

Court of King's Bench of Alberta

Citation: 1731271 Alberta Inc v Reimer, 2024 ABKB 446

Date: 20240719
Docket: 2403 09977
Registry: Edmonton

2024 ABKB 446 (CanLII)

Between:

1731271 Alberta Inc operating as Imperial Printing

Applicants

- and -

Angie Reimer and Westkey Graphics Ltd.

Respondents

**Reasons for Decision
of
Douglas R. Mah**

A. This Decision

[1] This decision is a more or less *verbatim* rendition of the reasons for decision delivered orally in Court on July 16, 2024.¹ I have only added formatting and full citations.

¹ The oral version remains the official decision of the Court.

B. What This Case is About

[2] 1731271 Alberta Inc (173) operating as Imperial Printing brings an application for an interlocutory injunction against its former employee, Angie Reimer, and her current employer Westkey Graphics Ltd.

[3] Imperial Printing alleges that Ms. Reimer was a key employee and therefore a fiduciary. It says that in breach of her fiduciary obligations, she has enticed a number of Imperial Printing's customers to take their business to Westkey, resulting in financial and intangible losses to Imperial Printing.

[4] Imperial Printing says that it only seeks to restrain Ms. Reimer and Westkey from soliciting its clients, not from conducting business, and then only for a limited period of one-year. It says that Westkey is a big company with a lot of clients. Thus, the harm suffered by Imperial Printing if the injunction is not granted outweighs the harm sustained by Westkey if the injunction is granted and that, overall, fairness favors the relief sought.

[5] Imperial Printing also says that Ms. Reimer took its property pertaining to a client, PCL, for the benefit of Westkey and seeks its return.

[6] The positions of Ms. Reimer and Westkey are aligned. They say that Ms. Reimer was never a key employee of Imperial Printing and thus not a fiduciary. Accordingly, no duty has been breached and no remedy lies. Furthermore, they say that Imperial Printing has not demonstrated any financial loss that was not self-inflicted, and any possible loss is compensable in damages. They say in these circumstances an injunction is a grossly disproportionate remedy that should not be granted.

[7] Ms. Reimer has an explanation for how she ended up with the PCL material.

C. Factual Background

[8] In its previous incarnation, Imperial Printing was a small offset printing business operated by the Ceilin brothers and then more latterly only by Geoff Ceilin. Ms. Reimer had a background in the printing industry, working with her parents since a tender age and being part of the family printing business until 1999. She then joined the original Imperial Printing as an order entry clerk and eventually her role evolved to encompass scheduling, planning, estimating, stock purchasing and providing quotes to clients. Although she worked on the office side of the business, not the production side, she was familiar with the machines from her childhood.

[9] It is accepted by all that Ms. Reimer is a dedicated, hard-working and valuable employee who has extensive knowledge and expertise of the industry. She said in her evidence that she was never herself involved in client development but did and does enjoy her role managing existing clients.

[10] As of March 31, 2020 Geoff Ceilin sold the assets of the original Imperial Printing to 173. 173 is part of the Rayacom Group of Companies. Rayacom consists of a number of printing and related businesses located in British Columbia, Alberta and Saskatchewan. The two principals of Rayacom are the brothers Martin Tran and Austin Tran. The Tran brothers are also the sole directors of 173 or the current Imperial Printing.

[11] In the sale agreement, 173 assumed no obligations of the original Imperial Printing and certainly not any employment contracts. On March 30, 2020 Ms. Reimer was presented with a

letter giving her the option to work at the new Imperial Printing, or not. It was up to her. She chose to work at the new Imperial Printing and did so between March 31, 2020 and February 28, 2024.

[12] It is accepted that at no time was Ms. Reimer ever subject to a written non-competition, non-solicitation or confidentiality clause, not with 173 operating as Imperial Printing or the original Imperial Printing. During her time with 173 operating as Imperial Printing (which I will now call Imperial Printing), Ms. Reimer fulfilled much the same role as she had prior to the sale. Rather than reporting to the former CEO Geoff Ceilin, she now reported to Martin Tran. On occasion, Martin Tran would delegate certain tasks to Ms. Reimer, usually with instructions.

[13] Sometime in 2023, Imperial Printing moved from its former Edmonton location to a new Edmonton location where it shared premises with Rayacom Printing, a separate legal entity but still part of the Group. Over time, Ms. Reimer became disaffected with Imperial Printing. She disagreed with management decisions made by Martin Tran which she felt resulted in business decline. Ms. Reimer deposes that while Martin Tran did not seek her advice, she raised certain concerns with him about these management decisions. She says that Martin Tran did not consider her input and she felt marginalized as an Imperial Printing employee.

