

CANADA / JUDGMENT

GEA Refrigeration Canada Inc. v. Chang

2020 BCCA 361

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 361 GEA Refrigeration Canada Inc. v. Chang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

GEA Refrigeration Canada Inc. v. Chang,

2020 BCCA 361

Date: 20201214

Docket: CA45068

Between:

GEA Refrigeration Canada Inc.

Respondent

(Plaintiff)

And

Kin Hung (Jeffrey) Chang, Aihua (Alex) Chen, Justin Lai, Xiao (Mary) Hua Wu,

Guang Hao (Frank) Xu, and FPS Food Process Solutions Corporation

Appellants

(Defendants)

And

Chen Yoiet (Andrew) Chu, Josephine Leung, Xiao Fan Qu,

and Cam Man Wong

(Defendants)

FILE SEALED IN PART

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated January 8, 2018 (GEA Refrigeration Canada Inc. v. Chang, 2018 BCSC 23, Vancouver Docket S125293)

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Place and Date of Hearing:

Vancouver, British Columbia

November 6 and 7, 2018

Place and Date of Judgment:

Vancouver, British Columbia

December 14, 2020

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Hunter

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Summary:

The individual appellants were former employees of GEA, a company that produced industrial hygienic freezers. They formed a competing company, FPS. The judge found that FPS used GEA engineering drawings, which were confidential, in designing its competing product. She made an award against FPS for breach of confidence, requiring it to disgorge profits for four years of operations. She also made an overlapping award of damages against the individual defendants. The appellants contended that the trial judge made palpable and overriding errors in her factual findings, and erred in her assessment of damages. The Court also heard motions dealing with the unsealing of court records. Held: Appeal dismissed; sealing order modified. There was evidence to support the judge's factual findings. While the evidence on the duration of the "springboard period" over which damages accrued was not particularly helpful, the judge was required to reach whatever conclusions she could on the basis of that evidence. Her assessment that the springboard period lasted four years was not unreasonable. With respect to the sealing orders, the Supreme Court should, in the first instance, deal with its own sealing order. The file in this Court should be unsealed, except for the appeal books and transcripts.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] This is an appeal from a Supreme Court judgment that held the appellants liable to GEA for breach of confidence. The judge found that the individual appellants, who were former employees of GEA, improperly used GEA's engineering drawings and other confidential information to design products for sale by FPS in competition with GEA.
- [2] The appellants say that the judge erred in finding them liable. They contend that the evidence was incapable of supporting the judge's finding that the appellants possessed GEA engineering drawings and used them to design FPS freezers. They also say that the judge erred in finding that Mr. Chang and Mr. Lai breached the terms of their contracts of employment with GEA.
- [3] The appellants also take issue with the judge's assessment of damages, and with her dismissal of their counterclaim sounding in defamation.
- [4] In addition to hearing the appeal, the Court heard an application to unseal the reasons for judgment in the Supreme Court file. Of its own motion, the Court heard submissions on the need to continue a sealing order on its own file. I will deal with these matters at the end of this judgment.

I. Overview

- [5] GEA Refrigeration Canada Inc. is a designer and manufacturer of hygienic industrial freezers -- specialized freezers used in the prepared food industry. In the late fall of 2009, some of its employees began planning to form a competing company. In April 2010 they founded FPS Food Process Solutions Corporation, which soon became a competitor to GEA.

- [6] GEA sued the appellants and some other former employees, alleging that they used its confidential information in designing FPS freezers. The defendants counterclaimed, contending that GEA's statements to customers concerning the alleged breaches of confidence amounted to defamation. The judge held in favour of GEA. She found that, to the knowledge of FPS, the individual appellants had wrongly made use of confidential information, including engineering drawings belonging to GEA, to design FPS freezers.
- [7] As a result of the breaches, the judge found that FPS profited by competing in the hygienic freezer market much earlier than it would have had it designed its freezers legitimately. She awarded damages of \$7,131,087 against FPS, calculated on the basis of disgorgement of profits for a period of approximately four years.
- [8] She found the five individual appellants to be jointly and severally liable with the corporation for \$3,630,000, assessed on the basis of profits lost by GEA as a result of their tortious breaches of confidence and their breaches of express and implied confidentiality provisions of their employment contracts. She awarded punitive damages against Mr. Chang and Mr. Lai, in the amount of \$75,000 each.
- [9] The appellants appeal both the finding of liability and the assessment of damages. They also appeal the dismissal of their counterclaim, though, as I will indicate, that aspect of the appeal is of limited import.
- [10] For reasons that follow, I would dismiss the appeal.

II. GEA Freezer Design Features

- [11] There are two basic types of hygienic industrial freezers: tunnel freezers, in which the product to be frozen is conveyed along a linear path from the entrance of the freezer to the exit; and spiral freezers, in which the product enters at the bottom (or the top) of the freezer, and follows a spiral path to exit at the top (or the bottom) of the freezer. Hygienic freezers have special design features to prevent bacterial growth and to allow for periodic thorough cleaning.
- [12] Hygienic freezers are individually designed, and are manufactured by a limited number of companies. At the time of FPS's entry into the industry, GEA and another company were the two major players, each accounting for roughly 40% of the market.
- [13] GEA's hygienic freezers exhibited certain unique features. While the panels of the freezers made by some other companies were made of galvanized steel, GEA used stainless steel. Stainless steel is smoother and has no coating to wear off, so it is less susceptible to bacterial growth. It is also more resistant to chipping and eliminates the risk of rust, again enhancing its sanitary qualities.

- [14] In some industrial freezers, panels are joined with caulking, or using chemical bonding agents. GEA, instead, used a system of continuous seam welds, making for a surface without crevices or uneven joints where bacteria could grow.
- [15] In order to allow the insulated stainless steel panels of the freezer to be welded with continuous seam welds, GEA developed a system using built-in heat sinks that allowed welding without damage to the insulation.
- [16] The panel joints in GEA freezers had to be capable of withstanding freeze-thaw cycles without the welds breaking or developing stress cracks. To accommodate thermal expansion and contraction, GEA designed the panels with built-in expansion flashings in the form of flanges.
- [17] A "CIP" ("Clean-in-Place") system was integrated into the freezer. During cleaning, this system flushes the freezer with hot water to ensure that it retains its hygienic qualities. In GEA's implementation, the CIP system recycles the cleaning water.
- [18] The floor design of GEA freezers was also unique, incorporating the same design features as the wall panels, fully sealing to the walls without uneven joints. The floor of the freezer was, itself, raised off of the floor of the building in which it was installed, using a support structure of pins to carry the weight of the internal machinery. The freezer floor was sloped to prevent water pooling when it was cleaned.
- [19] These various features of GEA hygienic freezers are relatively easy to describe, and formed an important part of GEA's marketing. While the concepts were not complicated, their implementation was difficult from an engineering standpoint. It took many years for GEA to develop and perfect its design. The process involved considerable research and development expenditures, and an iterative approach founded on trial and error. With gradual refinement, the design reached a stage of maturity by about 2004.
- [20] The design features of GEA freezers were not patented, nor is it suggested that they could have been. Nonetheless, the details of the way in which they were implemented was something that GEA took care to keep confidential, and they represented an important aspect of its competitive advantage in the industry.

III. The Individual Appellants

- [21] The individual appellants are all former employees of GEA. With the exception of Ms. Wu, they came to GEA from Aero Heat Exchanger Ltd. when GEA acquired that company in 2007.
- [22] Kin Hung (Jeffrey) Chang commenced employment with Aero Heat in 1990. By the time that company was acquired by GEA, he had risen to become its General Manager for Canada. Shortly after the acquisition, he became GEA's Vice President of Customer Sales and Service, one of the company's six senior management positions.

