

CANADA / JUDGMENT

Dehydration Research LLC v. EnWave Corporation

2022 BCCA 347

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 347 Dehydration Research LLC v. EnWave Corporation

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dehydration Research LLC v. EnWave Corporation,

2022 BCCA 347

Date: 20221014

Docket: CA48289

Between:

Dehydration Research LLC, 1140522 B.C. Ltd., Durance Technologies Inc.,

Timothy Douglas Durance and Gary Melvin Michael Sandberg

Appellants

(Defendants)

And

EnWave Corporation

Respondent

(Plaintiff)

And

Beanu Anand a.k.a. Bino Anand, Reihaneh Noorbakhsh,

Peregrine Precision Systems Inc., Peregrine Precision Systems, Inc.,

Peregrine Precision Systems LLC, Sean Nigel Tyrone McLean,
BC Hop Company Ltd., Dwayne Wallace Stewart and Primo Fabrication LLC

Respondents

(Defendants)

And

EnWave Corporation, Daniel Henriques, Brent Charleton,
Linkpoint IT Solutions Ltd., Mendi Yuda, Kyle Atkins, Brandon Kelly,
John Doe #1 and John Doe #2

Respondents

(Defendants by way of Counterclaim)

Before:

The Honourable Mr. Justice Fitch

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
April 25, 2022 (EnWave Corporation v. Dehydration Research, LLC,
2022 BCSC 637, Vancouver Docket S217003).

Counsel for the Appellants:

M.P. Katzalay

Counsel for the Respondent,

EnWave Corporation:

C.P. Dennis, K.C.

E.J.S. Aitken

Place and Date of Hearing:

Vancouver, British Columbia

October 5, 2022

Place and Date of Judgment:

Vancouver, British Columbia

October 14, 2022

Summary:

The applicants seek leave to appeal an interim injunction order enjoining them from doing business in the vacuum microwave dryer industry pending disposition of the underlying action. The applicants submit that there is an arguable case the chambers judge failed to correctly apply the "clean hands" doctrine, erred in his analysis of a party's ability to contract out of fiduciary duties, and erred in his application of the RJR-MacDonald test by failing to apply the more onerous "strong prima facie case" test to what the applicants assert was essentially a final injunction order. Held: The application for leave to appeal is dismissed. Interlocutory injunctions are discretionary orders and leave will only be granted where the applicant demonstrates an arguable case that the order is clearly wrong, a serious injustice will occur, or that discretion was exercised on a wrong principle or not exercised judicially. The applicants have not met their onus of demonstrating an arguable case, nor have they shown that there is a reasonable prospect a division of this Court would interfere with the way in which the chambers judge exercised his discretion. Accordingly, it is not in the interests of justice to grant leave to appeal.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Nature of the Application

- [1] Dehydration Research LLC ("DR"), its related companies and principals, Dr. Timothy Durance and Dr. Gary Sandberg (the "DR Applicants"), apply for leave to appeal an order made by Justice Basran on April 25, 2022, enjoining them from "directly or indirectly, selling, attempting to sell, supplying, delivering or installing Vacuum Microwave Dryers ("VMDs") until judgment is pronounced in the underlying action.
- [2] The application is brought pursuant to ss. 13(2) and 31 of the Court of Appeal Act, S.B.C. 2021, c. 6. It is common ground that the order sought to be appealed is a limited appeal order under Rule 11(a)(v) of the Court of Appeal Rules, B.C. Reg. 120/2022, and that leave to appeal is required.
- [3] For the reasons set out below, the application for leave to appeal is dismissed.

II. Background

- [4] EnWave Corporation ("EnWave") is the plaintiff in the underlying action and respondent to the application for leave to appeal.
- [5] EnWave is a research and technology company that designs, manufactures and sells industrial drying units that use VMD technology. The technology has been employed to a variety of different commercial ends, including drying fruits and other agricultural products.
- [6] EnWave spent approximately \$13 million developing VMD technology over 15 years. It began selling its equipment in 2014 and invested an additional \$11 million in research and development between 2014 and 2020.