[14] Without having a job to go to, Ms. Reimer resigned from Imperial Printing on February 28, 2024. She had given two weeks notice and a replacement employee, Ms. Hung, was brought in from Vancouver whom Ms. Reimer was supposed to train during the two weeks. Curiously, Ms. Reimer and her replacement never met in person. In cross-examination, Ms. Reimer revealed that she and Ms. Hung conducted all of the training (as it were) over email and phone, occurring during a 4-day period while Ms. Reimer was in Las Vegas.

[15] The previous October or November, while unhappy at Imperial Printing, Ms. Reimer made an in-person inquiry at Westkey Graphics about possible future employment. This followed a discussion with one of her brothers who was a pressman at Westkey wherein she made known her unhappiness at Imperial Printing. She met with Mr. Karmal and Mr. Colville. There were no openings at the time and both sides said they would keep one another in mind.

[16] On March 9 or 10, 2024 Ms. Reimer, more than a week after finishing at Imperial Printing, contacted Westkey again. This time they did have an opportunity for her. She began work with Westkey on March 18, 2024 in the capacity of an account manager, servicing Westkey's existing clients.

[17] Upon arrival at Westkey, Ms. Reimer sent some emails to former clients at Imperial Printing to advise them of her new contact information. She said she did so to let them know that she had not retired and had landed somewhere else, as she felt that Imperial Printing had left the impression with customers that she had quit the industry altogether. In some of the emails, Ms. Reimer did extol the virtues of her new employer (but also said the staff were inexperienced) and while a handful of the clients did reply with suggestions of possible future business with Westkey, Ms. Reimer says she did not follow up on the emails and did not pursue those clients on Westkey's behalf. Again, she was not in charge of developing new business but rather servicing existing accounts.

[18] In late March 2024, Martin Tran became aware of an email exchange between Ms. Reimer (now at Westkey) and Imperial Printing's client PCL which he interpreted as her attempt to move the business of PCL and its related company Melloy from Imperial Printing to Westkey.

He also concluded from those same communications that Ms. Reimer had misappropriated some product that Imperial Printing had done for PCL.

[19] Mr. Tran then, in quite a cordial way I should say, asked Ms. Reimer about her contact with PCL. He was not satisfied with her response and instructed his lawyer to send a cease-and-desist letter to Ms. Reimer and Westkey. Westkey’s corporate counsel responded that neither Ms. Reimer nor Westkey had done anything unlawful, and they would not be complying with the cease-and-desist demand.

[20] Mr. Tran then did some financial analysis by which he concluded that Imperial Printing’s revenues had diminished as a result of Ms. Reimer luring away clients to Westkey. Hence this litigation. Imperial Printing takes the position that a one-year prohibition against solicitation should be imposed by the Court upon Westkey & Ms. Reimer in respect of those clients who were clients of Imperial Printing as of the date that Ms. Reimer left her employment with Imperial Printing. Mr. Stephens advised that the granting of the injunction would likely end the matter as the injunction would expire before the matter could possibly reach trial.

D. Modified *RJR-MacDonald* Test

[21] In terms of the law, counsel agreed that the modified *RJR-MacDonald* test applies². The first part of the test requires the Court to consider the strength of the plaintiff’s case. In the modified test, the threshold of “serious issue to be tried” is replaced with “strong *prima facie* case”.

[22] It is agreed that Alberta jurisprudence establishes that the “strong *prima facie* case” threshold applies where breach of fiduciary duty is alleged, a finding of which might lead to a prohibition equivalent to the enforcement of a restrictive covenant.

[23] The cases supporting this proposition include:

- *Orbis Engineering Field Services v Taifa Engineering Ltd*, 2019 ABQB 510 at para 54;
- *GG & HH Inc v 2306084 Alberta Ltd*, 2022 ABQB 58 at paras 90-92; and
- *SHAC Solutions v Guenther*, 2024 ABKB 145 at para 46.

[24] Noteworthy for this case is that the elevated standard of “strong *prima facie* case” applies to both the existence of the fiduciary duty and its breach, as well as to the allegation of misappropriation of confidential information: *GG & HH* at para 92.

[25] The strong *prima facie* case standard requires the applicant to show it will “probably prevail at trial” or is “likely to succeed at trial”: *BrettYoung Seeds Limited Partnership v Dyck*, 2013 ABQB 319 at para 84 and the cases cited therein.