- [23] Justin Lai commenced employment with Aero Heat in May 2005. In 2008 he became GEA's Sales Manager for Western Canada and the Western Region of the United States.
- [24] Aihua (Alex) Chen was employed as a mechanical engineer with Aero Heat starting in 2003. He continued in that position with GEA. His duties included preparing layout and engineering drawings for freezers. He typically worked on 20 to 30 projects each year.
- [25] Xiao (Merry) Wu (whose Western name is misspelled in the style of cause) was hired directly by GEA in 2007. She was employed as a mechanical draftsman/designer and AutoCAD instructor. She and Mr. Chen are married to each other.
- [26] Guang Hao (Frank) Xu worked for Aero Heat as a mechanical engineer from December 2003, and continued in that position when the company was acquired by GEA. He was involved in preparing freezer layout and engineering drawings.

IV. Termination of the Appellants' Employment and Formation of FPS

- [27] Ms. Wu and Mr. Chen were the first of the defendants to leave GEA. As a result of the economic slowdown that began in 2008, the two were asked to participate in a work share program beginning in early 2009. The work share situation did not last long, and by March 2009, the company terminated Ms. Wu's employment.
- [28] In September 2009, the company also terminated Mr. Chen's employment, citing concerns about the quality of his work. Mr. Chen was of the view that he was wrongfully dismissed. Eventually, he and the company negotiated a severance agreement. Among its provisions was an agreement by Mr. Chen not to work for a competitor before June 1, 2010.
- [29] Mr. Chang was the next to leave the company. His satisfaction with his work had greatly diminished by 2008. He was frustrated with GEA, and under considerable stress. He spoke with the company's CEO in early 2009, who assured him that the company would do whatever it could to make it easier for Mr. Chang to satisfy customers, but, in Mr. Chang's view, there was no improvement over the ensuing months.
- [30] In late October 2009, Mr. Chang had another meeting with the CEO. Mr. Chang considered that, at that meeting, the CEO challenged his loyalty to the company. Shortly after the meeting, Mr. Chang tendered his resignation, effective December 31, 2009.
- [31] Although Mr. Chang testified that he did not, at that time, have intentions to start a business, the trial judge found that, before the termination of his employment, Mr. Chang was in contact with Mr. Lai with a view to starting a new business venture.
- [32] By the time Mr. Chang tendered his notice, Mr. Lai had also become disenchanted with GEA. He felt that he had been unfairly treated by not receiving compensation for his role in securing an important business relationship with a client. He was considering starting his own business.

- [33] Although Mr. Lai claimed that he was considering only the idea of getting into the industrial refrigeration business (and not into the hygienic industrial freezer business), the judge found, at para. 224 of her judgment, that Mr. Chang and Mr. Lai "began their discussions of forming a competitive freezer business in the mid to late fall of 2009". In late December 2009, the two engaged a realtor, and were actively searching out light industrial property to lease for a manufacturing facility. They went so far as to make an offer to lease a particular property for a period of five years, beginning in September 2010, though the offer did not come to fruition.
- [34] Mr. Lai continued, all the while, to be employed by GEA. In February 2009, he formally raised the issue of being compensated for his role in securing the important business relationship for GEA. Some tension ensued. The company was aware of rumours that Mr. Lai and Mr. Chang might be considering starting up a business to compete with it. It re-assigned Mr. Lai to a position where he had less contact with customers. Mr. Lai saw this as a demotion. In April 2010, he gave notice of termination to the company, with effect from May 21, 2010.
- [35] In the meantime, Mr. Chen had approached GEA, asking that he be released from the restrictions in his non-competition agreement. GEA indicated that it was prepared to consider doing so, depending on the nature of his proposed employment. Mr. Chen declined to produce that information. The judge inferred that Mr. Chen was intending to join Mr. Chang and Mr. Lai in their business venture.
- [36] FPS was incorporated in April 2010, by Mr. Lai's uncle. The judge found that the uncle was acting, at all times, as a mere proxy. When FPS was later reorganized (in June 2012), Mr. Lai's uncle ceased to be a shareholder and director, and the voting shares were split, with the numbered companies of Mr. Chang, Mr. Lai and the third former employee as the majority shareholders. The three were the directors of the company, and Mr. Chang was its president. The judge found that this arrangement represented the de facto structure of the company from the outset.
- [37] The company's earliest project was a beansprout machine, and it also produced other food processing equipment, such as a dumpling steamer, that did not compete with GEA's products. By mid May 2010, however, Mr. Chang and Mr. Lai had prepared a business plan for FPS that involved the production of hygienic freezers. The description of the products that the company would be producing clearly indicates that it intended to compete with GEA (note that in the business plan, the company is referred to as "FSI"; at the time the plan was created, FPS intended to create a subsidiary company to manufacture hygienic freezers. In the end, it did not do so, but undertook the manufacture itself):

FSI will manufacture industrial food tunnel and spiral freezers and offer retrofit/rebuild service for existing equipment. Primary focus will be placed on product hygienic engineering design and manufacturing processes to ensure highest quality product features and the most efficient manufacturing process possible.

FSI will manufacture tunnel and spiral freezer equipments [sic]. All equipment will be designed with fully welded stainless steel enclosures, designed to be effectively cleaned with automated "Clean in Place" systems and the ability to be pasteurized. The tunnel freezer is designed for bulk handled product such as fruits and vegetables. The spiral freezer is designed for individually-handled or delicate products or products requiring long freezing times .

- [38] The business plan also described the competition in the premium quality industrial freezer market as consisting of only two major players, one of which was GEA.
- [39] By the time the business plan was produced, FPS had secured temporary space for manufacturing, and had placed an offer on a larger warehouse and manufacturing property in Richmond. Mr. Chang had agreed to lend the company a large sum of money, and in fact did so in June 2010. The business plan forecast that FSI would be fully operational by January 2011.
- [40] The business plan showed Mr. Chang as the president of the company, Mr. Lai as the Vice-President, and Mr. Chen as the Chief Engineer. At the time the plan was produced, Mr. Chang remained subject to a non-competition agreement, as did Mr. Chen. Mr. Lai was still in the employ of GEA, though he had provided his notice.
- [41] The last of the appellants to leave GEA was Mr. Xu. He was also dissatisfied with the company, experiencing conflicts with his co-workers and with management, In the Spring of 2010 he took a three-month medical leave from his employment. On his return to work, he was given a warning by the company, and he was terminated on July 5, 2010, only a few days after his return. He was provided a severance package, including three month's salary, but felt seriously aggrieved by the termination.
- [42] The evidence did not clearly establish when each of the individual appellants began working for FPS. Despite the documentary evidence, including the business plan, Mr. Chang contended that he did not decide to join FPS until January 2011, when he attended a trade show in Portland, Oregon with Mr. Lai. The judge rejected that contention, finding that the two had attended the trade show to drum up business, and that Mr. Chang was a principal of FPS from its inception, as was Mr. Lai.
- [43] Ms. Wu stated that she started working for the company in June 2010, but the judge noted that earlier FPS drawings bore Ms. Wu's name. The judge concluded Ms. Wu commenced work for FPS in April 2010.
- [44] Other defendants were not officially made employees of FPS until their entitlement to Employment Insurance benefits ran out, but they worked for FPS on a "volunteer" basis before that. Mr. Chen began working for FPS at about the same time as Ms. Wu, though his actual "employment" by the company did not come until March 2011. Mr. Xu started working with FPS shortly after he was terminated from GEA, but he was not added to the FPS payroll until April 2011. The judge found that Mr. Chen and Mr. Xu, though they were not paid while they were receiving Employment Insurance benefits, were working for the company. They

understood that they would be remunerated once they no longer qualified for EI benefits, and would receive an equity stake in the company in exchange for their unpaid work prior to that time. Mr. Chen and Mr. Xu did receive equity stakes in the company in 2012 as part of the corporate reorganization.

[45] GEA became aware that FPS was entering the hygienic freezer market in March 2011, and wrote to FPS demanding that it not do so. FPS, however, was already marketing its product, and sold its first hygienic freezer on June 3, 2011.

[46] GEA commenced the litigation against the appellants in July, 2012.

