

CANADA / JUDGMENT

Ampco Manufacturers Inc. v. Boyd

2022 BCSC 589

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 589 Ampco Manufacturers Inc. v. Boyd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ampco Manufacturers Inc. v. Boyd,

2022 BCSC 589

Date: 20220315

Docket: S221563

Registry: Vancouver

Between:

Ampco Manufacturers Inc.

Plaintiff

And

Jennifer Boyd, Lisa Shoji and Tint'd Film & Graphic Solutions

Defendants

Before: The Honourable Justice Skolrood

Oral Reasons for Judgment

(In Chambers)

Counsel for the Plaintiff

appearing via video/teleconference:

D. Bernstein

A.L.J. Peng

Counsel for the Defendants

appearing via teleconference:

A.G. Cline

C. Burton, Articled Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 15, 2022

- [1] THE COURT: The plaintiff, Ampco Manufacturers Inc. ("Ampco"), seeks an interlocutory injunction restraining the defendants from using confidential and proprietary information allegedly obtained by the personal defendants during the course of or as a result of their former employment with Ampco.
- [2] The defendants deny that they are in possession of or have used or misused any confidential information belonging to Ampco.

Background

The Parties

- [3] Ampco is a BC company that provides manufacturing and printing services in the Lower Mainland. It has been in business for approximately 54 years.
- [4] Ampco has a display graphics division known as Ampco Graphics that specializes in designing, manufacturing, and installing graphics for buildings, windows and glass, fleet vehicles, and construction, retail and events signage. According to its CEO Mr. Konkin, Ampco has the largest market share in British Columbia for providing these types of graphic services.
- [5] The defendant Lisa Shoji is a former employee of Ampco. She began her employment with the company in 2006. From 2014 to early 2022, she held the position of account executive which involved communicating with clients and dealing with client contracts. From 2016 to 2022, she held that position within the graphics division.

- [6] The defendant Jennifer Boyd began working for Ampco on October 1, 2020, as an account executive. Ms. Boyd states in her affidavit that prior to joining Ampco, she had worked in the window film industry for over a decade.
- [7] Ms. Boyd is the sole proprietor of the defendant Tint'd Film & Graphic Solutions ("Tint'd"), which she first registered as a sole proprietorship in July of 2021. While Ms. Boyd does not describe Tint'd's business in her affidavit, as the name suggests, it appears to provide window film and graphic services, not unlike the services provided by Ampco's Graphics Division.

Termination of The Defendants' Employment with Ampco

- [8] As noted, both Ms. Shoji and Ms. Boyd are former employees of Ampco. It is useful to touch briefly on the facts relating to the termination of their employment.
- [9] Ms. Boyd was terminated on September 15, 2021, allegedly for cause for failing to provide an explanation or justification for a medical leave she took beginning on September 8, 2021. While not necessarily relevant to the issues now before the court, the circumstances surrounding Ms. Boyd's termination are not well explained by either party.
- [10] There is more evidence about the termination of Ms. Shoji's employment. She states in her affidavit that she resigned from Ampco on January 4, 2022. She then had discussions with Ampco representatives about who would take over her clients. She was unhappy with who Ampco was suggesting, which led to some acrimony. On January 20, 2022, she met with Mr. Konkin and Mike Smith, Ampco's sales manager, who accused her of starting her own company in competition with Ampco. She was told that she would be placed on paid leave. However, on January 24, 2022, Ampco terminated her employment allegedly for cause.
- [11] Mr. Smith gives similar evidence about the disagreement concerning who Ms. Shoji's clients would be transitioned to. He describes a meeting with Ms. Shoji on January 17, 2022, where he alleges that she "stormed out of his office". He states that given the acrimony that had developed, Ampco decided that Ms. Shoji should not attend the office for the balance of her resignation notice period.
- [12] Mr. Smith states that on January 20, 2022, he and Mr. Konkin escorted Ms. Shoji to her office to permit her to retrieve her personal belongings. After she left, he accessed her work computer using a new password that had been assigned. He states that he found many "suspicious emails" from Ms. Shoji to Ms. Boyd. Based on what he discovered, Ampco decided to terminate Ms. Shoji, which it did by letter on January 24, 2022.
- [13] Mr. Konkin gave similar evidence about Ms. Shoji's termination.