[26] The remaining two parts of the *RJR-MacDonald* test for an injunction remain in place for cases of breach of fiduciary duty. They are:

- irreparable harm to the plaintiff; and
- whom the balance of convenience favors.

² *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at p 334.

E. The Existence of a Fiduciary Duty

[27] It is also agreed that Imperial Printing is not attempting to enforce a restrictive covenant as Ms. Reimer is not signatory to any such covenant, nor even to a confidentiality provision, in either her employment with the former Imperial Printing or the current Imperial Printing. Rather, the existence of fiduciary duty is premised solely on Ms. Reimer being a key employee of Imperial Printing.

[28] The analytical framework for determining whether a fiduciary relationship exists is described in *Frame v Smith*, [1987] 2 SCR 99 at para 136 and modified by *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36, consisting of the following:

- a fiduciary has scope for the exercise of discretion or power;
- the fiduciary can unilaterally exercise that discretion or power so as to affect the beneficiary's legal or practical interests;
- the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power; and
- the fiduciary has given an undertaking, express or implied, to act in the best interests of the beneficiary.

[29] Jurisprudence applicable in Alberta firmly establishes that fiduciary relationships may arise in the employment context and constitute an employee as the fiduciary of an employer:

- *Torcana Valve Services Inc v Anderson*, 2007 ABQB 356 at para 31;
- *Tree Savers International Ltd v Savoy*, [1991], 81 Alta LR (2d) 325 QB at page 328;
- *Anderson, Smyth & Kelly Customs Brokers Ltd v World Wide Customs Brokers Ltd*, 1996 ABCA 169, at para 20;
- *HRC Tool & Die Mfg Ltd v Naderi*, 2016 ABCA 334 at para 20;
- *Jetco Heavy Duty Lighting v Fonteyne*, 2018 ABQB 345 at para 56; and
- *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54 at para 50.

[30] In general, to determine fiduciary employee status, the Court must take a functional approach by analyzing the employee's role and the nature of that employee's relationship to the employer:

- *Firemaster Oilfield Services Ltd v Safety Boss (Canada) (1993) Ltd*, 2000 ABQB 929 at para 42; RBC at para 50;
- *Anderson, Smyth* at para 17; and
- *ADM Measurements v Bullet Electric Ltd*, 2012 ABQB 150 at para 73 and 74.

[31] The key concept in these cases is that the employer's vulnerability is created by the employee's ability to exercise unilateral power or discretion so as to affect the employer's legal or practical interests. The critical question is whether the employee has "actual authority or

control over the employer's operation" (*RBC* at para 50) or "is imbued with discretion or control" (*Firemaster* at para 42).

[32] It is also important not avoid conflation of a valuable employee with a fiduciary employee. Given the onerous obligations held by a fiduciary, it is necessary to actually find that the employee is a "key employee" as opposed to merely being a good or valuable employee. This caution was delivered by the Court in *Flag Works Inc v Sign Craft Digital (1978) Inc*, 2007ABQB 434, a decision of Justice S. L. Martin as she was then, at para 51:

That Ms. Holt was an exceptionally good employee and even essential to the efficient operation of Ms. Flock's business does not however, make her into top or senior management. These were positions held by Ms. Flock and Ms. Hurley. Her responsibilities would have some impact on the practical and legal status of the company but any vulnerability which existed was attributable to her diligence, not her discretion to affect Flag Work's relevant financial or legal interests. That Flag Works needed Ms. Holt, or relied upon her to be the backbone of one of their profit center[s] does not make her into a "key employee" for the purpose of affixing fiduciary duties.

[33] With respect to employees who deal with clients, it is also important not to make a fiduciary finding based entirely on relationships with clients. The focus of the assessment is whether the employee is a key employee such that the employee has sufficient control and authority over the employer's business. Client relationships are only one part of that context. The Court in *Firemaster* states at para 29:

It is clear that the position of executive sales in Calgary offered the person who occupied it an important and unique opportunity to have personal relationships with representatives of all or most of Firemaster's key clients. It is further clear that Cusson [the employee] was trusted by Campbell [the owner] as being very good at forming relationships and fostering the image and sales of the company. Also, customers liked and trusted him. But what was not established by the evidence is that he had authority or responsibility within the Firemaster corporate framework to make any business decision on Firemaster's behalf. The test is not whether Firemaster's customers liked or trusted Cusson. That ought not to be the basis for finding a fiduciary duty. ...