V. The GEA Drawings

[47] GEA's primary claim was that the appellants improperly used its confidential information to design a competitive product for FPS. The judge found that they did so, through accessing engineering drawings of GEA's hygienic freezers and copying the designs.

[48] The judge analysed the case largely on the basis that the engineering drawings themselves constituted the confidential information that was misused by the appellants. I am not entirely persuaded that the concentration on the drawings, as opposed to the design information that they contained, was justified. It seems to me that the appellants would be guilty of a breach of confidence even if they had relied only on their memories in appropriating GEA's confidential designs rather than on the drawings. That said, a great deal of the evidence and argument at trial centred on the drawings. That emphasis has been repeated on the appeal. In the circumstances, I am prepared to analyze the appeal on the assumption that use of the drawings was critical, though I do so without endorsing that proposition.

[49] The marketing and production of hygienic freezers makes extensive use of drawings. At the initial stages, GEA prepares "sales drawings". These are provided to customers as part of GEA's marketing efforts. These drawings show the general configuration and appearance of the product, letting the customer see how the freezer will interface with other aspects of its industrial operation. Sales drawings might contain some dimensions, but would not show construction details or provide detailed engineering specifications.

[50] If the proposal progresses beyond initial sales discussions, GEA provides its customers with general layout drawings. These drawings are somewhat more detailed, including limited engineering specifications, but do not contain sufficient information to allow for the construction of the freezer.

[51] Once GEA finalizes a sale, it prepares engineering drawings (also referred to as "shop drawings") for its internal use. These are the detailed drawings used by GEA in the building and assembly of the freezer components.

- [52] While GEA incorporated confidentiality warnings into its sales and layout drawings, and while its confidentiality agreements with its employees extended to those documents, they were, in practice, not highly confidential. They were shared with customers as part of the sales and marketing effort, and the information that they contained could easily be gleaned from a superficial examination of a GEA freezer.
- [53] On the other hand, GEA went to considerable lengths to maintain confidentiality over the more detailed engineering drawings. Among these drawings were "installation drawings" that were used to assemble the various parts of the freezer on the customers' premises. With a few isolated exceptions, engineering drawings were not released to customers.
- [54] In addition to drawings, there were documents setting out the schedule for production of the freezer components and for construction of the freezer. The detailed scheduling documents were also kept confidential by GEA.
- [55] The judge found that Mr. Chen, when he worked for GEA, sometimes worked from home. In order to do so, he downloaded drawings onto his desktop and laptop computers. When he left GEA, he had many such drawings on his computers. Mr. Chen had signed confidentiality agreements, and knew that he was supposed to delete the drawings from his computers when his employment was terminated. The judge found, however, that he retained them, and then used them and shared them with co-workers at FPS in order to design and construct hygienic freezers. With respect to the other appellants, the judge made the following findings:
- [327] I conclude that Messrs. Lai and Chang knew full well that Mr. Chen had steadily accumulated a portfolio of GEA general layout and engineering drawings while at GEA and had retained them after he was fired. I find that none of these defendants or Ms. Wu or Mr. Xu had any reservation about using the Chen Drawings or any GEA drawing that may have come into their possession at FPS, and that they routinely relied on such drawings, to their advantage. An important mindset that informed their misplaced sense of entitlement to freely use GEA's drawings was their perception they had been poorly treated by GEA, and felt they owed it no loyalty.
- [56] There was direct evidence that Mr. Chen had general layout drawings, and that, on at least three occasions, he shared them with other FPS employees. Mr. Chen purported not to recall what other drawings were on his computers. The judge inferred that Mr. Chen had engineering drawings on his computers. She considered it likely that he had hundreds of such drawings.
- [57] Mr. Chen claimed that he deleted all drawings from his computers in 2012, when he received GEA's notice of civil claim. He said that he destroyed the hard drive on his laptop computer with a hammer in 2014, and took his desktop computer to a recycling depot at about the same time. He did not disclose the fact that he had had possession of the drawings until very near the time of trial. He claimed not to have used the documents while working for FPS.

- [58] The judge did not believe Mr. Chen. She inferred that his purpose in destroying the computers was to hide the fact that he had taken the documents. She found that the deletion of the documents occurred shortly before the destruction of the computers in late 2013 or early 2014.
- [59] The judge was convinced that the GEA drawings that Mr. Chen had taken were used by Mr. Chen and others at FPS for the purpose of designing and building FPS freezers. She found that such use was a practical necessity in order for FPS to design and market its freezers so soon after it commenced its operations.

VI. The Finding of Breach of Confidence

- [60] Citing *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, the judge noted that three criteria must be fulfilled in order for a cause of action for breach of confidence to be made out:
1. The information conveyed must be confidential;
 2. The information must have been communicated in confidence; and
 3. The information must have been used for an improper purpose.
- [61] That judge found that all three criteria were made out. As to the first criterion, the engineering drawings were not distributed to customers or to others outside the company. The details of the manner in which GEA implemented its design features were not disclosed by the company, and could not be completely ascertained by simply examining the finished product. It was well-understood that GEA's competitive advantage in the industry derived from the unique design features of its freezers, and it carefully guarded the information as to how those features were implemented from an engineering standpoint.
- [62] In respect of the second criterion, GEA had impressed on its employees that the documents and information were confidential, and imparted only for the limited purpose of the employees' employment with GEA.
- [63] The judge also found that the third criterion was satisfied. The confidential information was misused by being employed in the design and manufacture of a competing product.
- [64] While the judge briefly addressed the question of whether the employees were forever precluded from using the confidential information, she did not ultimately find it necessary to answer that question. Instead, she proceeded on the assumption that the defendants could have, eventually, designed a product to compete with that produced by GEA.
- [65] The remedy that the judge awarded was based on the idea that FPS had a "head start" or "springboard" in entering into competition with GEA by virtue of its misuse of confidential information. She required FPS to disgorge profits it realized as a result of having that head start in development.

- [66] The judge also awarded damages against the individual defendants, though on a different basis. She found, on the balance of probabilities, that their breaches of confidence resulted in GEA losing specific contracts to FPS. She held the individual defendants collectively responsible for the losses suffered by GEA as a result of its failure to secure contracts that it otherwise would have obtained.
- [67] Although the legal basis for the two damage awards differed, their scope overlapped, such that GEA would be overcompensated if it were allowed to collect both damage awards. The judge's order made it clear that GEA would be entitled to collect damages from the individual appellants only to the extent that it failed to recover amounts from FPS.

VII. The Breach of Contract Claims Against Mr. Chang and Mr. Lai

- [68] All of the appellants had written agreements requiring them to maintain confidentiality over information belonging to GEA, including GEA's engineering drawings. They also had agreements preventing them from entering into competition with GEA for a period of time after their employment terminated. At trial, there were issues concerning each of the contracts. Few live issues regarding the contracts remain on this appeal.
- [69] The only written contractual provision whose interpretation is in issue on the appeal is the non-solicitation provision of a contract between Mr. Chang and GEA:

4. NON-SOLICITATION OBLIGATIONS

4.2 You agree that, during the period of your employment by the Company and, in the event of the termination of your employment, for a period of one year to not directly or indirectly attempt or agree to recruit, train or solicit any person employed by the Company to provide services to yourself or to any person who engages in a business similar to the business of the Company or in any manner assist any person in any of the foregoing activities

- [70] The trial judge found that Mr. Chang breached this provision of his contract by recruiting a GEA employee, Cam Man Wong, to work for FPS in April 2010.
- [71] The trial judge also found that Mr. Lai breached the implied duties of good faith, loyalty and fidelity in his contract of employment by working to form FPS while he was still employed by GEA. Mr. Lai appeals from that finding.