- [7] EnWave is a leader in its field. It has about 45 royalty-bearing commercial licensing agreements with companies located in over 20 countries. The chambers judge found that EnWave's customers accept licensing agreements that require the payment of royalties because EnWave has few competitors in the market.
- [8] In addressing EnWave's dominance in the VMD market, the chambers judge noted the evidence of Alfred Hoen, former CEO of a German company that develops and manufactures industrial air dryers that do not use VMD technology. Mr. Hoen's affidavit was filed by EnWave in response to Dr. Durance's contention that EnWave's claim to be the world leader in VMD technology was misleading. Mr. Hoen deposed:

I agree with [Dr.] Durance in a general sense that there are other companies in the world that manufacture vacuum microwave dryers. But the global market of suppliers of vacuum microwave dryers is small. The technology is expensive, complicated and very time-consuming to master. There are very few companies in the world selling vacuum microwave drying equipment, and none that I would consider to be a "competitor" to EnWave. EnWave is by far the most advanced of all companies in the industry and there is no other company in the world that I am aware of that is close to EnWave's level in terms of the quality and industrial scale of their products.

- [9] Dr. Durance is a director and shareholder of the defendant 1140522 B.C. Ltd. He is also a director of the defendants, Durance Technologies Inc. and DR. 1140522 B.C. Ltd. wholly owns Durance Technologies Inc. which, in turn, wholly owns DR. Dr. Sandberg is also a shareholder in 1140522 BC Ltd.
- [10] Dr. Durance was EnWave's co-founder and CEO from 1999 until EnWave terminated his employment in August 2018. Dr. Sandberg is a food scientist who served as EnWave's Senior Vice President, Technical Services, from 2015 until he resigned in October 2018.
- [11] By virtue of their positions with EnWave, Drs. Durance and Sandberg had access to EnWave's confidential information, including its VMD technology and product designs.
- [12] EnWave's privileged position in the market and the need to keep knowledge of its technological processes "in house" was acknowledged by Dr. Durance in an email he sent to the Board of Directors shortly before his departure from the company. The email reads, "We have little opportunity to hire REV expertise [an aspect of VMD technology] from outside the company, so we must build it within the Company. We invented this technology here, and EnWave is the best source of vacuum microwave expertise in the world. Believe me, there are people out there that want to know what we know!"
- [13] Both Dr. Durance and Dr. Sandberg had employment contracts with EnWave that contained express terms limiting their ability to use EnWave's confidential information for their own purposes and preventing them from soliciting EnWave employees, clients, and suppliers for a period of one year following the termination of their employment. Dr. Durance's employment contract restricted him from competing with EnWave within Canada for a period of one year. Both contracts prohibited the disclosure of confidential information to

others within Canada for a period of two years following the termination of their employment.

- [14] In their employment agreements, Drs. Durance and Sandberg acknowledged they would have access to detailed confidential information and trade secrets, the identity of past, present, and prospective customers, suppliers and employees of EnWave, "the disclosure of any of which to competitors of [EnWave] or to the general public, or the use of [this information] by the Executive or any competitor of [EnWave] would be highly detrimental to [EnWave's] interests".
- [15] Drs. Durance and Sandberg also agreed to immediately deliver to EnWave any EnWave documents or other EnWave property in their possession or control upon the termination of their employment.
- [16] In addition to its internal employment agreements, EnWave used various external measures to safeguard its confidential information. EnWave required every customer or potential customer using or inquiring about its technology to sign a nondisclosure and confidentiality agreement to prevent the disclosure and use of EnWave's confidential information. Similarly, EnWave required its suppliers and manufacturers to agree to similar confidentiality provisions.
- [17] The chambers judge was satisfied that:
- [85] EnWave's confidential information is valuable to the company and is the product of years of research and millions of dollars invested in developing its technologies and products. Its success and competitive position depends significantly on its ability to maintain the proprietary and confidential nature of its technologies, products, and manufacturing processes.
- [18] In the week before his departure from EnWave, and when he knew his employment relationship with EnWave would likely come to an end, Dr. Durance forwarded to his personal email address numerous emails pertaining to EnWave's business. He did so without EnWave's knowledge or permission. The emails included names and contact information for several current or prospective EnWave customers and suppliers. The information Dr. Durance forwarded to himself included contact information for Primo Fabrication LLC ("Primo Fabrication"), a company that had supplied manufacturing services to EnWave, and Peregrine Precision Systems ("Peregrine"), a prospective customer of EnWave.
- [19] On October 31, 2018, approximately two months after his departure from EnWave, Dr. Durance incorporated Durance Technologies Inc. On January 15, 2019, Dr. Durance incorporated DR.
- [20] In 2019, Primo Fabrication was commissioned by DR to manufacture a unit utilizing VMD technology. Peregrine later became DR's first customer.