[34] The cases of *Flag Works* and *Firemaster* also indicate that the employer's particular vulnerability does not arise because the employee happens to be a good or valuable employee. To ground a fiduciary relationship, the required vulnerability is based on the employee's ability to exercise discretion or authority over the employer's operations: *Firemaster* at para 33 to 35.

[35] Here, Imperial Printing took pains to draw the Court's attention to the various ways in which (they say) Ms. Reimer exercised influence and control over the operations of Imperial Printing:

- First, there was her title of General Manager or Plant Manager of Imperial Printing and her placement in the organizational chart of Rayacom, indicating that she was within the senior management group;

- Second, there was the suggestion that Ms. Reimer was the primary interface between Imperial Printing and its portfolio of existing customers;
- Third, the scope of tasks and duties for which she was responsible indicate key employee status;
- Fourth, the fact that she was invited to and participated in financial and other important meetings of Rayacom management or as Imperial Printing’s representative;
- Fifth, the extent of her expertise as the “print mom” (a workplace nickname given to her) and the fact that she did destination training, namely in Vancouver.

[36] So, I will examine the evidence in relation to each of these to reach my conclusion about whether Ms. Reimer was a key employee or not.

i. Title & Placement in Organizational Chart

[37] The list of employees appended to the asset purchase agreement describes Ms. Reimer as “plant manager”. Ms. Reimer testified that this was news to her. In her employment at the old Imperial Printing, she says she had never been referred to as the plant manager.

[38] On the Rayacom website, which is said to have come from 2023, Ms. Reimer’s title is given as “Imperial Printing – General Manager” and she is shown as one of 7 members of “Our Leadership Team”.

[39] Again, Ms. Reimer deposes that she never held the title General Manager at Imperial Printing. Furthermore, she took great umbrage during her cross-examination that her picture had been used on the Rayacom website without her knowledge or consent. She knew nothing about what was depicted on the Rayacom website.

[40] Curiously, Ms. Reimer was never mentioned on the website for Imperial Printing, despite Imperial Printing’s position that she was in charge of the entire operation. Her business card from Imperial Printing put in evidence did not show a particular title or position.

[41] With regard to the organizational chart, there are 11 distinct divisions or entities of the “Rayacom Corporate Stores” reporting either directly or indirectly to Austin Tran and Martin Tran. Ms. Reimer is shown as leading the Imperial Printing entity and reporting directly to Martin Tran.

[42] Again, somewhat curiously, of those 11 purported entity heads, only Ms. Reimer is shown as a member of “Our Leadership Team” on the Rayacom website. The other 10 are missing and I don’t know why that would be, since on the organizational chart those other 10 are shown at the same level and in the same color of box as Ms. Reimer. Like the Rayacom website, Ms. Reimer had no knowledge of the organizational chart.

[43] In any event, Mr. Graham reminded me that I said at para 86 of *Orbis*: “Fiduciary capacity is not determined by the colour of the box or placement on an organizational chart nor even by titles, or by [the employer] saying they are fiduciaries.” This would be particularly so where the employee in question has no knowledge of the organizational chart, the website, or the title. The title and placement in the organizational chart are but one piece of evidence and in this case is not a very compelling piece of evidence.

ii. Primary Interface

[44] Mr. Tran reproduced in his affidavit a number of emails exchanged between Ms. Reimer and various customers showing that she interacted directly with these customers. That is not disputed by Ms. Reimer but as Mr. Graham says, and I accept, it was her job to service existing customers. These emails are nothing more than an example of that.

[45] Imperial Printing points to *Jardine Lloyd Thompson Canada Inc v Harke-Hunt*, 2013 ABQB 313 at para 40 and says that Ms. Reimer did those things at Imperial Printing that are denoted as part of a fiduciary role:

An employee is a key employee if he/she has:

- knowledge of names of customers and/or contact persons and/or the needs of clients;
- access to the employer's special or confidential information;
- the names of suppliers;
- knowledge of pricing and/or the authority to provide special pricing
- arrangements or other special information to clients; or
- other duties and responsibilities which show them to be a key person to the Corporation.

[46] I dealt with this argument at para 88 of *Orbis*:

Mr. Robinson said that I should have regard to the factors denoting fiduciary capacity as listed by Justice Manderscheid in para 40 of *JLT*. I note that Justice Manderscheid explicitly at para 38 adopts the paradigm from *Frame v Smith* and I interpret para 40 as listing guideline factors that are examples of functions that might suggest fiduciary capacity. These examples may inform the legal test but the actual legal test is that set out in *Frame v Smith* and *Elder Advocates*.