VIII. Alleged Errors in the Judge's Analysis

- [72] The appellants contend that the judge made a palpable and overriding error of fact in finding that the appellants possessed and used GEA engineering drawings to produce FPS freezers. They also contend that the judge made legal errors in her assessment of damages, requiring FPS to disgorge profits for a longer period than she should have. Finally, they contend that the judge erred in finding that Mr. Chang breached provisions of his contract with GEA, and that Mr. Lai breached implied duties of good faith, loyalty and fidelity to GEA.

IX. Possession and Use of the Drawings

A. Did the Judge Err in Finding that Mr. Chen Possessed Engineering Drawings?

- [73] The appellants contend that the judge's finding that the appellants possessed and used GEA's confidential drawings was "unsupported by any direct evidence". They say that the judge committed a palpable and overriding error in making her finding. I am unpersuaded. The judge based her finding on strong circumstantial evidence, and it was open to her to make the finding that she did.
- [74] The trial was a complex one, lasting several weeks. The reasons for judgment are lengthy, painstakingly analysing the evidence of each witness, and making numerous findings of fact and credibility. A review of the reasons is challenging. The judge did not provide a concise, linear summary of her chain of reasoning. Further, some of her conclusions are expressed in language that can be interpreted more broadly than appears to have been intended. In order to understand the precise findings that were made, therefore, it is important to provide a précis of the judge's reasoning.
- [75] The reasoning begins with the proposition that Mr. Chen had GEA drawings on his computers after he ceased being employed by the company. The documentary evidence introduced at trial included three layout drawings that Mr. Chen shared with his colleagues in emails. Mr. Chen admitted that he routinely placed GEA documents on his computers while he worked for the company, and that such documents remained on his computers when he ceased to be employed by it. He claimed not to recall what documents he had on the computers.
- [76] The judge inferred that those documents included engineering drawings. The evidence strongly supported that inference. Mr. Chen was employed as a mechanical engineer with GEA, and his work included the creation and use of both layout drawings and engineering drawings. Most of his work, however, was in respect of engineering drawings. Nothing in the evidence suggests that he stored only layout drawings on his personal computers, and it would have made no sense for him to follow such a restriction while he worked for GEA.
- [77] Mr. Chen's evidence did not suggest that he took any steps to cull the documents stored on his computers when his employment with GEA was terminated. Even if one were to accept the proposition that the retention of documents was innocent, then, there is no reason to expect that it would have been confined to layout drawings.
- [78] The inference that engineering drawings remained on Mr. Chen's personal computers after he left GEA is strengthened by his own testimony. Mr. Chen did not deny that he retained engineering drawings; rather, his evidence was to the effect that he did not recall what drawings were on his computer. At one point in his cross-examination, Mr. Chen indicated that a reason for retaining the documents on his computers was to assist him in finding future employment:

Q You testified, sir, that as a result of being sued by GEA, you deleted drawings because you knew having them was inappropriate; isn't that right?

A If there is no this action, these drawings would be drawings that kept in my computer for work. This is accumulation of the knowledge I learned during the six years at work. As an engineer, I think if you want to find another job, a lot of employees will require to see what you have done in the past. That's why I kept those old drawings. I didn't do anything about them. I thought that this experience would help me find a job in the future.

[79] It seems obvious that, if Mr. Chen's purpose in retaining the drawings on his computers had been to have a portfolio to show prospective employers, he would have kept not only the relatively simple and undetailed layout drawings, but also engineering drawings, which would be much more useful in showing his skills and knowledge.

[80] Given Mr. Chen's lengthy employment by GEA and his explanation as to how GEA documents remained on his computers after he was terminated by the company, the judge's inference that he retained hundreds of drawings is an entirely reasonable one. He had worked on many projects, and had drawn, modified, or used a large number of drawings. He admitted that he routinely copied those drawings to his computers, and did not suggest that he systematically deleted them.

[81] The fact that there was no direct evidence that Mr. Chen possessed engineering drawings after his employment with GEA was terminated is not surprising. The judge found that the appellants' disclosure of documents was woefully inadequate:

[42] [T]he orderly unfolding of this proceeding was markedly hampered by the defendants' stunningly deficient and dilatory disclosure of relevant documents. The pattern of shoddy disclosure left the impression that they deliberately confined their disclosure to documents that nicely aligned with the story they were attempting to craft at any given time during the proceeding. In saying this, I wish to be clear that I am criticizing the conduct of the defendants themselves, primarily Messrs. Chang, Lai and Chen, and am not attaching blame to their counsel.

[44] [A]nother disconcerting example of the defendants' treatment of documents was that, following the initiation of these proceedings and after Mr. Chen received a letter from GEA's counsel demanding the return of GEA's documentation, Mr. Chen "recycled" his home/desktop computer and took a hammer to the hard drive of his personal laptop/notebook computer. In the process, he destroyed an untold number of GEA's drawings that he had quietly transferred to his computer and/or laptop while he worked for GEA, and which he retained and used at FPS.

[82] She also considered that Mr. Chang, Mr. Lai and Mr. Chen were "untrustworthy and discreditable witnesses".

B. Did the Evidence Support the Judge's Finding that the Appellants Had a Sense of Entitlement to Use the Drawings?

- [83] The fact that Mr. Chen possessed GEA engineering drawings at material times does not, in and of itself, show that he or his colleagues used those documents to design FPS hygienic freezers. The judge inferred, however, that Mr. Chen and the other individual appellants did so, with the knowledge of FPS. Several factors led the judge to draw this inference.
- [84] She considered that the appellants' perceptions that they had been poorly treated by GEA led to a "misplaced sense of entitlement to freely use GEA's drawings". This inference appears to be well-supported. The appellants described their dissatisfaction with their employment by GEA. While all but Mr. Chen denied that they had access to engineering drawings after they left GEA, Mr. Lai and others had no concerns about using GEA's sales and layout drawings in their work.
- [85] All of the employees also took the position at trial that they were fully entitled to implement the design features of GEA freezers into FPS products, and that they were entitled to adopt the same engineering solutions that were used at GEA to implement those features. In my view, the judge did not err in her assessment of the appellants' "sense of entitlement".
- [86] I will return to the subject of the sense of entitlement below, in discussion of the AutoCAD blocks.

C. Was it Permissible for the Judge to Draw an Adverse Inference from Mr. Chen's Destruction of Evidence?

- [87] The judge drew an adverse inference from the fact that Mr. Chen deliberately destroyed his computer hard drives, knowing that the litigation was ongoing, and that his possession of GEA drawings was relevant to the litigation:
- [322] As the litigation intensified, the continued retention of the Chen Drawings became a serious liability for the defendants. I find it was that realization that drove Mr. Chen to deliberately disable his computers. His intention in doing so was to destroy his incriminating catalogue of Chen Drawings and to obliterate any trace of the use of those drawings and any other GEA drawings by him and others at FPS.
- [88] The appellants contend that no adverse inference ought to have been drawn. They cite *Dwyer v. Mark II Innovations Ltd.*, 208 O.A.C. 305 (Ont. C.A.), a case in which a trial judge drew an adverse inference from the defendant's failure to testify. The Ontario Court of Appeal noted that the plaintiff's evidence was "[a]t its highest ambiguous" and, in its endorsement decision said:
- [4] We do not think an adverse inference was appropriate in these circumstances. An adverse inference should be drawn only after a prima facie case has been established by the party bearing the burden of proof. [W]e do not think the evidence led by the respondent established a prima facie case that the contract of employment was for a fixed term.

- [89] The appellants say that the judge should not have drawn an adverse inference against Mr. Chen in the absence of a prima facie case. In my view, Dwyer is of no assistance to them. It cannot be suggested that the plaintiff in the case before us failed to present a prima facie case of breach of confidence.
- [90] Even leaving that issue aside, however, this case is readily distinguishable from Dwyer. In Dwyer, the defendant had a legal right to refrain from giving evidence. The burden was on the plaintiff to prove his case, and, in the absence of a prima facie case, there was no need for the defendant to present evidence. In this case, Mr. Chen had a legal obligation to preserve documents relevant to the litigation, and to disclose them to adverse parties. He was aware of the litigation, and he destroyed the documents because he considered his possession of them was not in his interests. His failure to preserve the documents was culpable and deliberate.
- [91] A trial judge is entitled to draw an adverse inference from the deliberate destruction of evidence if certain conditions are satisfied:
- [18] [St. Louis v. The Queen (1896), 25 S.C.R. 649 stands for the proposition that] [s]poliation in law does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavourable to the party destroying it. This presumption is rebuttable by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which the party either proves his case or repels the case against him.

