

Court of King's Bench of Alberta

Citation: Southwest Design & Construction Ltd v Janssens, 2024 ABKB 502

Date: 20240820
Docket: 2306 00891
Registry: Lethbridge

Between:

Southwest Design & Construction Ltd and Mid-West Design & Construction Ltd

Plaintiffs/Applicants

- and -

**Blayne Janssens, David Mathieu, Anthony Gibson, Greg Klassen, Ryan Olsen, John James,
JC James Properties Ltd, Chris Murray, and Elevate Construction Partners Inc**

Defendants/Respondents

Corrected judgment: A corrigendum was issued on August 21, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of the Honourable Justice M.H. Bourque

I. Background

[1] Southwest Design & Construction Ltd. and Mid-West Design & Construction Ltd. (**Southwest**) seek an interim injunction (1) enjoining the Respondents from bidding on or otherwise pursuing any projects or other work that the Applicants bid on or had the opportunity to bid on or became aware of while the Respondents (other than Chris Murray and Elevate Construction Partners Inc.) were employed or engaged by the Applicants; (2) enjoining the

Respondents from soliciting the Southwest's clients or employees until September 1, 2025; and (3) for a preservation order over relevant litigation records and documents.

[2] The instant litigation commenced after negotiations failed between the owner of Southwest, Fred Keck (**Keck**) and two of Southwest's long-time employees, Blayne Janssens (**Janssens**) and David Mathieu (**Mathieu**), who were unable to reach an agreement to purchase Southwest from Keck. Afterwards, Janssens and Mathieu decided to leave Southwest and start their own construction business, Elevate Construction Partners Inc. (**Elevate**). Before leaving Southwest, Janssens had served as Southwest's General Manager since around 2005, and Mathieu started working at Southwest in 1988, serving as Southwest's Ironworker Superintendent. The parties differ in the scope, nature, and length of the negotiations between them, but that difference, in my view, does not change the outcome of this application. Nor do the reasons why the talks were unsuccessful.

[3] Keck started Southwest in the 1980s, and for most of its history, Southwest has focused on the business of construction of steel structures, such as grain bins and Quonset buildings, though it later diversified to a range of commercial, industrial, agricultural and residential building construction projects, with offices in Lethbridge, Calgary, Medicine Hat, and Grande Prairie. Keck is 76 years old and describes himself as semi-retired, having reduced his time at Southwest over the last several years and estimated being away from work approximately 40% of the time.

[4] Southwest describes Janssens as the most senior person at Southwest, other than Keck, with the most senior employees at other Southwest locations reporting to him. Janssens had signing authority on behalf of Southwest, including the authority to bind Southwest to contracts. Janssens oversaw business development, construction activity, and various divisional operations, such as finance, marketing, staffing and scheduling.

[5] Southwest describes Mathieu as "instrumental to the business" and having "effective control over all construction-related aspects, including operations and quality control procedures, scheduling, hiring of construction employees and contractors, management of construction schedule and budget, and job safety.

[6] Southwest describes Construction Manager Ryan Olsen (**Olsen**) as having responsibility for monitoring project schedules and providing advice and expertise for all building construction projects; Chief Financial Officer Anthony Gibson (**Gibson**) as overseeing Southwest's financial operations and affairs, financial control and productivity; Project Manager Greg Klassen (**Klassen**), as overseeing and managing all aspects of construction projects from sales to project completion, with responsibility for sales and customer interaction, and bidding on new projects; Salesman and Project Manager John James (**James**), as providing sales and construction management services, including significant customer interaction.

[7] Southwest alleges that between July 2023 and September 1, 2023, Janssens and Mathieu took "deliberate, secret and calculated steps" to establish a competing construction company, including recruiting "four key Southwest executives," namely Olsen, Gibson, Klassen and James, to join them in starting a competing business and recruiting five of Southwest's best construction workers (the **Junior Employees**). During that time, Southwest also alleges, and it is not disputed, that Janssens and Mathieu caused Elevate to be incorporated, arranged financing, set up bank accounts, arranged for insurance and bonding, acquired office space and completed

leasehold improvements, prepared financial projections and business plans as well as a profit-sharing arrangement respecting Elevate.