[47] Nor does simply knowing who the customers are or having relationships with them render an employee a fiduciary. In the *HRC* case cited in *Jetco*, Ross J said at para 54:

It is likely that Prowest's success is due to knowledge of the industry and contacts with clients that Bahra and Naderi developed while working for HRC. But that is simply a reflection of the legitimate entitlement of employees to go into the market and use their skills and knowledge to compete with their former employers. In the circumstances of this case, it is not an indication of exploitation by the employees or vulnerability of the employer.

[48] The trial decision in *HRC* was affirmed by the Court of Appeal at 2016 ABCA 334. This aligns with the passage I quoted earlier from *Firemaster* that the fact that clients like or trust a certain employee does not make that employee a fiduciary.

iii. Scope of Duties

[49] Mr. Tran at para 10 of his affidavit lists Ms. Reimer's duties at Imperial Printing. Ms. Reimer agrees that she did engage in customer service and maintaining existing client relationships, ordering supplies, scheduling and planning of jobs, estimating and providing quotes. She disagrees that she did business development, managed all the staff and was responsible for their payroll, handled WCB claims and took part in the high-level financial management of Imperial Printing.

[50] Ms. Reimer is very clear that her focus was on existing customers and that it was not her job to go out and get new customers. She denies being involved in staff hiring and managing staff. In her cross-examination, she did not recognize the name of Michael Teng as the immigration consultant Rayacom or Imperial Printing used to bring in foreign workers. She thought he was an IT person.

[51] Ms. Reimer says she did report hours to the payroll department. She says she was instructed to deal with the WCB claim by Mr. Tran.

iv. Meetings

[52] Much was made by Imperial Printing of various entries in what looked like Ms. Reimer's Microsoft Outlook Calendar while employed at Imperial Printing. Ms. Reimer was shown as being invited to various meetings which Mr. Tran says with key contracts, customers and suppliers, and to management and financial meetings. The calendar indicates that she accepted some of these invitations and others she did not.

[53] Ms. Reimer states that she did not even know about the Microsoft Outlook Calendar function. She did not know that her contact information in Microsoft Outlook showed her as being the manager. She stated that she did not know anything about being invited to meetings electronically, accepting meetings through the calendar or not accepting meetings. She indicated that she did not attend many of the meetings to which she was supposedly invited.

[54] Ms. Reimer recalls attending the occasional financial meeting to provide information about Imperial Printing. She says he did not attend most of the financial meetings because they started at 3 p.m. and 3 p.m. was her quitting time.

v. Print Mom

[55] Ms. Reimer agrees that she was given the nickname "print mom" because of her extensive knowledge of the printing industry. She says she did one training trip to Vancouver. When Mr. Tran undertook to provide the backup for the other training trips that she supposedly took, he was unable to provide any documentation.

[56] When I look at all of this evidence in totality, not in isolation but together, I am still hard-pressed to say there is a strong case that Ms. Reimer is a key employee. She was supposed to deal with customers, so she dealt with customers. She reported hours to payroll. She signed a WCB claim form and sat in on a meeting. Someone had to do these things. These are not the activities, or are not necessarily the activities, of the key employee. Relatively junior people in an organization can report hours for payroll purposes, handle WCB claims, deal with suppliers and so on.

[57] What all of this demonstrates to me is that in addition to core duties of estimating, quoting, planning and scheduling, and ordering supplies, she was given a variety of other

administrative tasks by Martin Tran, which she carried out under his instructions. What it does not tell me is that Ms. Reimer wielded such independent or unilateral discretion and authority that she could affect the legal and or practical interests of the company.

[58] There is contrary evidence.

[59] There is the manner in which she was brought on as an employee of the new Imperial Printing. Her employment contract was not retained as an asset in the sale from Geoff Ceilin to 173. In fact, she was handed a piece of paper and told that she could either sign it to stay on with the new Imperial Printing or not sign it and walk out the door. The choice was hers. This rather cavalier attitude of “take it or leave it” does not point to key employee status or the retention of a mission-critical employee.

[60] Then there is the manner in which Ms. Reimer was replaced in her position at Imperial Printing. It was done in an equally cavalier fashion. Ms. Reimer made herself available during the last two weeks of her employment to train her replacement. Her replacement did not show up. The two never met. Rather, the training, such as it was, was conducted entirely over email and over the telephone during a period of four days while Ms. Reimer was in Las Vegas. If Ms. Reimer was indeed a key and mission-critical employee, some greater effort should have been taken to train her replacement so that there would not be a falloff in this important position when Ms. Reimer left for good.