McDougall v. Black & Decker Canada Inc., 2008 ABCA 353; see also Chow-Hidasi v. Hidasi, 2013 BCCA 73 at para. 29

- [92] In the case before us, the preconditions for the drawing of an adverse inference were met, and it was within the trial judge's purview to find that Mr. Chen's decision to destroy his computer hard drives was motivated by knowledge that the information on them would adversely affect his case. The judge's inference that information on Mr. Chen's computers would have disclosed the use of GEA engineering drawings in designing FPS freezers was not an unreasonable one.

D. The Judge's Reference to the Date Change Memo E-mail

- [93] The evidence included an e-mail from Mr. Chen to Mr. Chang and Mr. Lai dated September 12, 2012, in which Mr. Chen indicated that he had discovered a way to change the document creation date recorded on drawings produced using AutoCAD software.

- [94] Both GEA and FPS used AutoCAD to create their engineering drawings. GEA adduced the evidence of an expert on AutoCAD to describe the manner in which the program date stamps drawings. The evidence was that the program will ordinarily show the original creation date of a drawing's contents, even where the content has been cut and pasted from an old document into a new one.
- [95] The email with respect to changing the time stamp on AutoCAD documents was suspicious. The most obvious purpose for changing the creation date recorded on an FPS AutoCAD drawing was to disguise the fact that some of the underlying content had been taken from older drawings -- presumably those prepared by GEA. If that was not the purpose, the appellants ought to have been able to provide a reasonable explanation. The judge considered that they did not do so:
- [347] The unimpressive testimony of [Mr. Chen and Mr. Chang] served to convert the Creation Date Email from a suspicious appearing communication into an incriminating piece of evidence. I find it indicates that Messrs. Lai and Chang, with Mr. Chen's informed and willing assistance, together sought a way to manipulate the creation date of FPS drawings that had stemmed from or otherwise had some connection to an "old one", meaning a GEA drawing. I further find that their purpose in doing so was to hide their unauthorized and improper use of such GEA drawings, most all of which I find were included within the Chen Drawings, at FPS. This ties in with my conclusion that Messrs. Chang and Lai had full knowledge and approved of the routine use at FPS of any and all GEA drawings that came its way, including the Chen Drawings and GEA's sales drawings that were appropriated to FPS by Mr. Lai.
- [96] In my view, the inference drawn by the judge was open to her on the expert and lay evidence before her with respect to AutoCAD date stamps.

E. AutoCAD Blocks

- [97] One feature of AutoCAD software is that it allows for the creation of "blocks" -- collections of drawing objects that are combined and can be inserted into drawings as a single unit. When a user creates a new block, the user can assign a name to the block to identify it. If no name is provided, AutoCAD gives the block a random identifier consisting of the characters "A\$C" followed by eight hexadecimal digits.
- [98] The number of unique identifiers in such a system is 168, or close to 4.3 billion. In the result, it is extremely unlikely that any two blocks created in AutoCAD will bear the same randomly created identifier. Where a block in one drawing has the same AutoCAD-generated identifier as a block in another drawing, it can be safely assumed that the two blocks are identical, and came from the same source.

- [99] When blocks are copied into one drawing from another, they remain embedded in the new drawing, even if, due to modifications in the drawing, they are no longer in use. GEA retained an expert to examine FPS and GEA drawings. His findings were summarized by the trial judge as follows:
- [356] For purposes of his expert report, Mr. Fane examined 8,472 FPS AutoCAD drawings and 769 GEA AutoCAD drawings. In the course of his comparison, Mr. Fane made certain observations and opinions as summarized below:
1. 608 of the 769 GEA drawings contained block definitions using the A\$Cxxxxxxxx block format;
 2. Those drawings yielded 6,755 instances of A\$Cxxxxxxxx block names, with each name often appearing in more than one drawing, for an average of 8.78 instances of such block per drawing;
 3. The 8,472 FPS drawings yielded 14,850 instances of FPS files containing block names that matched the GEA names that had been inserted in the FPS drawings;
 4. 3,427 of the 8,472 FPS drawings (about 40.1%) used design content that came from GEA files based on the overlapping existence of block names and definitions, and of the A\$Cxxxxxxxx format block names in particular;
 5. 4,503 of the FPS files contained 10,260 instances of unused block definitions that matched the names of GEA block names;
 6. 35 distinct A\$Cxxxxxxxx block names accounted for 2,696 of the GEA block names inserted in FPS drawings. Mr. Fane opined that those blocks could have only originated in GEA files;
 7. A study of 20 user-named blocks and of 20 A\$Cxxxxxxxx blocks showed corresponding blocks to be identical between the two sets of files. Mr. Fane provided some examples illustrative of this finding; and
 8. There were a number of FPS drawings that had the same creation date as a number of GEA drawings down to the thousandth of a second. Those creation dates predated the formation of FPS.
- [357] There was no instance where a block originated with FPS and was used by GEA.
- [100] An expert called by the appellants stated that at least some of the AutoCAD blocks may have originated with component suppliers, and not with GEA. His evidence, however, accounted for only a proportion of the AutoCAD blocks. The judge concluded that many of the AutoCAD blocks used by FPS originated in GEA drawings. Ultimately, the appellants conceded that that was true. They contended, however, that the blocks were a result of Mr. Lai using templates for sales drawings that he had acquired from GEA. While it was conceded that he ought not to have done so, FPS argued that the use of the sales drawings did not represent the appropriation of genuinely confidential documents or information.

- [101] The judge accepted that showing that sales drawings had been used in that way would not prove a breach of confidence. She did, however, note that such an inappropriate use of GEA property was indicative of the appellants' sense that they were entitled to make use of GEA drawings:
- [364] Implicit in the defendants' argument is that Mr. Lai had no qualms about using whatever GEA sales drawings he had kept on his personal computer while employed by GEA for the benefit of FPS. So bold was Mr. Lai, that he even used one or more GEA drawings as a convenient starting point to prepare drawings of his apartment. He also copied to FPS's drawings, GEA's confidentiality legend word-for-word (other than company name) complete with its grammatically incorrect use of the word "subjected". Mr. Lai's cavalier sense of entitlement to use GEA drawings at FPS as he might like, was emblematic of a mindset that he shared with Messrs. Chang, Xu and Chen and Ms. Wu.
- [102] The judge was not satisfied, however, that Mr. Lai's use of sales documents as templates accounted for the widespread use of GEA AutoCAD blocks in FPS drawings:
- [365] I accept that some of the blocks, layering, and colour schemes in GEA drawings were imported into FPS sales drawings created by Mr. Lai in consequence of the process described. However, I am not satisfied that Mr. Lai's propensity to recycle GEA sales drawings in this way fully explains how it was that such a staggering number of A\$Cxxxxxxx named blocks that had originated in GEA drawings, especially those block names that I have concluded were created by GEA, came to be incorporated in FPS's drawings.
- [103] She concluded:
- [367] The A\$Cxxxxxxx block names that I have found were created by GEA and subsequently embedded in FPS's drawings [are] compelling circumstantial evidence. When evaluated in the context of the evidence as a whole, it bolsters my finding that the defendants, Chen, Xu and Wu and FPS through its management at the highest level (that is, Messrs. Lai and Chang) routinely used the Chen Drawings in the preparation of FPS's drawings. Based on Mr. Fane's comprehensive analysis and the sheer pervasiveness of the GEA block names and drawing elements in thousands of FPS's drawings, I conclude that their presence is also the result, and in all probability largely the result, of the unrestricted use at FPS of the Chen Drawings.
- [104] On appeal, the appellants say that the judge failed to determine whether the AutoCAD blocks in question were included in engineering drawings, or merely in sales and layout drawings. They contend that the blocks were only present in sales and layout drawings. GEA disagrees with that factual position, and says that the blocks occurred in engineering drawings as well as in sales and layout drawings.