Ampco's Investigation/Allegations

- [14] In his affidavit, Mr. Konkin describes the steps taken to investigate Ampco's suspicions that Ms. Shoji and Ms. Boyd have accessed and used Ampco's confidential information. I will summarize the results of the investigation and the evidence generally relied upon by Ampco in support of its application.
- a) Ampco retained DFI Forensics to conduct a forensic analysis of Ms. Shoji's work computer. Juseop Lim is a certified forensic examiner employed by DFI who conducted the forensic analysis. Mr. Lim prepared a report dated February 28, 2022. DFI's key findings include:
 - i. Emails from Ms. Shoji's Ampco email address to her personal email that appear to include some Ampco customer-related information;
 - ii. Ms. Shoji appears to have copied 1,414 files into two new folders on January 17, 2022, the same day Ms. Shoji met with Mr. Smith to discuss transitioning her clients;
 - iii. A new file titled "contact.pst" was created on January 20, 2022, containing 1,556 contacts;
 - iv. Two USB devices were connected to Ms. Shoji's work computer on January 14, 2022, and on January 18-19, 2022. DFI was unable to determine if any files were copied to the USB devices; and
 - v. A search of emails showed 249 emails from Ms. Shoji's Ampco email to her personal email.
 - b) The "suspicious" emails from Ms. Shoji to Ms. Boyd include some emails that include client names and invoicing information, as well as information relating to certain tendering opportunities. It also appears that Ms. Shoji and Ms. Boyd were discussing aspects of Tint'd's new business, including the design for its website;
 - c) Mr. Konkin describes how certain images are shown on Tint'd's website that reflect work done by or for Ampco. He refers in particular to some glasswork done for the University of British Columbia ("UBC") Faculty of Dentistry, as well as for one individual customer. He also notes that there are logos of various companies on Tint'd website that are clients of Ampco; and
 - d) Ampco also relies on the fact that Ms. Boyd first registered Tint'd as a sole proprietorship in July of 2021, while she was still employed by Ampco.

The Defendants' Responses

- [15] Ms. Shoji and Ms. Boyd both swore affidavits in which they address some but not all of Ampco's allegations. As submitted by their counsel, they were somewhat constrained in putting their evidence together, given the short timeframe for responding to Ampco's application which was brought on a short-leave basis.
- [16] The key elements of the defendants' responses include the following:

- a) Both Ms. Shoji and Ms. Boyd deny misusing any confidential information of Ampco. Both also deny that Ms. Shoji has any involvement with Tint'd. According to Ms. Shoji, she has been unemployed since her termination by Ampco;
 - b) Ms. Shoji explained certain of the emails relied on by Ampco. For example, she acknowledges that she emailed a client, Vancity, about her departure from Ampco. However, she says it was to assist in the transition of Vancity's file. In fact, she copied another Ampco employee who she thought could assist with the transition;
 - c) One email to Ms. Boyd asking Ms. Boyd to quote on some work was for a personal friend of Ms. Shoji who operated Lindsay Music, which was not an Ampco client;
 - d) In another email to Ms. Boyd, Ms. Shoji provided some pricing information for a competitor of Ampco. None of Ampco's pricing information was disclosed;
 - e) Ms. Shoji and Ms. Boyd discussed aspects of Tint'd's new business by email; however, both say that it was simply correspondence between friends and not business partners;
 - f) Ms. Boyd deposes that she has not solicited any clients that she worked with while employed by Ampco. To the extent that she has done work for Ampco clients, she says that they either approached her or the work was obtained through an open-tender process; and
 - g) Ms. Boyd states that the glass work for UBC was not proprietary to Ampco but belonged to UBC and has been installed at UBC by a number of different contractors. She says, as well, that the photo identified by Ampco of work done for one of its personal clients is simply wrong, as Ampco was mistaken about the address.
- [17] The defendants' essential position is that they have not used or misused any confidential information of Ampco, have not solicited Ampco clients using any confidential information, and have not passed off any of Ampco's work as Tint'd's work.

Legal Framework

- [18] In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [CBC], the Supreme Court of Canada modified the well-known test for interlocutory injunctions emanating from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, as it relates to mandatory injunctions. In *RJR*, the court established a three-part test:
- a) has the applicant established that there is a serious issue to be tried?
 - b) will the applicant suffer irreparable harm if the injunction is not granted?
 - c) where does the balance of convenience lie?
- [19] In *CBC*, the Supreme Court of Canada confirmed that where an applicant seeks a mandatory injunction, the court should apply the heightened threshold question of whether the applicant has established a strong prima facie case.