- [21] The chambers judge noted Dr. Sandberg's admission that, following his resignation, he retained and subsequently used EnWave's information for the benefit of DR. While Dr. Sandberg deposed that the retention of this information was inadvertent, the chambers judge concluded that on the evidence before him there was a serious issue to be tried about whether Dr. Durance and Dr. Sandberg used EnWave's confidential information to develop a competing product.
- [22] The steps taken by DR and Drs. Durance and Sandberg in 2019 and 2020, after their employment with EnWave had come to an end, to manufacture and sell vacuum microwave dehydrators using VMD technology was summarized by the chambers judge:
- [25] DR is a supplier of vacuum microwave dehydrators and developed a 12 kW unit utilizing VMD technology.
- [26] Dr. Durance also took steps to develop a larger unit. In July 2019, he communicated with a Taiwanese manufacturing company called Bottle Top Machinery Co., Ltd. ("Bottle Top") about having them potentially manufacture a unit "similar to equipment sold by EnWave Corporation" for DR.
- [27] According to Dr. Durance, DR manufactured and sold two vacuum microwave dryers: one to the defendant, Peregrine, and the other to the defendant, BC Hop Company Ltd. ("BC Hop"), a British Columbia company that had been in negotiations with EnWave for the purchase of a 10 kW batch unit.
- [28] Dr. Sandberg deposed that in or around the late summer of 2020, he met with an employee of BC Hop who had been doing a trial with one of EnWave's machines. The BC Hop employee indicated that BC Hop was not interested in EnWave's licensing and royalty model. Dr. Sandberg advised this individual that DR was in the process of developing its own machine and there was no royalty or licensing requirement as a condition of purchase of one of its machines.
- [29] On June 29, 2020 and July 27, 2020, DR provided BC Hop with quotes for a 12 kW VMD machine. These quotes were signed by Dr. Durance on behalf of DR. This was less than two years after Dr. Durance resigned from EnWave. As set out in paragraph 21 of these Reasons, Dr. Durance's employment agreement prohibited the disclosure of EnWave's confidential information or the use of it in Canada for two years after the termination of his employment.
- [30] BC Hop ended its negotiations with EnWave in September 2020, the same month that DR. Durance deposed that BC Hop ordered a 12 kW machine from DR.
- [31] In 2021, EnWave learned of DR's sale to BC Hop, and Dr. Durance's and Dr. Sandberg's competing venture generally, from one of its customers.

- [23] How EnWave came to learn that Dr. Sandberg retained EnWave documents following his resignation was an important consideration on the interim injunction application, and it is an important issue on the application before me.
- [24] As I understand it, at about the same time EnWave was alerted to the fact that DR had entered the market as a competitor, EnWave's CFO, Daniel Henriques, learned that Dr. Sandberg's computer was still on EnWave's IT network. Although Dr. Sandberg had taken his computer with him on termination and could no longer remotely access EnWave's network, Mr. Henriques learned from EnWave's external IT provider that EnWave continued to have access to, and could prepare a backup image of, files left on Dr. Sandberg's computer.
- [25] In an affidavit filed for use on the interim injunction application, Mr. Henriques deposed that he believed accessing the files left on Dr. Sandberg's computer was permitted by the terms of EnWave's IT Policy.
- [26] Mr. Henriques instructed EnWave's IT service provider to do a backup of various file names on the laptop and send it to him. Mr. Henriques then went through the files performing key word searches for documents that related to "EnWave" and "vacuum microwave technology". Mr. Henriques asked that files identified through this search be copied and made available to him for review.
- [27] Mr. Henriques deposed that the documents he reviewed suggested Drs. Durance and Sandberg had taken steps to launch DR to compete with EnWave by manufacturing and selling drying units that relied on vacuum microwave technology. He noted that several documents retrieved from Dr. Sandberg's files were EnWave documents that appear to have been modified for DR's purposes.
- [28] The chambers judge found that the documents retrieved from Dr. Sandberg's computer included: detailed specification sheets for EnWave's 10 kW and 12 kW units; the material properties of EnWave's products; a step-by-step description of the inner workings of EnWave's products; an operator's manual; a detailed document prepared for Bottle Top inquiring into the possibility of Bottle Top manufacturing vacuum microwave equipment similar to equipment sold by EnWave; and a draft purchase agreement naming EnWave as the vendor and BC Hop Company Ltd. ("BC Hop"), as the purchaser.
- [29] BC Hop had been in negotiations with EnWave for the purchase of a vacuum microwave dryer unit prior to Dr. Sandberg's departure from the company. In June and July 2020, Dr. Durance provided BC Hop with quotes for a 12 kW VMD machine. As the chambers judge noted, this was less than two years after Dr. Durance left EnWave. He reiterated that Dr. Durance's employment agreement prohibited the disclosure of EnWave's confidential information or the use of it in Canada for two years after the termination of his employment. BC Hop eventually purchased a 10 kW VMD unit from DR.