[8] On September 1, 2023, Mathieu, on behalf of himself and of Janssens and nine other employees, delivered to Southwest resignation letters with effect as of Friday, September 15, 2023. Elevate commenced operating on September 18, 2023. Southwest alleges that it is “still reeling from the negative impact of these departures” and the “unfair competition” of Elevate.

[9] Southwest entered into Confidentiality Agreements with each of Olsen, Gibson, Klassen and James (Southwest was unable to locate copies of the same with either Janssens or Mathieu) prohibiting the unfair use, disclosure, retention, and deletion of confidential information and that by entering into the Confidentiality Agreements, Olsen, Gibson, Klassen and James were, *inter alia*, obligated to protect and safeguard confidential information against unauthorized use, publication, or disclosure, and to not use confidential information except for business purpose, as expressly authorized, or to unfairly compete or obtain an unfair advantage against the Company in any commercial activity.

[10] Gibson signed the Confidentiality Agreement in early 2023 when he started with Southwest. Other than Gibson, Olsen, Klassen, and James signed the Confidentiality Agreement well after they commenced employment with or providing services to Southwest. Concerning Janssens and Mathieu, Southwest submits that “it was always understood that they had agreed to and were subject to the terms of the Confidentiality Agreement, in addition to their common law and fiduciary obligations.”

[11] Southwest also points to its Acceptable Use Policy regarding the acceptable and unacceptable uses of electronic devices and network resources, which was signed and agreed to by Janssens, Mathieu, Olsen, Gibson, Klassen and James.

II. Issues

[12] Southwest states that the only issue is whether it is entitled to an injunction restraining the Employee Defendants and James¹ from continuing to breach their fiduciary, common law, and contractual duties. It states that the Court should answer the following questions:

- a. Whether the Respondents should be permitted to violate their fiduciary duties and compete against Southwest by soliciting customers and employees and misusing Southwest business opportunities and confidential information; and
- b. Is it just to leave Southwest to only a remedy of damages in the circumstances?

III. Analysis

[13] The parties agree that the determination of this application is governed by the 3-part test in *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

[14] Regarding the first prong of the test, the parties agree that the applicant must demonstrate a strong *prima facie* case based on a preliminary assessment of the merits (*IBM Canada Ltd v*

¹ Employee Defendants is defined in the Statement of Claim as Janssens, Mathieu, Olsen, Gibson and Klassen. It does not include James because James provided services to Southwest through J.C. Properties Ltd. For ease of reading these reasons, I have used the term Respondents to describe the Employee Defendants and James (and any reference to James includes J.C. Properties Ltd.), but not Elevate or Murray.

Almond, 2015 ABQB 336 at paras 25-27; *GG & HH Inc v 2306084 Alberta Ltd.*, 2022 ABQB 58 (*GG*) at paras 85 and 90). A strong *prima facie* case means one that is “likely to succeed at trial” or that has a “very strong probability of success” (*Modry v Alberta Health Services*, 2015 ABCA 26 at para 37).

A. Has Southwest demonstrated a strong *prima facie* case?

[15] Southwest submits that it has met the strong *prima facie* case test based on breaches of fiduciary duties and breaches of other employment obligations, including the common law duties of good faith and loyalty and related contractual obligations.

[16] Concerning fiduciary duties, Southwest submits the following:

- a. Janssens and Mathieu were fiduciary employees. As a result, Janssens and Mathieu were and continue to be subject to fiduciary duties;
- b. Because they acted in concert with Janssens and Mathieu, the other Respondents are also subject to fiduciary duties;
- c. The Respondents breached their fiduciary duties by creating clear situations where their personal interests conflicted with Southwest’s and then preferring the former to the latter, including the following examples:
 - i. While still employed at Southwest, they secretly planned to form a competing business. Using their positions at Southwest and Southwest resources, they planned the new business and recruited other key Southwest employees to work for them. Because the Respondents acted in secret, they denied Southwest the opportunity to attempt to retain employees and clients before they departed. The Respondents did not disclose their plans to form a competing business and did not give Southwest a fair opportunity to protect its own interests. Instead, they kept their activities secret until the last minute to give themselves an unfair advantage over Southwest;
 - ii. While still employed at Southwest, and at a time when the Respondents knew (but did not disclose) they would be leaving to form a competing business, they submitted proposals for business opportunities. After leaving Southwest, they bid against Southwest for those same projects. Again, keeping their plans secret denied Southwest the opportunity to protect its interests. Moreover, there is an inescapable inference the Respondents used their knowledge of Southwest’s confidential information from the bids they prepared at Southwest when they bid against Southwest through Elevate.