[105] As this issue was not canvased in the cross-examination of Mr. Fane, nor fully developed in the appellants' factum, this Court is not in a position to determine that the judge made a palpable error in respect of the AutoCAD blocks. Accordingly, I would not give effect to this argument.

[106] In any event, the judge's findings with respect to the AutoCAD blocks, while of some importance, were not critical to her conclusions. I am therefore not convinced that any error made on this issue, even if it could be shown to be palpable, could be described as overriding. I am satisfied that the judge's conclusion that the GEA engineering drawings were used in designing FPS freezers rested on a number of pieces of evidence, and did not ultimately turn on whether the GEA AutoCAD blocks had been copied into FPS engineering drawings.

F. Practical Necessity

[107] The judge's primary reason for inferring that FPS had used the GEA engineering drawings to design and produce its own hygienic freezers was her view that such use was a practical necessity. The appellants take issue with a number of the judge's statements, and suggest that the judge underestimated the skills of the FPS engineers, wrongly finding that they had limited abilities.

[108] The appellants concentrate on two paragraphs of the judgment, which, when read in isolation, could be seen as casting aspersions on the skills of FPS engineers:

[556] It is axiomatic that the engineer defendants lacked the skill and know-how to create all of the engineering drawings required to manufacture a complete FPS freezer, or even to replicate the engineering design concepts intrinsic to any of the GEA Features.

[562] I conclude that the defendants imported to FPS the familiar designing and drawing protocols that the engineer defendants had been trained in and followed at GEA. At FPS, the engineer defendants looked to engineering drawings created for past freezer projects to create their engineering drawings for FPS's freezers. As was the case at GEA, this was the preferred approach because it saved time and ensured consistency of design and adherence to the desired engineering design standards. But it was more than that. Apart from the relatively rare instance that a straightforward freezer component might be designed and drawn from scratch, in order to create the requisite engineering drawings, it was imperative that the engineer defendants refer to pre-existing engineering drawings and cut-and-paste whatever contents they found useful; it could not be done otherwise. In the FPS scenario, the only existing engineering drawings initially available at FPS were the Chen Engineering Drawings.

- [109] While these paragraphs might be read as suggesting that the engineer defendants lacked the skill to design hygienic freezers, such a reading would be a curious one. Hygienic freezers are designed by engineers, and the defendant engineers had been involved in such design for many years. They clearly had the aptitude and skill necessary to design hygienic freezers.
- [110] As I read the reasons for judgment, the judge was not casting aspersions on the abilities of the appellant engineers when she concluded that they could not have produced FPS freezers from scratch without relying on GEA drawings. An industrial appliance of the quality produced by GEA and FPS is not simply drawn and built. Rather, designing a hygienic freezer requires an approach where components are designed, tested, and iteratively redesigned. The final product is a result of a complex process of research and development. It is not a simple drafting project.
- [111] Some appreciation of the complexity of the process can be gained by considering the evidence of Dr. Nima Atabaki, the engineering expert relied on by the appellants at trial. He was asked whether a hypothetical competitor could have designed a freezer similar to GEA's simply by examining the finished product. The trial judge summarized his report and testimony on the issue as follows:
- [423] Dr. Atabaki opined that it was possible for a competitor to do so but only under certain conditions:

I believe that this is possible if the competently skilled and fully equipped competitor has a strong engineering team including research engineers. This will require to iterate [sic] several times by prototyping, conducting analytical and experimental studies and documenting to refine the design and develop the product with specifications that can compete in the market.

- [424] Dr. Atabaki was asked to elaborate on his passage. He testified that a "strong" engineering team would include research engineers who would have to conduct research of relevant literature before they could commence fabrication of the freezer. He had not assessed the strength or competency of the engineering team at FPS in that regard. He stated that the classic engineering model would be followed. That protocol dictated an incremental approach where challenging pieces would be isolated and built individually as a small prototype and then through a process of trial and error the designs and processes would be tested, analysed, and refined until each was acceptable. Dr. Atabaki agreed that the entire process he described would take "some time", "a lot of money", and would require a strong engineering team. Later in his oral evidence, Dr. Atabaki summed up the process as follows:

Here they are asking, if you see it from outside, the freezer, can you manufacture that? I am saying, if I just look at something from outside, I need to think about it, see what are the functions, what are the requirements, and very classical way of designing. But as I said those parts that I don't know, I will start reading about it, doing my homework, if you want, and prototyping, if needed, and doing numerical, experimental, whatever that is helping me to get it

right as the closest iteration that I can. So I am not saying it may be 10 years to do it. I am saying it can - it's not a very complicated science, so I am saying that it can be done fairly easily.

- [425] I understood Dr. Atabaki's opinion to be that, with the investment of time and money, simply by examining the finished product a strong engineering team could possibly be able to design and build a sufficiently close approximation of the subject freezer to adequately compete in the market, but not necessarily an exact duplication.
- [112] As the judge noted, GEA had itself engaged in a lengthy and expensive process of freezer design, a process that was not followed by FPS:
- [534] The development of GEA's freezer line, including the GEA Features, was the culmination of years of engineering design and manufacturing trial and error and research on the part of Aero Heat and GEA. Mr. Chang himself took part in some of that internal collaborative process. After the Share Purchase, GEA formed a separate Tech Centre to facilitate research projects and test theories relating to freezing food products. Refinements to the GEA product continued to be made. All the while, it invested significant funds toward scientific research and experimental development, claiming expenditures of nearly \$500,000 in 2009 alone.
- [535] GEA's track record of research and development initiatives and expenditures stands in stark contrast to the absence of one at FPS. From the time of its formation in 2010 through to 2014, FPS contributed nothing or next to nothing on freezer-related research and development. The financial evidence shows no such expenditures were made in 2010. FPS spent the sum of \$28,243 in 2011, which dropped to a mere \$2,668 in 2012 and increased to \$15,601 in 2013.
- [536] It is telling that FPS's financial investment in research and development was negligible in its start-up years. I find that was the case because, for all intents and purposes, the defendants were not meaningfully engaged in any freezer research or development. Indeed, there is not a speck of evidence to suggest that before FPS started to build freezers, the defendants undertook any in-house research or spent time on conceptual design or engineering development of its product. They did not consult a patent or rely on a literature review. Nor did they engage in the reverse engineering of any part of a GEA freezer (or a freezer manufactured by any third party competitor) as a means of acquiring detailed engineering design and specification information to use in the fabrication of an FPS freezer.
- [538] The pivotal question thus arising is: how was FPS able to build an hygienic commercial-grade freezer that enabled it to immediately compete in the same niche market as GEA, without having conducted any appreciable research or internal development, having attempted no reverse engineering and having relied on no (non-GEA) external sources?