[61] There was no job description or performance reviews put in evidence to even say what her job was. There was no employment contract describing her duties. How can it be said that a relatively sophisticated network of companies with numerous employees operating across three provinces in various businesses would not even document the duties and responsibilities of a key member of senior management? How could Ms. Reimer ever be held to account as a high-level employee when no standards or expectations were stated?

[62] It is accepted that she was not a director or officer of any Rayacom company. It is accepted that there was no performance pay or pay-at-risk. The purchase and sale agreement shows her as being an hourly wage employee, albeit the second-highest one. She did not give instructions to the company’s lawyers or other professionals.

[63] Most telling of all, nowhere in the evidence is there any example or illustration of how Ms. Reimer wielded independent or unilateral power or authority so as to be able to affect Imperial Printing’s legal or practical interests. In my view, there is evidence of the opposite. She did as instructed. She had no independent authority that could change the Imperial Printing’s strategic direction. She was not asked for her opinion and when she gave it, on her own initiative, it was ignored. It was, to paraphrase Ms. Reimer’s words, her feelings of helplessness, futility and marginalization, and her sense that Imperial Printing was going downhill, that led her to be so unhappy that she quit without another job to go to. All of this is particularized in para 30, items (a) through (h) and para 31 of her affidavit.

[64] There is no dispute that she was an excellent employee who is good with clients, from which I conclude in line with *Flag Works* and *Firemaster* that any vulnerability that Imperial Printing had arose because Ms. Reimer was a good and valuable employee, not because Ms. Reimer was able to exercise discretion or authority over Imperial Printing’s operations so as to affect Imperial Printing’s legal or practical interests.

[65] This is the same conclusion that I reached in the *Jetco* case, cited by the applicant, at paras 63-75. In that case, the employee in question was the vice-president of sales who had forged close relationships with the company's best clients. However, aside from having the ability to submit orders, he had no power or discretion to guide the company's direction or render it vulnerable, other than by being a good employee or a bad employee.

[66] After reviewing the relevant cases, I said this at para 65 of *Jetco*:

While it is clear from the above survey of case law that any decision regarding the existence of a fiduciary duty is contextual and highly fact dependent, nonetheless the common thread is the reposing, by the employer, of sufficient discretion and power to make business decisions such that the employer's legal or practical interests are vulnerable to the exercise of that power or discretion. The value or competence of the employee does not, by itself, provide the required degree of vulnerability.

[67] We have essentially the same position here: a good employee, a valuable employee, an experienced and knowledgeable one, and someone who is skilled at managing clients. What is missing is the employee having such discretion and power to make business decisions such that the employer's legal or practical interests are vulnerable to the exercise of that power discretion. Ms. Reimer was not there to lead the company. That was the purview of Martin Tran. Ms. Reimer's duties essentially were scheduling, planning, estimating, stock purchasing and providing quotes to clients, and carrying out the instructions of Martin Tran with respect to any other administrative tasks specifically assigned.

[68] I conclude therefore that Imperial Printing is not made out a strong *prima facie* case that Ms. Reimer was a key employee of Imperial Printing and therefore its fiduciary.

F. Alleged Breach in the form of Solicitation

[69] Where there is no duty, there can be no breach.

[70] If it were necessary to make a finding of whether there is a *prima facie* case with respect to breach, I would make these observations:

- I have reviewed all of the emails sent by Ms. Reimer to the clients of Imperial Printing when she started at Westkey.
- At paras 92- 98 of *Jetco*, I canvassed the case law as to what constitutes solicitation. Merely providing new contact information is not solicitation. There must be encouragement or in the least a request that the client follow the departed employee to the new employer.
- Some of Ms. Reimer's emails may be close to the line where they extol Westkey's virtues but when doing so, she also comments about inexperienced staff. On balance, I say some case has been made out that solicitation has occurred, but I cannot say that it reaches the level of strong *prima facie* case.

G. Alleged Breach of Confidentiality

[71] There are two aspects here. The first relates to the confidentiality of the customer list. The second relates to the allegation of misappropriated product from Imperial Printing.

i. Customer List

[72] Ms. Reimer deposed and testified that she took nothing with her from Imperial Printing. In particular, she did not take either a physical or digital customer list. Once she deleted Imperial Printing's VPN from her laptop, she had no way to access any of Imperial Printing's computerized information. She said she was able to reconstruct the email addresses of some customers from memory. Others she was able to look up on the internet on either a corporate website or LinkedIn.