[20] In the present case, the relief sought in the notice of application has both prohibitive and mandatory elements:

- a) Para. 2(a) seeks an order restraining the defendants from using, divulging, or continuing to possess any and all of Ampco's confidential and proprietary information; and
- b) Para. 2(b) seeks an order requiring the defendants to preserve, produce, and deliver to Ampco all documents and records containing Ampco's confidential information.

[21] At the hearing of the application, Ampco provided a draft form of order setting out the specific terms it is seeking. As I noted at the hearing, the proposed form of order goes far beyond the scope of the relief sought in the notice of application, including orders that the defendants deliver up all computers and electronic devices in their possession for the purpose of a forensic inspection at the defendants' cost.

[22] As I will discuss, I am not prepared to grant the expansive relief sought, both because it is not set out in the notice of application and, in any event, Ampco has not met the test for such intrusive mandatory relief.

Discussion

[23] I will deal with each of the constituent elements of the injunction test in turn.

Strong Prima Facie Case

[24] Given the mandatory terms sought by Ampco, it fairly acknowledged that the appropriate test to apply is the strong prima facie case test. In *CBC*, the Supreme Court described this test at para. 17:

[17] This brings me to just what is entailed by showing a "strong prima facie case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[25] In my view, while Ampco has suspicions about certain conduct, some of it reasonably well formed, the bulk of Ampco's allegations are speculative and fall well below the strong prima facie test. For example:

- a) The forensic analysis done by DFI, which is a central linchpin of Ampco's case, simply establishes that 1,414 files and 1,556 contacts were copied to folders in what is described as the Egnyte desktop app. That system is described by Mr. Mitchell, Ampco's information

systems manager, as a cloud-based repository system that Ampco uses to save and store files and data. In other words, what the DFI report shows is that Ms. Shoji copied information from her work computer to Ampco's own backup system. There is no evidence to indicate that Ms. Shoji subsequently accessed the files copied to the Egnyte app. Indeed, that would have been impossible, given that her access to the system was revoked. I acknowledge that Ms. Shoji does not provide an explanation for copying these files, nor does she address the issue of the mystery USBs, however, the burden is squarely on Ampco as the applicant to establish the elements of the injunction test;

- b) Ampco overstates the significance of certain email communications. For example, it suggests Ms. Shoji's email to Vancity about her departure from Ampco supports that she is working with Ms. Boyd and Tint'd. It points in particular to where she says that she is taking some time off but has plans come March, and the fact that she provides her Vancity contacts with her personal cellphone and email. Ms. Shoji says she was simply trying to assist in the transition of Vancity as a client. That explanation is at least as plausible or more so than the sinister interpretation that Ampco seeks to give the email;
- c) There are a number of emails between Ms. Shoji and Ms. Boyd about Tint'd, for example about the development of the Tint'd website. However, these emails do not establish that they were working together, nor do they indicate any misuse of Ampco's confidential information;
- d) Ampco puts considerable weight on the fact that Ms. Boyd registered Tint'd as a sole proprietorship while still employed by Ampco. However, there is no evidence to indicate that she operated the business or competed with Ampco until after she was terminated;
- e) There is no evidence of Ms. Boyd or Tint'd soliciting former Ampco clients, either using confidential information or at all. Mr. Konkin implicitly acknowledged the speculative nature of this claim when he says in his affidavit about seeing certain company logos on the Tint'd website:

I verily believe that this means that the Defendants have solicited or intend to solicit the business of these Ampco customers or clients. I cannot take steps to confirm whether these Ampco customers or clients have in fact been solicited, because revealing the issues contained herein to them would severely damage Ampco's reputation and goodwill, and their confidence in Ampco.

- [26] I would add that there is no prohibition against non-fiduciary former employees like Ms. Shoji and Ms. Boyd competing with their former employer, including soliciting clients of the former employer, provided they do not use confidential information: see *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51 at para. 33, and *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361 at para. 143.

- [27] As I indicated, there are aspects of the defendants' conduct that reasonably give rise to suspicions on the part of Ampco. For example, Ms. Shoji's email to Ms. Boyd dated December 6, 2021, attaching screenshots of what are labelled "invoicing reports" setting out client names, a brief description of work done, and the amounts invoiced, were not explained by either Ms. Shoji or Ms. Boyd. However, it is not clear that there is any confidential information that was shared in those reports.
- [28] The question of whether Tint'd improperly displayed proprietary work of Ampco in the form of the UBC glasswork is disputed on the evidence. Nonetheless, it is understandable that this would raise a concern on the part of Ampco.
- [29] That said, suspicions and concerns do not constitute a strong prima facie case, and when the evidence is viewed in its entirety, I find that Ampco has failed to satisfy the first element of the test for an interlocutory mandatory injunction.