- [113] The FPS engineers, of course, had certain advantages over the hypothetical competitor and over GEA in its early times. They had worked for GEA on freezers, and had a good knowledge of the way their freezers were built. They did not have to "re-invent the wheel" in developing FPS freezers. That said, they did not have experience in designing freezers from scratch. That was not the process followed at GEA.
- [114] The practice at GEA was for engineers to start a project using drawings from similar projects completed in the past, and to reuse them or modify them as needed to meet the customers' requirements. The judge referred to evidence given by GEA's Director of Engineering and Research and Development, Felix Lee:
- [117] Stressing the importance of relying on tried and tested engineering drawings, Mr. Lee said that GEA's collection of engineering drawings were the result of an accumulation of past design and fabrication experience and served to implement a design standard to maintain consistency and ensure that GEA's design criteria and design intent were achieved. He testified that it was expected that the GEA engineers would refer to previous engineering drawings from past projects in order to prepare their new drawings, and that they adhered to that practice on most all occasions.
- [115] The judge also noted the evidence of Thomas Ho, the Technical Engineering Manager of GEA, who stated that very few engineering drawings at GEA were created from scratch; that was a practice reserved for situations where a new component or sub-assembly was being used in the freezer.
- [116] In saying that the FPS engineers would not have been able to simply design FPS freezers by drawing them from scratch, then, the judge was not denigrating the capabilities of the engineers, but simply making the point that a great deal of research, trial and error, and iterative development is necessary in order to make a hygienic freezer from scratch.
- [117] The judge, in essence, found that the appellants could only have designed FPS freezers in one of two ways. First, they could have designed their freezers from scratch, using their skills and abilities, but only if they also engaged in a comprehensive program of research and development, and invested significant amounts of time and money into their program. There was no evidence to suggest that such a course had been followed.
- [118] The other way to design FPS freezers was the same way that GEA freezers were designed -- by using existing GEA drawings, and modifying them as necessary to meet customer requirements. This method of design greatly reduced the need for research and development, and limited the need for testing and iterative re-design, but only because the existing GEA designs already embodied the results of research, development, and testing.

- [119] The judge considered that the FPS engineers could not have relied simply on their memories to create designs similar to those created by GEA. There were too many drawings and too many components to allow for that. They needed to either use the existing GEA drawings, or undertake a process of research and design mirroring the one that had been undertaken by GEA over a period of many years:
- [555] [I do not say] that the engineer defendants did not develop the skill and know-how to prepare some of GEA's engineering drawings related to some elements of a GEA freezer by rote. I am satisfied that based on repetition, some pieces of the massive repertoire of engineering drawings used at GEA had become ingrained and could be reproduced by the engineer defendants without reference to an existing engineering drawing. Still, that approach was very much the exception and not the rule. The probabilities establish it was the exception because the engineers at GEA, including engineer defendants, did not have the skill and know-how to design all the constituent elements and compose all the engineering drawings needed for the manufacture of a GEA freezer from scratch. It is simply not plausible.
- [120] The judge did not accept that the appellants, even with their experience in the hygienic freezer industry, could simply create drawings from scratch and end up with fully functional, quality industrial freezers:
- [575] The crucial point is that only experienced and appropriately trained persons applying their independent (though collective) brainpower and thought-processes, and investing the same or similar time and resources and utilizing the same or similar methodology as was employed by GEA, could have produced the engineering design concepts embodied by the GEA freezer and set out in its engineering drawings.
- [576] GEA's engineering drawings were its tried and tested blueprints that laid out the engineering design concepts and detailed specifications of its freezers in an identifiable and concrete form. The other side of the same coin is that entire GEA freezer, including the GEA Features, represented the physical manifestation of the meticulous formulae spelled out in those drawings .
- [121] I am not persuaded that the judge erred in her analysis of the evidence. She fully appreciated that FPS's engineers were skilled and experienced in the hygienic freezer industry. She did not accept, however, that their skill and experience would allow them to simply sit down at a computer, create an AutoCAD drawing, and then build a high-quality, functioning hygienic freezer. Building such a product required them to start with either an existing design or an extensive process of research and development.

G. Design Concepts vs. Design Details

- [122] The appellants contend that the judge confused "design concepts" with "design details". They say that while the evidence supports the idea that FPS used the same engineering solutions as GEA to resolve challenges in designing their freezers, their detailed designs were different from those used by GEA. Accordingly, they say FPS could not have used GEA engineering drawings in designing their freezers.
- [123] It is true that the components of FPS freezers were not interchangeable with those of GEA freezers. There were differences in the details, though they employed the same basic underlying designs.
- [124] The judge fully understood that FPS freezers were not carbon copies of GEA freezers. She described specific differences in the components at length in her judgment (see, for example, paras. 387-416).
- [125] While the judge found that FPS used GEA engineering drawings in designing its freezers, she did not suggest that the engineering details of the freezers were identical. Rather, she found that FPS started with GEA engineering drawings, and modified them to create its own engineering drawings, which used FPS components that differed in details from those used in GEA freezers.
- [126] The differences in detail did not serve to convince the trial judge that FPS designed its hygienic freezers without using GEA engineering drawings as the foundation for its own drawings.
- [127] I am not persuaded that the trial judge conflated design concepts with design details, nor am I convinced that the judge made a palpable and overriding error in inferring that GEA engineering drawings were used as the basis for designing FPS freezers.

H. "Cutting and Pasting"

- [128] The appellants also take exception to the judge's finding that they created FPS freezer drawings by "cutting and pasting" from GEA drawings. They say that there was no evidence of cutting and pasting, and that no FPS drawing (or substantial part of an FPS drawing) was shown to be identical to any GEA drawing.
- [129] There was some evidence of actual electronic cutting and pasting, in that the AutoCAD blocks created by GEA were embedded in FPS drawings. This appears to have been a result of using GEA drawings as the basis for FPS drawings.
- [130] If the evidence of the AutoCAD blocks is ignored, the appellants are correct in saying that the evidence would not support a finding that the appellants engaged in actual cutting and pasting.

- [131] While the judge used the phrase "cutting and pasting" at places in her judgment, it appears that what she meant is simply that the appellants used GEA drawings as guides or templates in designing their competing products. The judge's meaning is clarified at para. 565 of her reasons:
- [565] [T]he engineer defendants were not so brazen or foolish to reproduce exact facsimiles of the Chen Engineering Drawings so as to manufacture perfect replicas of a GEA freezer. Rather, I find that the extent of their strict duplication of the contents of those drawings was variable. In the preparation of their drawings, they used some of the Chen Engineering Drawings in the form of a guide, modifying aspects of the design elements and specification details as they saw fit. In other instances, the engineer defendants heavily counterfeited the FPS designs and drawings from the Chen Engineering Drawings, making only immaterial tweaks to the conceptual engineering designs and specification data. I find that they followed the latter approach, in relation to the Chen Engineering Drawings that were the blueprints for certain of the GEA Features as discussed below.
- [132] The judge then discussed specific aspects of the design of GEA and FPS freezers, supporting her conclusion. The existence of design modifications did not cause her to resile from her conclusion that the GEA engineering drawings were the foundation of the FPS design.
- [133] It was the trial judge's function to draw inferences from the proven facts. I am not convinced that the judge either misapprehended the evidence or drew inferences that were impermissible. Her finding that FPS used GEA engineering drawings in designing its hygienic freezers was a reasonable inference to draw, and cannot be interfered with by this Court.

X. The Disgorgement Order Against FPS

- [134] The judge recognized that the remedies for breach of confidence are varied, and that the court enjoys considerable flexibility in deciding what type of order is appropriate. In this case, she chose to require FPS to disgorge profits that it achieved by misusing confidential information.

A. The Springboard Doctrine

- [135] The judge approached the issue of damages using what is known as the "springboard doctrine:
- [501] A collection of principles that have come to be known as the springboard doctrine have shaped the law aimed at protecting confidences. The doctrine is germane to whether the information in question possesses the necessary quality of confidence, as well as the appropriate remedy and the quantum of an award where a breach has been proven.