[17] Southwest also submits that the same examples demonstrate a strong *prima facie* case that the Respondents breached their duties of good faith and loyalty and contractual duties to Southwest.

1. Were Janssens and Mathieu fiduciaries?

[18] Southwest argues that Janssens and Mathieu were fiduciaries because they were part of its senior management team, had extensive knowledge of ongoing projects, and had access to confidential and proprietary information. Southwest argues that Janssens and Mathieu also

exercised great discretion for proposals and projects, had the authority to make unilateral decisions on projects, and oversaw workflow and staff development. Southwest further submits that Janssens had the most authority out of anyone at Southwest except for Keck. Southwest acknowledges that Janssens was subject to oversight by Keck but submits that the evidence demonstrates that Janssens played a significant role in the design and completion of Southwest projects, which allowed him to unilaterally exercise power or discretion to affect Southwest's legal or practical interests and that Southwest was vulnerable to that discretion or power.

[19] In *HRC Tool & Die Mfg Ltd v Naderi*, 2016 ABCA 334 at para 6, the Court of Appeal summarized the analytical framework for determining whether a fiduciary relationship exists as follows:

- (a) the fiduciary has scope for the exercise of some discretion or power;
- (b) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
- (c) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power; and
- (d) The existence of an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries.

Mere vulnerability or reliance is not sufficient to create a fiduciary relationship:
Elder Advocates at para 28.

See also: *Abt Estate v Cold Lake Industrial GP Ltd*, 2019 ABCA 16, at para 73; *Jetco Heavy Duty Lighting v Fonteyne*, 2018 ABQB 345, at para 55; *Questor Technology Inc v Stagg*, 2020 ABQB 3, at para 60.

[20] In determining fiduciary employee status, the court must look at the content of the employee's role and the nature of that employee's relationship with the employer. The key concept is that the "employer's vulnerability is created by the employee's ability to exercise unilateral power or discretion to affect the employer's legal or practical interests: does the employee have actual authority or control over the employer's operation or is the employee imbued with discretion or control. It is not enough to be a valuable or good employee. Fiduciaries are often "key" employees (*Jetco*, para 58).

[21] In *GG*, Justice Eamon explained that "a key employee usually meets the requirements for imposing fiduciary duties" (at para 100) but that "beyond the group of directors, officers and key employees, the Courts are cautious in imposing the onerous duty of fiduciaries to employees, because the law 'favours the granting of freedom to individuals to pursue *economic* advantage through mobility in employment' (at para 101), concluding that that "not every employee performing an important and central role is a key employee" (at para 102).

[22] In his affidavit, Keck deposes that "Janssens and Mathieu had worked for [him] for a combined total of over 60 years", that "their departure was a major blow," that he had placed "a huge amount of trust in them" and that given his mostly retired status, "they effectively ran the business" for him (at para 15). He describes the Respondents as "the majority of [Southwest's] senior leadership" and that they had "responsibility for the direction and management of [Southwest's] overall business, strategy and affairs. He further states that the Respondents (at para 16) "to varying degrees, had the authority, power, and discretion to make decisions that

materially affected the Company's interests." He also attached job descriptions for those various positions.

[23] Southwest submits that Janssens and Mathieu are "clearly" fiduciaries and that there is "ample undisputed evidence" about their job duties.

[24] In his affidavit (at para 3), Mathieu deposes that, as construction manager, his main responsibilities included organizing job sites for crews. He acknowledges having the ability to sign off for supplies for job sites and rental equipment but notes that he had no signing or banking authority. Nor did he have the authority to sign any major agreements or make any major decisions on behalf of Southwest. No doubt Mathieu was essential or "important to the smooth and profitable functioning" of Southwest, but that does not make him a fiduciary (*Flag Works Inc v Sign Craft Digital (1978) Inc*, 2007 ABQB 434 at para 47). At this stage, I cannot find a strong *prima facie* case that Mathieu has actual authority or sufficient control over Southwest's operation to make him a fiduciary of Southwest. Accordingly, Southwest has not shown a strong *prima facie* case that Mathieu is a fiduciary.

