Pagefreezer Software Inc.*, 2023 BCCA 179 at para. 25. That said, it became apparent during the hearing that it is only the exhibits to this affidavit that contain the confidential information. In these circumstances, I made the sealing order for the whole affidavit on the assurance of counsel for the plaintiff that another copy of the affidavit will be filed without the exhibits attached; this copy of the affidavit will not be sealed.

"Thompson J."