Irreparable Harm

- [30] While failure on the first part of the test is sufficient to dispose of Ampco's application, I will also address the second part of the test, irreparable harm.
- [31] In my view, Ampco has also failed to establish this element of the test.
- [32] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, the Court of Appeal underscored that there must be an evidentiary foundation beyond mere speculation that irreparable harm will result: see para. 60. In my respectful view, the allegations of harm here do not rise above the level of speculation.
- [33] In its notice of application, Ampco alleges the following harm will result if the injunction is not granted:
- a) Its business market share and profits will decline and it will lose its competitive edge;
 - b) The defendants will continue to cause confusion in the market and in particular for Ampco's current clients, customers, and suppliers through the continued passing off of Ampco's work on the Tint'd website, and continued direct solicitation of Ampco's clients, customers, and suppliers;
 - c) Monetary damages will not cure the loss of confidence in Ampco by its current clients, customers, and suppliers;
 - d) Monetary damages will not cure the loss of confidence and morale in Ampco's workplace amongst its employees;
 - e) Monetary damages will not cure the damage caused to Ampco's reputation, brand, and goodwill;

- f) The wrongful use of Ampco's confidential information by the defendants to springboard into the market, gain an unfair competitive edge, and acquire client or customer relationships without the usual time, effort, research, cost, and investment necessary cannot be measured in monetary terms; and
- g) The plaintiff cannot control any future widespread dissemination of its confidential information.
- [34] Against these broad, sweeping allegations of harm, it is useful to examine the evidence led to support them.
- [35] Mr. Konkin again deposes that Ampco has been in the business for approximately 54 years, has established a positive reputation and goodwill with its customers, and has the largest market share in British Columbia. Mr. Smith, the Ampco sales manager, gives similar evidence.
- [36] It is quite apparent that Ampco is a well-established business, secure in its position as a market leader.
- [37] The harm alleged by Ampco is described in Mr. Konkin's affidavit as follows:
- I am very concerned that Boyd, Shoji and Tint'd are making use of Ampco's confidential and proprietary information to unfairly compete with Ampco. I believe that Ampco's competitive position in the market for Services is being undermined and harmed by Boyd, Shoji and Tint'd having access to Ampco's confidential and proprietary information.
- [38] It is not at all clear from the evidence how the establishment of a small competitor like Tint'd is likely to result in a diminishment of Ampco's market share and profits, create confusion in the market, result in lost confidence by Ampco's clients and suppliers, damage its brand, or cause morale problems amongst its employees. Again, the harm alleged is entirely speculative and lacks an evidentiary foundation.
- [39] Ampco has therefore failed to establish it will suffer irreparable harm if the injunction is not granted.

Balance of Convenience

- [40] Given my finding that Ampco has failed to establish the first two elements of the test for an interlocutory injunction, it is not necessary to address the third element, the balance of convenience.

Conclusion

- [41] In summary, Ampco has failed to establish the requisite elements of the test for granting an interlocutory injunction. Given the position taken by the defendants that they neither possess nor are using Ampco's confidential information, it might be argued that the court should simply grant an order restraining what the defendants deny doing on the basis that

there would be no prejudice to the defendants. However, the test for granting an injunction exists for a reason. An interlocutory injunction is a significant pretrial remedy that should only be granted in exceptional circumstances where the test is met on a solid evidentiary foundation. That is not the case here.

[42] Ampco's application is therefore dismissed.

[43] Those are my reasons. Submissions on costs?

[44] CNSL D. BERNSTEIN: It's Mr. Bernstein here. With the application being dismissed, we would submit that there were still findings that the defendants haven't explained their conduct and this application was forced upon my client in order to try and prevent the use of its confidential information, which --you've got our submissions on that. So it should at least be in the cause as this matter proceeds through litigation.

[45] THE COURT: All right, Ms. Cline?

[46] CNSL A. CLINE: Yes, I would respectfully disagree with my friend. In our view, we have been wholly successful in our defence of this application, so we would seek costs in any event.

[47] THE COURT: I think the defendants have been successful. While costs might go in the cause, it is not at all clear where this case is going to go. In my respectful view, I think the application was misguided, so I am going to grant the defendants a single set of costs, since they are jointly represented, calculated as ordinary costs at Scale B, payable in any event of the cause and forthwith.

[48] Those are my reasons, thank you.

"Skolrood J."

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