[25] As for Janssens, the evidence that he was a fiduciary is more persuasive, and I am satisfied that a trial judge may conclude Janssens was a fiduciary. In questioning, Janssens acknowledged that he had the authority to sign cheques without Keck's approval and enter contracts on Southwest's behalf. Janssens also admits that he oversaw Southwest's business in Lethbridge and had some limited oversight for other locations. Though Janssens does not recall signing a consent to act, documentary evidence shows he consented to be appointed vice-president of "South-West Steel Products Ltd." Southwest's former corporate name (Exhibit 2, Keck Affidavit).

[26] The Respondents acknowledge that "it is possible" Janssens was a fiduciary by nature of his position within Southwest but point to the lack of evidence as to any unilateral authority Janssens could exercise to affect Southwest's legal or practical interests and that Southwest was peculiarly vulnerable to or at the mercy of Janssens's authority.

[27] Janssens was a key employee and Keck's second-in-command. He had the authority to sign cheques and enter contracts to bind Southwest. Having reviewed the extensive affidavits and questioning transcripts, and although the matter is not free from doubt, I find that Southwest has established a strong *prima facie* case that Janssens was a fiduciary.

2. Did the Respondents breach their common law duty of good faith and loyalty?

[28] Southwest submits that the Respondents breached their common law duty of good faith and loyalty through the "Elevate Start-Up," "Employee Solicitation," and "Misuse of Business Opportunities."

a) Elevate Start-Up

[29] Southwest defines "Elevate Start-Up" in its brief to include the Respondent's "planned and covert efforts" while still employed by Southwest to undertake the following:

- a. Between July 25 and 27, Janssens told Gibson that he and Mathieu were considering starting their own company. Gibson, Janssens, and Mathieu began to discuss insurance for a new company, and Gibson met with Canadian Western Bank to discuss obtaining a line of credit;

- b. On July 28, Janssens invited Gibson, Mathieu, Klassen, Olsen, and James to a breakfast meeting where Janssens told them all he was considering starting his own business and that “within days,” they advised that they would join Janssens in the new business venture;
- c. Between July 31, 2023, and August 3, 2023, Janssens and Mathieu discussed by text potential logo designs and company names;
- d. On August 2, 2023, in planning his departure from Southwest, Klassen emailed his wife about commission payments;
- e. Sometime after August 3, 2023, Janssens discussed Elevate with Murray and proposed that Murray be an investor and shareholder;
- f. Between August 8 and 9, 2023, Janssens and Mathieu discussed work for “4 guys starting as soon as (they) could for their new venture;
- g. On August 10, 2023, Gibson and Janssens met with Canadian Western Bank to discuss guarantees, management resumes, and budgets for Elevate’s line of credit, including a discussion of a business plan, Elevate’s direction, and potential partners. On the same date, the Respondents met for lunch to discuss the new construction company;
- h. On August 14, 2023, Gibson, Janssens, and Mathieu met with Schwartz Reliance Insurance to inquire about obtaining an insurance quote for Elevate;
- i. On August 19, 2023, Gibson purchased Surface Pro computers for employees of Elevate to use, and Klassen started using this computer before September 15, 2023;
- j. On August 21, 2023, during business hours and using Southwest email accounts and devices, Gibson emailed the other Respondents to acquire their non-Southwest phone numbers and emails to assist in the incorporation of Elevate;
- k. On August 22, 2023, Janssens and Gibson met with MNP to discuss Elevate’s structure and possible terms of a unanimous shareholders agreement;
- l. Between August 21 and August 24, 2023, Mathieu and other Respondents texted to discuss names for the venture, and Southwest recovered a Word document from Gibson’s recycle bin that contained various logos and comments for Elevate;
- m. On August 24, 2023, a law firm began setting up Elevate;
- n. On August 28, 2023, Elevate was incorporated;
- o. On August 29, 2023, Gibson and Mathieu texted to confirm a signing at a lawyer’s office for Elevate’s share certificates;
- p. On August 29, 2023, Olsen and Mathieu texted about a potential warehouse space for Elevate;
- q. In mid-August 2023, Elevate started looking for office space, and the Respondents reached a consensus to lease a space on 6th Avenue;
- r. Regarding the renovations to Elevate’s office space, Olsen obtained a Southwest drawing from an abandoned project file, provided it to trades, and directed a

draftsperson employed by Southwest to revise those drawings, work for which Elevate did not pay;