- [30] In an affidavit filed for use on the injunction application, Dr. Sandberg deposed that the computer he used while employed at EnWave was his personal computer, and that he used it for both personal and EnWave-related business. Dr. Sandberg deposed that he kept highly personal and confidential information amongst the files EnWave accessed long after his departure.
- [31] All electronic files and documents stored on the computer Dr. Sandberg used while he was employed by EnWave that were not specifically reviewed by Mr. Henriques were delivered into the possession of a third-party law firm. Thereafter, EnWave deleted its copies of the files.
- [32] EnWave commenced a claim against Drs. Durance and Sandberg, DR, and others, seeking damages, an accounting of profits and injunctive relief for--among other things--breach of contract, breach of confidence, and breach of fiduciary duty.
- [33] In July 2021, EnWave applied for an interim injunction restraining Drs. Durance and Sandberg, DR and other named defendants from developing, manufacturing, marketing, advertising, promoting, or selling industrial dryers utilizing vacuum microwave drying technology until the trial.
- [34] The injunction application was set for hearing on August 17 and 20, 2021. It was adjourned at DR's request. As a condition of the adjournment, Justice Winteringham made an interim order enjoining the defendants from selling, attempting to sell, supplying, delivering, or installing vacuum microwave dryers until such time as the Court pronounced judgment after hearing EnWave's injunction application on its merits.
- [35] This was the state of affairs when the application came before the chambers judge.
- [36] To complete the picture, I am advised that the underlying action has been set for trial in September 2023.

III. Reasons for Judgment of the Chambers Judge

- [37] In reasons indexed as 2022 BCSC 637, the judge identified the three-part test EnWave was obliged to meet--there is a serious issue to be tried, they will suffer irreparable harm if the injunction is refused, and the balance of convenience lies with them: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*].
- [38] Relying on *British Columbia (Attorney General) v. Gitanmaax Band*, [1987] 2 W.W.R. 331 (C.A.), *aff'd* [1991] 1 S.C.R. 62, the chambers judge recognized that injunctions are equitable remedies and that the fundamental question in each case is whether granting the injunction is just and equitable in all the circumstances.

- [39] On the issues of irreparable harm and the balance of convenience, the primary submission of the DR Applicants was that EnWave was not entitled to equitable relief in the form of an interlocutory injunction because it did not come to the court with "clean hands". They relied, in this regard, on the conduct of EnWave in accessing files on Dr. Sandberg's computer 2½ years after he resigned from EnWave. The DR Applicants characterized this conduct as "hacking".
- [40] After reviewing the relevant terms of the employment contracts, the evidence that EnWave's confidential information may have been taken and used by the DR Applicants in the development of the competing venture, and the rapid deployment of a similar product by the DR Applicants while they were in possession of EnWave's confidential information, the chambers judge was satisfied EnWave had established a serious question to be tried about whether Dr. Durance and Dr. Sandberg breached their obligation of confidence owed to EnWave. In this regard, the chambers judge noted that Dr. Durance had not explained "how his pre-EnWave VMD knowledge allowed DR to develop a product based on this technology in a fraction of the time and cost expended by EnWave".
- [41] On the same evidence, the chambers judge was satisfied EnWave had established a serious question to be tried about whether Drs. Durance and Sandberg breached the fiduciary duties they owed to EnWave by using EnWave's confidential information to compete with it.
- [42] Finally, the chambers judge was satisfied that EnWave had established a serious question to be tried about whether Drs. Durance and Sandberg breached their employment contracts with EnWave by, among other things, failing to return to EnWave its confidential information when they left the company.
- [43] On the issue of whether EnWave would suffer irreparable harm if the injunction was not granted, the chambers judge noted that, in their employment agreements, Dr. Durance and Dr. Sandberg agreed that EnWave would suffer irreparable injury in the event of any breach of their employment obligations. They further agreed that damages would be an inadequate remedy at law in the event of a breach, and that EnWave would be entitled to injunctive relief enjoining and restraining its executive employees from committing any such breach. The chambers judge noted that, while not necessarily determinative, these types of clauses have been held in other cases to raise a presumption of irreparable harm not easily compensable in damages in the event of a breach.
- [44] The chambers judge took note of the other ways in which an applicant can establish that the harm it will suffer will be irreparable, including by demonstrating a permanent loss of market share or loss of the ability to exploit a business opportunity from the privileged position of being the first entrant into the market. I do not understand the DR Applicants to take any principled issue with the discussion of the chambers judge as to various ways in which an applicant might establish irreparable harm. Indeed, a ground of appeal advanced by DR in its notice of application for leave to appeal--that the chambers judge erred in finding EnWave would suffer irreparable harm if the injunction was not granted--was

abandoned by DR at the outset of the hearing before me.