[73] While the contact information for individual contacts for various clients is not confidential information (unless it is something like an unlisted telephone number), the fact that a certain company *is* a client may be confidential. I appreciate that Ms. Reimer would have used a Westkey computer when sending those emails. However, the emails were sent to the clients themselves, not third parties. She was carrying the information for the most part in her head and for the most part did not disclose the information to anyone. She was telling those clients about her own relocation which, without more, is not objectionable.

[74] The sole exception might relate to the interactions Ms. Reimer had with PCL/Melloy after she began at Westkey. Others at Westkey obviously were aware that PCL/Melloy was an Imperial Printing client. In particular, there is the "dicey" comment from Mr. Colville.³

[75] Since there is no evidence from Mr. Colville, I don't know quite what to make of the "dicey" comment. I do not know whether he means that signing up PCL is unethical or illegal, or whether he is just describing a process that is complicated or awkward. I don't know whether he made the assumption that PCL/Melloy is being "moved over" from Imperial Printing or whether he precisely knew what product or service Westkey was providing to them.

[76] Ms. Reimer's evidence is that Imperial Printing and Westkey were not in competition with one another over PCL and Melloy work because Westkey was providing a different product or service. Ms. Reimer also says that companies like PCL will competitively source multiple providers for the same job in an effort to get the best deal. Imperial Printing has been unable to undermine or controvert any of this evidence.

[77] I also note that the Court of Appeal found in the *HRC* case at para 24 that customer information generally known in the industry is not confidential:

It is clear from the evidence that Bahra and Naderi took no confidential information upon their departure. They even made their Prowest computers available to the appellant for review. The Trial Judge found that the customers' identities were well known in the industry and were not special, unique, or exclusive to the appellant... Nothing in this finding warrants appellate intervention.

³ Mr. Colville's email to two Westkey employees on March 27, 2024 in reference to Melloy as a potential new client: "Hello you two. Hope all is well. This is a bit dicey getting these clients moved over from our competitor and if we don't ABSOLUTELY have to get them to fill this out and can use the info supplied in their Credit info they supplied – can we just get them signed on with what we have?? Thanks! K."

[78] That is the same as in this case. What Ms. Reimer took with her was in her head, or at most readily accessible from public internet sources. Moreover, the evidence shows that customers seeking printing services go to multiple vendors, for quotes or for different jobs. From that, I infer that those in the industry generally know who the customers are. It is not a secret.

[79] Overall, I am not satisfied there is a strong *prima facie* case with regard to breach of confidentiality on this score.

ii. Misappropriation

[80] With regard to the other matter of the allegation of misappropriation, Ms. Reimer has provided her explanation as to how she ended up with those particular images on her phone. She says she was simply finishing up some work for Imperial Printing in her waning days as an Imperial Printing employee. Imperial Printing has not been able to undermine or controvert that evidence.

[81] In her March 25, 2024 email as a Westkey employee to Mr. Mercier at PCL, she says she says she has “samples of the product” but not the artwork. I do not know what samples she has or what artwork she is talking about. I do not know whether the product and artwork refer back to the images sent to her cell phone.

[82] Again, overall, I am hard-pressed to say there is a strong *prima facie* case with regard to misappropriation of property, when the property cannot even be identified.

[83] My conclusion on the first branch of the modified *RJR-McDonald* test is that the applicant Imperial Printing has failed to make out an strong *prima facie* case with regard to either the existence of fiduciary duty or a breach of any sort.

H. Irreparable Harm

[84] As has been said in cases such as *British Columbia (Attorney-General) v Wale* (1986), 9 BCLR (2d) 333 (BCCA), aff’d, [1991] 1 SCR 62, the constituent parts of the *RJR-MacDonald* test should not be considered as three watertight compartments or a checklist or a series of three hurdles to be overcome each in succession. Rather, they comprise an integrated whole to the consideration of whether an injunction would be just and fair in all of the circumstances. The strength of one component can compensate for the weakness of the other. Accordingly, I embark on a consideration of the remaining two parts of the test, irreparable harm, and the balance of convenience.

[85] In his May 16, 2024 affidavit, Martin Tran attributes financial losses of \$640,552.33 due to business diverted by Ms. Reimer to Westkey. Imperial Printing also says that present and future losses resulting from loss of reputation, goodwill and future business are intangible and unquantifiable.

[86] Ms. Reimer and Westkey reply that it is not possible for Imperial Printing to demonstrate to the Court’s satisfaction that the claimed losses are in any way connected to Ms. Reimer moving to Westkey.