- s. In late August, Olsen and Klassen oversaw improvements to the Elevate’s office space;
- t. In late August, before resigning from Southwest, Klassen received and accepted an Elevate offer of employment from Janssens;
- u. Olsen received a similar document prior to resigning and subsequently obtained assurances that he would receive a comparable salary, company vehicle and future profit sharing;
- v. On August 30, 2023, the Respondents selected a company logo for Elevate;
- w. On August 31, 2023, Elevate applied for liability insurance, and on September 1, 2023, Elevate opened its first bank account.
- x. Between August 31 and September 4, 2023, Mathieu, Olsen, James, Janssens, and Murray executed corporate documents to appoint directors and subscribe for shares of Elevate;
- y. During the first week of September, Klassen met with James and the other Respondents at the new Elevate office to discuss business plans, projections, shareholders, and salary increases.

[30] Overall, I am not persuaded that Southwest has established that the Elevate Start-Up steps demonstrate a strong *prima facie* case that the Respondents breached their duty of good faith and loyalty. I agree with Justice Graesser that “it would be contrary to public policy, and contrary to common sense, to prohibit a fiduciary from contemplating leaving and working for the competition while still employed,” provided they are fulfilling their employment obligations (*Torcana Valve Services Inc v Anderson*, 2007 ABQB 356 at para 55). On the latter point about fulfilling employment obligations, Keck confirmed in questioning that there were no performance issues for any of the Respondents and that they had fulfilled their work responsibilities to the date they left.

[31] Moreover, the facts and circumstances here are significantly different than in *CRC-Evans Canada Ltd v Pettifer*, 1997 CanLII 14943 (ABQB): Southwest has not demonstrated a strong *prima facie* case, or at all, that the Respondents betrayed duties owed by them to Southwest, that before leaving Southwest, the Respondents did not make decisions in Southwest’s best interests, that during that time the Respondents planned to go after customers normally serviced by Southwest or that they planned to bid on projects on which they had bid on behalf of Southwest.

[32] In deciding that Elevate Start-up steps do not meet the strong *prima facie* case standard, I do not wish for these reasons to be interpreted as condoning the use of a drawing from an abandoned project file. Nor have I overlooked the allegation about having a Southwest draftsperson modify a drawing.

b) Employee Solicitation

[33] In its brief, Southwest defines “Employee Solicitation” to describe the following events:

- a. during the last week of August 2023, Mathieu went out for drinks with the Junior Employees (which included relatives and close friends of Mathieu), whom Southwest

- says Mathieu “carefully selected and targeted” because of his relationships with them as well as his knowledge of Elevate’s capacity for workers;
- b. Mathieu told the Junior Employees that he was starting his own business and to let him know whether they were interested in joining him;
 - c. Mathieu brought resignation letters to the meeting for the Junior Employees to sign and for Mathieu to collect on their behalf;
 - d. The Junior Employees were provided documents detailing a profit-sharing arrangement and salary guarantees for employment with Elevate;
 - e. Mathieu told the Junior Employees to keep this information secret.

[34] I am satisfied that Southwest has demonstrated a strong *prima facie* case that Mathieu breached his duty of loyalty to Southwest by soliciting the Junior Employees. While the caselaw confirms that it is permissible for a fiduciary employee to make an informal announcement of their impending resignation (*Jetco*, at para 93), I find that Mathieu’s actions in the above-described events went beyond an informal announcement of his decision to leave Southwest.

c) Misuse of Business Opportunities

[35] Southwest defines Misuse of Business Opportunities as the Respondents taking advantage of Southwest’s business relationships and corporate opportunities mainly related to 4 projects: Westwind Honda, Ironwood Building, Blanco Cantina and Lethbridge Housing Authority. According to its brief, Misuse of Business Opportunities also relates to sending an introductory email and allegations regarding additional projects: Kainai Forage hay storage shed, Braemore, Barr-Ag, and Serfas. I have examined each of these allegations below.

[36] As an overarching point, I find that Southwest’s evidence is lacking in several material respects, not the least of which is the lack of tangible evidence of any misuse of confidential information or breaches of the Confidentiality Agreements. In his affidavit, Keck stated that he “believes” the Respondents are soliciting clients. At questioning, he confirmed having no information to support his belief and not losing any ongoing projects to Elevate. Without more, unsubstantiated speculative beliefs are generally insufficient to demonstrate a strong *prima facie* case.