- [45] The chambers judge found that EnWave had established that its success and market dominance had been irreparably impaired by the dissemination of its confidential information to third parties, and by the commercialization of a line of competing VMD products manufactured and sold by DR that may have come about because of the DR Applicants' misuse of its confidential information.
- [46] In addressing the balance of convenience, the chambers judge noted that preservation of the status quo is an important consideration. He emphasized that EnWave was the only significant marketer of vacuum microwave technology in the Western world. He concluded that the balance of convenience favoured granting the injunction:
- [114] An interim injunction is appropriate to preserve the status quo because any damages to the DR Defendants' new and relatively unestablished company are more easily calculated than the intangible losses to EnWave's well-established business. This is particularly so because the loss of EnWave's apparent market dominance could be long-lasting, and its reputation and goodwill may be permanently damaged. For these reasons, the balance of convenience favours the continuation of the injunction pending trial.
- [47] The chambers judge then turned to address whether EnWave was disentitled to the equitable relief it sought based on the DR Applicants' claim that EnWave "hacked" into Dr. Sandberg's computer and, thus, did not come before the court with "clean hands". In support of its position on this point, the DR Applicants relied on *Autosurvey Inc. v. Prevost*, [2005] O.J. No. 4291, 44 C.P.R. (4th) 274 (O.N.S.C.), a case in which a permanent stay of proceedings was granted where the plaintiff chose to pursue an unauthorized self-help remedy by hacking into the defendant's computer server, thereby improperly obtaining access to communications protected by solicitor-client privilege.
- [48] The judge rejected the defendants' position on this issue for two reasons. First, he concluded that the documents retrieved from Dr. Sandberg's computer would inevitably have been discovered during the document discovery process. Second, it was not contested that Dr. Durance sent contact information relating to EnWave's suppliers and customer prospects to his own personal email account days before his employment with EnWave was terminated. Taking these considerations into account, the chambers judge came to this conclusion:
- [123] I am not satisfied that EnWave engaged in a self-help remedy that provided them with the only source of documents that supports this application. The information regarding Dr. Durance's emailing of EnWave supplier and customer information to himself was not obtained from Dr. Sandberg's laptop computer. This information independently supports maintaining the injunction. The DR Defendants used this contact information to seek the assistance of Primo Fabrication in manufacturing a DR machine. They also sold one of their machines to Peregrine, a prospective customer of EnWave.

[124] Given these circumstances, I am not prepared to disentitle EnWave from seeking injunctive relief on the basis that it does not have clean hands. In my view, EnWave established that it is entitled to the continuation of the interlocutory injunction until trial.

[Emphasis added.]

[49] The judge directed the DR Applicants to deliver to EnWave, within 60 days of the date of the order, all EnWave documents they had in their possession in hardcopy and electronic form. The DR Applicants did not oppose the making of this order.

IV. The Leave Application

[50] The DR Applicants seek leave to appeal the order on grounds that the chambers judge erred by:

1. failing to find that EnWave lacked clean hands and was, therefore, not entitled to the injunction it sought;
2. finding that the parties could not and/or did not contract out of certain fiduciary duties and common law duties of confidence; and
3. applying the lower threshold test of a "serious question to be tried" instead of "strong prima facie case" when considering the first branch of the test for an injunction set out in *RJR-MacDonald*, where the injunction sought by EnWave was said to be "essentially a final order": see *RJR-MacDonald* at 335-338.

V. Law and Analysis

The Test for Leave to Appeal

[51] The onus is on the DR Applicants to establish that the requirements for leave to appeal have been met: *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 4 B.C.L.R. (2d) 8, 1986 CanLII 1089 (B.C.C.A.) at para. 5 (Chambers).