[87] Mr. Graham argues that the financial information presented in this application by Imperial Printing is unreliable. It is unreliable in that it encompasses a 6 month period that

includes the 3 months before Ms. Reimer left Imperial Printing's employment. As such, without further explanation, it just as easily supports Ms. Reimer's contention that Imperial Printing was on the decline even before she left. There is no comparative information from other years.

[88] As well, as Mr. Graham pointed out, \$154,961.33 of the alleged \$640,554.32 lost revenue is attributable to clients of Rayacom (not Imperial Printing), amounting to almost 25% of the loss.

[89] Further, the financial analysis provided in Ms. Reimer's response to undertakings shows that at most Westkey has only received approximately \$56,000.00 in orders from clients that may overlap with Imperial Printing, and a good portion of those orders arise from work that Imperial Printing does not do. By my own calculation, the actual overlap is \$46,111 of work that Imperial Printing could have done.

[90] Mr. Graham further argues that in Ms. Reimer's evidence there is ample explanation for why Imperial Printing clients might have turned away from Imperial Printing and sought alternate providers, be it Westkey or someone else. Mr. Karmal states in his affidavit that the printing industry itself has experienced a decline in business. These assertions were not controverted or undermined in any way by Imperial Printing.

[91] I note that in cases such as *Enviro Trace Ltd v Sheichuk*, 2014 ABQB 381 and my own decision in *Lynx Integrated Solutions Corp v 2031783 Alberta Ltd*, 2023 ABKB 220 in which I did grant an interlocutory injunction, unquantifiable loss of market share, reputation and goodwill can comprise intangible loss that establishes irreparable harm for the purposes of the injunction test. However, those were cases involving theft of technology or proprietary information, now used by a competitor. In those cases, the applicant was a unique player in the market with special technology that was then alleged to have been stolen so as to no longer be unique. That is not the allegation here. Imperial Printing and Westkey were not unique from one another.

[92] Here, each side has been able to produce a set of figures intended to show exactly what has been lost by Imperial Printing, to the penny, if a breach of fiduciary duty by way of solicitation had been established. Imperial Printing complains about the loss of its own clients. It seeks restraint for only one year with respect to those specific clients. I agree with Mr. Graham that the loss is quantifiable and not intangible.

[93] For those reasons, I conclude that irreparable harm has not been made out.

I. Balance of Convenience

[94] Considering the balance of convenience at the final stage of the *RJR-MacDonald* test involves an assessment of which party would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[95] I did also say that the three parts are integrated and should be considered as a whole. While many factors may come into play at this stage, I see these as important in this case:

- the extent of irreparable disadvantage to either side if the injunction is granted or not;
- the public interest; and

- relative strength of each side's case.

[96] I am of course revisiting points previously discussed in this decision. But that is what I'm required to do. This is where I weigh them.

[97] I have concluded that if this matter were to proceed to trial and should Imperial Printing ultimately be successful, its losses would be very easily ascertained since we are only talking about specific customers in the work diverted to Westkey, if indeed diverted.

[98] Imperial Printing also made the point that Westkey has 5000 customers and if they're not allowed to contact a few, then so what? That argument, to me, misses the point about how the marketplace works.

[99] This engages the public interest factor. Consumers should be able to choose their vendors. Should the Court be telling those customers on Imperial Printing's list that they cannot go to Westkey even if they want to go to Westkey, even if they have reasons for going to Westkey unrelated to Ms. Reimer or anything she might have said to them? I am told that commercial consumers of printing services may go to more than one, or even multiple vendors, simultaneously. The statement was not challenged at all.

[100] It is also only speculation at this point, which is not been backed up by evidence, that clients were enticed away from Imperial Printing by Ms. Reimer. Even in the case of PCL/Melloy, Westkey provided different services. While Westkey's well-being as a business might not be weakened by the injunction sought, in all the circumstances I would be interfering with the free choice of customers in this industry. That is not in the public interest.

[101] Finally, my own view is that Imperial Printing has a very difficult road ahead of it to establish at trial a case for breach of fiduciary duty by a key employee. For all those reasons, the balance of convenience favors Ms. Reimer and Westkey.

J. Result

[102] The application for an interlocutory injunction is dismissed.

[103] At the hearing, I gave direction as to how costs might be addressed.

Delivered Orally on the 16th day of July, 2024

Dated at the City of Edmonton, Alberta this 19th day of July, 2024.

Douglas R. Mah
JCKBA

Appearances:

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