[37] On the other hand, each Respondent attested to the return of all Southwest property in their possession and denied having used any Southwest property outside their employment. They also denied using any Southwest information to prepare proposals. Despite hiring a professional forensic accounting firm and conducting rigorous questioning, Southwest has failed to provide meaningful evidence to refute the Defendants’ sworn declarations.

[38] Following the hearing of this application, counsel for the parties wrote to me with submissions regarding the discovery of one possible instance of retention of Southwest property: an Excel file or a portion of an Excel file containing Southwest data or information that Gibson believed he had deleted from his computer before leaving Southwest, except to discover that he had not deleted it from his “downloads” folder. Gibson attested to how the file found itself in his downloads folder, that he had not known it had remained in his downloads folder, that he had not accessed or used the file at any time after leaving Southwest as he believed it had been deleted, and immediately corrected his previous affidavit and answer in questioning reflecting the discovery of the file in his downloads folder. He further confirmed that the file contents or

portion thereof were never used, copied or disclosed. Southwest has requested, and the Defendants have consented to, an Order to deal with the inadvertent retention of the file or portion of the file in Gibson's downloads folder. Nothing in this application turns on this inadvertent retention of Southwest property.

(1) Westwind Honda

[39] It is not disputed that on August 22, 2023, Janssens and Klassen prepared and submitted a proposal to Westwind Honda four Southwest to manage the construction of a new dealership building. After leaving Southwest nearly two months later, Westwind Honda contacted Janssens and Klassens, asking Elevate to submit a proposal. The evidence clearly shows that the Respondents did not solicit Westwind Honda.

[40] Both proposals were in evidence before me; however, Southwest has not persuaded me of a strong *prima facie* case that the proposals' contents reveal that Southwest's confidential or proprietary information was used to structure the Elevate proposal. Having reviewed both proposals and the record in this application, nothing would allow me to logically infer that the Respondents used confidential Southwest information to formulate the Elevate bid.

(2) Ironwood Building

[41] Southwest's complaint regarding Elevate doing work for Ironwood is challenging to understand because Southwest's evidence is that Ironwood was not a client but a "long-time" supplier. That it was a "long-time" supplier is also questionable, given Southwest's vague evidence that Ironwood "has been working with Southwest since 2021". There is no evidence that Southwest had ever done any work for Ironwood. Moreover, Janssens' evidence explains that Ironwood was looking for labour only, which Southwest did not do, except in rare circumstances if Southwest did not have enough work to keep their crews busy. Southwest has not persuaded me that the Respondents solicited Ironwood or that the Respondents used confidential Southwest information to obtain this work.

(3) Blanco Cantina

[42] Southwest completed the project's first phase for the Blanco Cantina restaurant and bid on the second phase. Elevate was awarded a project for Blanco Cantina. Klassen testified in questioning that the project manager at Southwest dealing with Blanco Cantina was Reed Hudson, who was never part of Elevate and remained employed at Southwest. Moreover, the evidence shows that on November 22, 2023, the owner of Blanco Cantina reached out to Janssens: "we should connect and discuss our rooftop." Southwest has not demonstrated direct solicitation nor use of confidential Southwest information.

(4) Lethbridge Housing Authority

[43] Southwest deposes that Lethbridge Housing Authority was an existing customer in July 2023 and that James was responsible for many of the prior proposals and projects. In October 2023, Elevate was awarded a \$10,000 construction management contract for a housing project. Southwest submitted that it could not bid on the project because of the Respondents' departure due to a lack of resources to put together a bid. In his affidavit, James explains that the project was awarded to Elevate through a public tender process and that any company could bid on the project. Southwest has not provided evidence of direct solicitation nor use of confidential Southwest information. Moreover, the nature of a public open bidding process tends to negate direct solicitation (*IBM Canada Ltd. v. Almond*, 2015 ABQB 336 at para 79).

(5) Introductory Email

[44] Keck testified to his belief that Elevate sent an introductory email to a “substantial portion” of Southwest’s former and existing customers and subcontractors in the Lethbridge area. I see nothing wrong with sending an introductory email to subcontractors. As for former and existing contracts, only one addressee has been identified as a former or existing Southwest client, yet no evidence has been submitted to show that that client was directly solicited or that it became an Elevate client.