[52] The well-known "test" for granting leave to appeal was set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers):

[10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

- [53] These criteria are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).
- [54] The merits threshold on an application for leave to appeal has been described as "relatively low": *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Chambers); *William v. Taseko Mines Ltd.*, 2019 BCCA 479 at para. 17 (Chambers) [*Taseko Mines*]. The question is whether the applicant has identified an arguable case of sufficient merit to warrant scrutiny by a division of the Court: *A.L.J. v. S.J.M.*, [1994] B.C.J. No. 1450, 1994 CanLII 2614 (B.C.C.A.) at para. 10 (Chambers). The merits component of the test has also been understood as requiring an applicant to establish a reasonable possibility that a division of the Court would grant the appeal on its merits: *MacRae v. Woermke*, 2019 BCCA 355 at para. 4 (Chambers), citing *Webb v. Canada (Attorney General)*, 2019 BCCA 288 at para. 15 (Chambers).
- [55] Despite the relatively low merits threshold, this Court is reluctant to grant leave to appeal from discretionary orders: *Taseko Mines* at para. 17. In the case of a discretionary order, leave will only be granted where the applicant shows an arguable case that the order is clearly wrong, a serious injustice will occur, or the discretion was exercised on a wrong principle or not exercised judicially: *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 at paras. 35-36 (Chambers) [*Independent Contractors*].
- [56] Whether to grant or deny injunctive relief is a discretionary decision: *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31 (Chambers).
- [57] Application of the merit component of the test must take account of the standard of review applicable to a discretionary decision: *Teal Cedar Products Ltd., v. Mashari*, 2021 BCCA 353 at para. 34 (Chambers).
- [58] Appeals from orders granting injunctive relief are exceptional because the law is well-settled, and the appeal will typically turn on the facts of a particular case: *Independent Contractors* at paras. 51, 53.
- [59] The "significance to the practice" component of the test requires consideration of whether the issue(s) in respect of which leave to appeal is sought raise matters of general interest in need of clarification: *Columbia National Investments Ltd. v. Abbotsford (City)*, 2007 BCCA 368 at para. 24 (Chambers), *Gichuru v. Law Society of British Columbia*, 2012 BCCA 159 at para. 20 (Chambers) [*Gichuru*]. Orders that are context dependent and specific to the action are unlikely to raise points of broader significance to the practice.
- [60] In considering whether an appeal will unduly hinder the progress of the action, factors to be considered include whether an appeal would interfere with upcoming trial dates or time-sensitive aspects of the litigation: *Gichuru* at para. 23.
- [61] With these factors in mind, framed more broadly by the interests of justice, I turn to consider the three proposed grounds of appeal identified by the DR Applicants.

Ground 1: Whether the Chambers Judge Arguably Erred in Principle in his Application of the "Clean Hands" Doctrine

- [62] The "clean hands" doctrine may be invoked against a plaintiff to deny equitable relief that would otherwise be available. Whether the doctrine should be applied is a matter of judicial discretion. As a general rule, it is applied only where the misconduct "has an immediate and necessary relationship to the subject matter of the claim" (emphasis added; footnotes omitted): Halsbury's Laws of Canada (online), Equitable Remedies, "Maxims of Equity: Those Who Come into Equity Must Come with Clean Hands" (II.4) at HER-6 "Clean hands' doctrine" (2020 Reissue).
- [63] The DR Applicants argue that the decision of the chambers judge stands as authority for the proposition that "a party can obtain an injunction on the basis of illegal conduct (hacking an opposing party's computer) so long as (a) some of the documents or information illegally obtained would, in the course of the litigation, be producible, and/or (b) there is a basis to granting the injunction that does not rely on illegally obtained documents".
- [64] Respectfully, the DR Applicants overstate the reach of the decision they seek to appeal. In addition, they fail to contend with settled jurisprudence contrary to their position on this point.
- [65] First, I note that the chambers judge made no factual finding that the documents retrieved from Dr. Sandberg's computer were illegally obtained by EnWave. The absence of a factual finding on this point would put this Court in the unenviable position of being the court of first instance on a factual matter that has not been fully developed on the evidence. It would also require this Court to prematurely weigh in on an issue best left to be resolved at trial. Put differently, I consider it to be a factor telling against the granting of leave that the factual underpinnings for the most serious of DR's allegations are absent.
- [66] More importantly, it appears to me that this Court has already accepted the proposition the DR Applicants seek leave to contest--that if entitlement to equitable relief can be established without reliance on the alleged misconduct, the alleged misconduct does not bar the granting of the remedy: see *DeJesus v. Sharif*, 2010 BCCA 121 at paras. 83-86 [DeJesus].
- [67] *DeJesus* was considered in *Mayer v. Mayer*, 2012 BCCA 77 at para. 86. There, the relevant rule was stated this way: "the relationship between the relief sought and the misconduct must be direct and necessary in the sense that the person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim" (emphasis added). The principle was acknowledged again in *Wang v. Wang*, 2020 BCCA 15 at paras. 46-47.
- [68] Similarly, in *Nagel's Debt Review v. Mosiuk*, 2019 SKCA 16 at para. 69, the Court held that the clean hands doctrine is not absolute and that a plaintiff can avoid its application if they do not need to rely on the illegality to establish their claim: see also *Vestby v. Galloway*, 2020 ABQB 361 at paras. 112-117.

- [69] As noted, the chambers judge found that Dr. Durance's decision to email to himself EnWave customer and supplier information which then may have been used to: (1) seek the assistance of Primo Fabrication in manufacturing a drying unit for DR using VMD technology; and (2) sell two VMD drying units to Peregrine and BC Hop, both prospective customers of EnWave, independently supported the injunction. In short, the chambers judge found that EnWave did not need to rely on its alleged misconduct to establish the foundation for its claim to injunctive relief.
- [70] I acknowledge that the other basis upon which the judge refused to apply the clean hands doctrine--that the information retrieved from Dr. Sandberg's computer would inevitably have been discovered in the litigation process--raises an arguable ground of appeal; one which I consider to be of general importance to the practice.
- [71] If the issue stood on its own, I would have been inclined to grant leave. But it does not. It was only one of the bases upon which the chambers judge declined to apply the clean hands doctrine against EnWave. In these circumstances, the issue has an academic quality to it. In the circumstances of this case, the DR applicants have not persuaded me that it would even be necessary for a division of this Court to address the issue if leave were granted.
- [72] Against this background, I do not think the DR Applicants have met their onus of showing that the order sought to be appealed is clearly wrong or that it is reasonably possible a division of this Court would find error in principle in the chambers judge's application of the law.
- [73] For related reasons, I do not accept that this issue warrants the attention of a division of this Court on grounds that clarification of the law is needed.
- [74] Further, as I have noted, the decision made by the chambers judge is a discretionary one that would attract a deferential standard of review. In the absence of an arguable error in principle material to the outcome of the application, I do not consider that the DR applicants have met their onus of showing it is reasonably possible that a division of this Court would interfere with the way the chambers judge exercised his discretion.
- [75] While these factors are not the only ones to be considered on this application, I regard them to be governing in the circumstances of this case. They lead me to the conclusion that it is not in the interests of justice to grant leave to appeal on this ground.

Ground 2: Whether the Chambers Judge Erred in His Analysis of Fiduciary Duties and Contractual Terms in Employment Agreements

- [76] The DR Applicants assert that:

The chambers judge appears to have completely rejected the law regarding private ordering--the principle that parties are free to contract out of common-law and fiduciary duties--and found that, regardless of the time and geographically limited restrictive covenants in the employment agreements of the Individual Appellants, they owed additional fiduciary duties inconsistent with these covenants.

- [77] The DR Applicants assert that this reasoning amounts to a "change in the law" about whether parties may "contract out of fiduciary and/or common law duties". They rely on *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 and *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12, for the proposition that private ordering of one's common law duties or obligations imposed by equity can be achieved through contract.
- [78] Despite clear pronouncements from the Supreme Court of Canada on this point, the DR Applicants nevertheless suggest that leave should be granted to enable this Court to clarify the law.
- [79] Again, I am of the view that the submissions of the DR Applicants overstate the significance and reach of the chambers judge's conclusion. The chambers judge did not purport to resolve evidentiary conflicts or decide difficult questions of law. He did not ignore the DR Applicants' arguments on this point but considered them through the lens of the *RJR-MacDonald* test, finding serious questions to be tried in *EnWave's* claims for breach of confidence, breach of fiduciary duty, and breach of contract. The chambers judge made no conclusive finding concerning the proper scope and interpretation of the contractual obligations owed by Drs. Durance and Sandberg or the interplay between those obligations and the fiduciary duties they owed at common-law.
- [80] Once again, the argument of the DR Applicants on this point has an academic quality to it. On the evidence before him, the chambers judge was satisfied there was a serious question to be tried about whether Drs. Durance and Sandberg had breached their contractual obligations to *EnWave*. He said this:
- [29] On June 29, 2020 and July 27, 2020, DR provided BC Hop with quotes for a 12 kW VMD machine. These quotes were signed by Dr. Durance on behalf of DR. This was less than two years after Dr. Durance resigned from *EnWave*. Dr. Durance's employment agreement prohibited the disclosure of *EnWave's* confidential information or the use of it in Canada for two years after the termination of his employment.
- [95] I am satisfied on the evidence that the DR Defendants engaged in manufacturing, marketing, and sales activities related to DR's 12 kW units within the two years contemplated by the confidentiality clause in Dr. Durance's and Dr. Sandberg's employment agreements. This evidence includes the modification of *EnWave* specification sheets and operator's manual in 2019, the commissioning by DR of design work by *Primo Fabrication* in the summer of 2019, and quotations prepared for BC Hop in June and July 2020 for the sale by DR of a 12 kW unit. I also note Dr. Durance's forwarding of *EnWave's* confidential