(6) Kanai Forage

[45] Southwest submits that Klassen worked with Kainai Forage, including a project for the Shed 10 hay storage project. Southwest had submitted a bid on that project in September 2022, but Kainai Forage had not awarded the contract. Instead, in August 2023, Kainai Forage requested updated pricing. Klassen explains in his affidavit that Kainai Forage undertook a Request for Proposals process. Moreover, the evidence shows that on September 25, 2023 (the day immediately preceding the date the introductory email discussed above was sent), Kainai Forage reached out directly to Klassen. Again, there is no evidence of direct solicitation in connection with this project or use of confidential Southwest information. In any event, Klassen deposed and confirmed at questioning on his affidavit that, to his knowledge, the Shed 10 hay storage project contract had not been awarded.

(7) Braemore

[46] The evidence regarding this work project appears to arise only from Klassen's questioning. Southwest submits that Klassen bid on work for a customer called Braemore on behalf of Southwest and that after leaving Southwest, Klassen “updated some pricing” for the same job. In his questioning, Klassen confirmed that Braemore had “reached out to [him].” The paucity of evidence does not establish a strong *prima facie* case of solicitation or use of confidential Southwest information.

(8) Barr-Ag and Canadian Hay Properties

[47] Southwest submits that it completed a project for these entities in the past and is “aware that a contract for a second project is upcoming, and while it has not been awarded yet, Southwest believes that Elevate will bid on this project.” At best, this submission is speculative regarding solicitation and use of confidential Southwest information.

(9) Serfas Farms

[48] According to Southwest, Klassen worked with Serfas Farms while employed at Southwest and was the project manager for a building project “a number of years ago.” Klassen started a construction project for Serfas Farms while at Elevate. In questioning, Klassen explained that he met people from Serfas Farms at a Potatoes Growers Conference in November and talked to them, that he had a relationship with Serfas Farms even before he started at Southwest, that they wanted to meet with Klassen, and that it turned into a project. Again, there is no evidence of direct solicitation or use of confidential Southwest information.

[49] For all these reasons, I am not satisfied that Southwest has established a strong *prima facie* case of any Misuse of Business Opportunities.

3. Conclusion on Strong *Prima Facie* Case

[50] Southwest has established a strong *prima facie* case that Janssens was a fiduciary of Southwest and that Mathieu breached his duty of loyalty by effectively soliciting a small group of employees to leave Southwest and join Elevate. On the other hand, Southwest has not established a strong *prima facie* case that the Respondents directly solicited its clients, nor has it established a strong *prima facie* case that the Respondents have used confidential Southwest information. Even if I accepted that all Respondents are fiduciaries, Southwest has not established any breach other than Mathieu soliciting the Junior Employees in late August 2023.

B. Will Southwest Suffer Irreparable Harm?

[51] I have not been persuaded that Southwest is at risk of suffering irreparable harm if an injunction is not granted.

[52] According to Keck, Southwest has relied upon referrals, goodwill, and its reputation to expand its business and revenue over the last 40 years in Alberta. Southwest states that it will suffer a permanent loss of market presence and customers, along with the associated profits, if no injunction is granted. Southwest claims to have already suffered irreparable harm in that its projects are in disarray, and existing relationships with both clients and employees were harmed by “the unceremonious and abrupt mass exodus.” Southwest states that its employees have devoted massive resources to identifying and correcting project issues and repairing damaged client and employee relationships. Southwest further submits that it has noted a diversion of projects and that the Defendants have taken opportunities from Southwest that existed before their departure with customers that have been its long-time customers. Southwest further submits that there will be irreparable harm in the continued erosion of its business and competition in circumstances where it is unclear whether Southwest will be able to collect damages from the Defendants if Southwest is successful at trial. Southwest argues that the Defendants have not met their burden of establishing that they would be able to pay damages.

[53] Paragraph 35 of Keck’s affidavit contains nothing more than self-serving, vague and speculative allegations. There is nothing either in his affidavit or in the other affidavits made in support of the application showing any loss of market share or significant decrease in business, clients, or revenues. In any event, those types of harm can be quantified in money. The various affidavits sworn by Southwest’s bookkeeper offer no more insight into the harm Southwest has or is at risk of suffering. Rather, they contain the same hyperbolic assertions as in the Keck affidavit, with no data to demonstrate, for example, loss of business, loss of market share, or loss of clients.