information to his personal email account in the days leading up to his departure from EnWave. All of these activities were undertaken within two years of Dr. Durance's and Dr. Sandberg's departure from EnWave.

- [81] In short, I am not persuaded there is an arguable ground of appeal here or that any issue arising out of the reasons of the chambers judge, given the context in which they were given, can properly be characterized as an issue of importance to the practice that requires the attention of the Court. Again, while these are not the only considerations on an application for leave to appeal, I consider them to be governing in the circumstances of this case.

Ground 3: Whether the Chambers Judge Correctly Applied the RJR-MacDonald test

- [82] The DR Applicants assert that, in granting an injunction that prevents them from selling industrial dryers utilizing VMD technology until trial, the chambers judge granted a remedy that "effectively amounts to a final determination of the action". In these circumstances, the DR Applicants submit it is arguable the chambers judge erred by not applying in this case--as an exception to the generally applicable "serious question to be tried" test--a "strong prima facie case" test. In support of this proposition, the DR Applicants rely on RJR-MacDonald at 335-38, CCI Thermal Technologies Inc. v. Lewis, 2005 ABQB 579 at paras. 65-69, and Pandi v. Fieldofwebs.Com Ltd., [2007] O.J. No. 2739 (O.N.S.C.) at paras. 6-7. The DR Applicants submit that the identification and application of the correct test is of considerable significance to them, as the effect of the order is to shut down their business to the extent it relies on VMD technology. In addition, they argue that this issue is one of broad significance to the practice.
- [83] EnWave maintains the injunction is not a final order and submits there is no merit in the notion that the chambers judge applied the incorrect test.
- [84] I am not persuaded that leave to appeal should be granted in relation to this issue, primarily for two reasons.
- [85] First, it does not appear to me that the DR Applicants suggested in oral argument of the application that it was appropriate in this case to apply the strong prima facie test. There was, admittedly, confusion on the point. In their injunction Application Response, the DR Applicants suggested that the serious question to be tried test applied, but also suggested in the same Response that the applicable threshold was a strong prima facie case.
- [86] On the hearing of the injunction application, the DR Applicants clarified its position, arguing that, in the circumstances of this case, the appropriate inquiry at the first stage of the RJR-MacDonald test was to determine whether there was a serious question to be tried. The DR Applicants acknowledged that the applicable merits threshold was low and said, "we're not here to reset that bar". They suggested that the application was better determined on the other two prongs of the RJR-MacDonald test.

- [87] While I have not been provided with a complete transcript of the submissions made on the injunction application, it is apparent that the argument the DR Applicants seek to raise on appeal was not pursued before the chambers judge. Indeed, it appears that this argument was disclaimed by the DR Applicants in the court below. For obvious reasons, I am most reluctant to grant leave on an issue the DR Applicants chose not to raise in argument before the chambers judge.
- [88] Second, on the strong factual findings made by the chambers judge, I am not persuaded that the DR Applicants have established there is a reasonable possibility a division of this Court would conclude that the result would have been different had the chambers judge been asked to apply the strong prima facie test.
- [89] For these reasons, I conclude that it is not in the interests of justice to grant leave to appeal on this ground.
- [90] In considering all three grounds of appeal, I have not overlooked criteria the DR Applicants have met. I accept that granting leave would not unduly hinder the progress of the action. I accept that the issues are of importance to the DR Applicants. But weighing the applicable criteria collectively, I have not been persuaded that it is in the interests of justice to grant leave in this case.

VI. Conclusion

- [91] For the foregoing reasons, I would dismiss the application for leave to appeal with costs to EnWave.

"The Honourable Mr. Justice Fitch"

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