[54] I also accept the Respondent’s submissions that any damages Southwest has suffered due to the alleged massive disarray in the projects were avoidable. Janssens and Mathieu each offered to stay longer than their September 15 last-day notice if needed to ensure that no interruption in business operations would occur, but those offers were rejected. Keck terminated Janssens on the spot. Mathieu’s offer was rejected, and he was told that Southwest did not need his help to finish the rest of the projects. Other than Gibson and Janssens, all Respondents continued performing their services until September 15.

C. Does the balance of convenience weigh in favour of or against granting injunctive relief?

[55] I am also not persuaded that the balance of convenience favours Southwest. This part of the tri-partite test requires me to determine which of the two opposing parties will suffer the more significant harm from granting or refusing an interlocutory injunction, pending a decision on the merits. Does the benefit of injunctive relief to the plaintiff outweigh the convenience of withholding it to the defendant? Is the inconvenience to the defendant of granting the injunction more substantial than the inconvenience the plaintiff will suffer if relief is withheld? Are there impacts on third parties?

[56] In its application, Southwest sought a broad injunction, including a prohibition on the Respondents' operating in the construction business in Alberta. The injunctive relief Southwest seeks in its brief is narrower:

- a. an Order enjoining Elevate and the Respondents from bidding on or otherwise pursuing any projects or other work that Southwest bid on or had the opportunity to bid on while the Respondents were employed or engaged by Southwest;
- b. an Order enjoining Elevate and the Respondents from bidding on any projects the Respondents became aware of while they were employed or engaged by Southwest;
- c. an Order enjoining the Respondents from soliciting Southwest clients or employees until September 1, 2025;
- d. an Order requiring the Respondents to preserve all documents and records, ... relating in any way to jobs awarded to or completed by Elevate since its inception.

[57] In my view, the balance of convenience favours the Respondents regarding the injunctive relief sought in paragraphs (a) and (b). If granted, the Respondents would be precluded from bidding on projects where the prospective client, unsolicited, approaches Elevate or any of the Respondents. Moreover, if granted, such injunctive relief would unduly impact third parties' freedom to hire whichever construction company they wish to employ because the Respondents would be obligated to turn down the work. Southwest vaguely asserts that not granting the injunction would negatively impact it financially and that its projects and client relationships are in disarray. However, it has failed to provide any information or data remotely substantiating those assertions. At questioning, Southwest confirmed that it had not lost any further employees since the Respondents' departure and had not lost any existing contracts.

[58] Regarding the relief sought in paragraph (c), the balance of convenience favours Southwest because the Respondents have sworn that they have not solicited Southwest clients and have no intention of doing so. Even if I were inclined to grant the relief sought in paragraph (c), I find the period sought is longer than reasonable in this case's circumstances. As for the relief in paragraph (d), I expect Elevate to be required to retain those records in the ordinary course of its business without needing an injunction to be granted.

D. Considering the tri-partite factors together

[59] Southwest has demonstrated a strong *prima facie* case but in very limited respects and not in the respects that might shore up weaknesses in the other factors. It has not shown that it would suffer irreparable harm if an injunction were not granted. Nor has it persuaded me that the balance of convenience favours the granting of an injunction. Considering the factors together, I decline to order the relief sought by Southwest.

IV. Disposition

[60] The application is dismissed.

Heard at Calgary, Alberta on May 23, 2024.

Supplemental Submissions received on June 7, 2024, June 14, 2024, June 18, 2024, June 24, 2024, and June 26, 2024.

Dated at Lethbridge, Alberta on the 20th day of August, 2024.

M.H. Bourque
J.C.K.B.A.

Appearances:

G. Vogeli, KC

D. Kiefer

for the Plaintiffs/Applicants

M. Vernon

L. Carter

for the Defendants/Respondents

**Corrigendum of the Reasons for Decision
of
The Honourable Justice M.H. Bourque**

Paragraph 24 - Last sentence has been corrected to read:

Accordingly, Southwest has not shown a strong *prima facie* case that Mathieu is a fiduciary.