- [502] At the root of the springboard principle is the recognition that information may possess the compulsory quality of confidence for a breach of confidence claim if it has saved a defendant substantial time, effort and expense in searching for and gathering the information himself or herself, even if that information could have been derived from one or more publicly accessible sources.
- [503] The information confided to the defendant is viewed as having offered a "springboard" in the sense that it has eliminated the bother of the defendant having to do the groundwork to source it out and compile it. That advantage carries a degree of commercial value because it has given the defendant a head start in entering the competitive business. In this paradigm, the information is said to have the necessary quality of confidence and merit protection because the owner has used its own skill, knowledge and effort to produce a result that the party receiving the information in confidence could only have obtained independently by investing at least a similar amount of expense, time and effort as was incurred by the original owner. See generally: *Lac Minerals* at 610 and *Cadbury [Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142]* at para. 67. Importantly, in the employment context the rule operates to disallow a former employee's use of confidential information as a springboard in post-employment competition with his or her ex-employer.
- [136] In this case, the use of the springboard doctrine was appropriate. The appellants, at least after the non-compete provisions of the individuals' contracts expired, were free to enter the industrial hygienic freezer industry. It was common ground that there were various engineering solutions to the challenges of designing hygienic freezers, and that GEA's designs were not the only way to build a competitive product. Accordingly, the appellants would have been able to compete in the industry after some period of time developing a product. Further, the GEA designs, could, with some difficulty and expenditure of money, be discovered through reverse engineering. They were not patented, so GEA had no assurance that it would not, at some point, face a competitor using designs similar to its own.
- [137] In short, the judge's first task was to define the "springboard period" -- the period for which FPS would have to compensate GEA for having breached confidences.

B. The Start of the Springboard Period

- [138] The judge considered that the period should start with the first sale of an FPS freezer. She chose that as the start date based on the fact that the date of the first sale was used in *Cadbury* as the start date of the springboard period. The judge found that the date of sale of the first FPS freezer was January 2011.
- [139] The judge was in error in finding that the first FPS freezer was sold in January 2011. The industrial appliance sold on that date was, in fact, a dumping steamer. The first sale of a hygienic freezer by FPS was, in fact, on June 3, 2011.

- [140] The appellants argue that they were entitled to compete with GEA as soon as the non-compete provisions of their contracts expired. They say, therefore, that the springboard period should have commenced in June of 2010, when the non-compete agreements entered into by Mr. Chen and Mr. Xu expired. In support of that proposition, they cite *Cadbury; Barton Insurance Brokers Ltd. v. Irwin*, 1999 BCCA 73; *Imperial Sheet Metal Ltd. v. Landry*, 2007 NBCA 51; and *Genesta Manufacturing Ltd. v. Babey* (1984), 48 O.R. (2d) 94 (S.C.).
- [141] I am not convinced that the appellants' proposition is sound, but I am also not persuaded that the judge applied the correct criteria in determining the start date for the springboard period.
- [142] *Barton Insurance* and *Imperial Sheet Metal Ltd.* are both cases dealing with the ability of former employees to accept employment with companies that compete with their former employers, and to solicit business from clients of the former employer.
- [143] The general law in the area is summarized in *Imperial Sheet Metal Ltd.*, first with respect to non-fiduciary employees:
- [34] Once the employment relationship ends, the non-fiduciary employee is permitted to engage in fair competition with a former employer. Fair competition has traditionally meant that the employee may, without fear of legal consequences, establish a business that competes directly or indirectly with the business of the former employer. A correlative right is the right of the employee to work for a competitor of the former employer. As well, in both instances, the employee may bring to that business the knowledge and skill acquired while working for the former employer. The right to compete includes the right to solicit the customers of the former employer "whose names and addresses he has learned during the period of his service". Again, it must be emphasized that former employees cannot make use of printed information compiled by the former employer, including a customer list. The use of the employer's documentation or confidential information would amount to "unfair competition". Subject to that limitation, it has to be understood that employers cannot claim a monopoly over their clients or customers. This explains why employees are routinely required by their employers to execute confidentiality, non-competition or non-solicitation agreements. With respect to the latter two points see *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2007 BCCA 22.
- [144] The court then discusses the situation of fiduciary employees:
- [43] For purposes of deciding this appeal, I need only restate a few basic and well-recognized propositions under this heading. Not only does the fiduciary employee have a continuing duty to keep confidences, he or she has a continuing duty to act in the best interests of the former employer. Curiously, however, the law permits the fiduciary employee to compete with the former employer so long as he or she does not actively solicit the customers of the former employer for a reasonable period of time. Furthermore, this obligation is not breached if it is the client or customer that seeks out the fiduciary.

[Citations omitted].

- [145] This general law was applied in both *Barton* and *Imperial Sheet Metal Ltd.* In both cases, the former employer was denied relief against the employee.
- [146] These cases are of no assistance in defining the springboard period. They simply do not turn on the springboard doctrine. Even in the case of fiduciary employees, the length of time for non-solicitation is not based on an estimate of the amount of time needed to research and develop anything, nor have the cases suggested that the time period for non-solicitation is based on how long it would take to cultivate new clients. Rather, what is at issue in these employment law cases is a question of balancing the interests of an employer in retaining their clients with the rights of an employee to continue work in their industry. The courts require that a "reasonable time" pass before solicitation is allowed. I do not see these cases as having any influence in determining when genuine springboard periods commence or end.
- [147] *Genesta* also concerns the solicitation of customers of a former employer, and includes a situation where a confidential customer list was appropriated by the former employee. It was further alleged in that case that the defendant acquired confidential information in his employment, and subsequently utilized that information when he worked with extruded plastics. There is a very brief discussion of the springboard issue in the case, but it is of little assistance, since the court found both that the employee did not acquire confidential information in his employment, and that, in any event, he did not make use of the alleged confidential information during any possible springboard period.
- [148] *Cadbury* is more helpful on the springboard issues. The defendant had, for a period of time, been entitled to use *Cadbury's* confidential information under licence. When the licence expired, it immediately began marketing its competing product. The springboard period began at the date the product entered the market because that was the date upon which the defendant was first guilty of misusing confidential information.
- [149] In my view, *Cadbury* stands for the proposition that the springboard period commences (at least in cases not involving fiduciary relationships) when the wrongdoer breaches a confidence by misusing information in a way that is capable of causing damage to the victim of the breach. In *Cadbury*, that date corresponded with the competing product's entry onto the market, as there was no misuse of information that could damage the plaintiff's interests until that occurred.
- [150] In the case before us, it seems to me that the breach of confidence arose when FPS commenced its marketing of hygienic freezers. GEA's business was affected from that date onward, as a new competitor had entered the market and was making use of its confidential information.

[151] The judge found that FPS's efforts to market hygienic freezers dated back to January 2011, when Mr. Chang and Mr. Lai attended the trade show in Portland. By coincidence, that date is not materially different from the date that the trial judge used as her commencement date for the springboard period. In the result, though her rationale for using that date was faulty, the date chosen by the judge was a reasonable one.

C. The Duration of the Springboard Period

[152] The duration of the springboard period is a matter of controversy in this case, and the evidence at trial was not entirely satisfactory in establishing a reasonable duration. The appellants suggest a duration of one year. They base this period on the length of the non-compete agreements entered into by some of the individual appellants, and on their assertions that FPS could have fully designed a competitive freezer in that time frame without use of the GEA engineering drawings.

[153] The judge did not see anything in the non-compete agreements that served to limit the common law requirements to refrain from breaching confidences. I agree with her analysis. Indeed, if anything, the contractual provisions, read as a whole, were intended to augment rather than to diminish the common law restrictions.

[154] The judge rejected the proposition that the defendant engineers could have designed a quality hygienic freezer from scratch in one year. She noted that the design of GEA freezers had taken a considerable period of time: major design modifications to improve the hygienic freezers commenced in about 1998, and only reached a stage of maturity in about 2004.

[155] The appellants' expert, when discussing the possibility of reverse engineering a GEA freezer, acknowledged that prototyping would be a costly process, and would take some time. He did not provide any precise time estimate, but did allow that it would not take as long as ten years. The expert engaged by GEA suggested a longer period, but, again, without providing a specific timeframe.

[156] The appellants further argued that evidence as to the length of time it took to prepare an engineering drawing from scratch could be used to estimate the time required to design a freezer. They asserted that engineering drawings would take no more than one hour to produce. The evidence relied upon for this surprising proposition was the following testimony of Mr. Ho.

Q How long does it take to make a typical component drawing?

A Are we talking about from scratch? Could be -- well, if you copy one from previous --

Q No, just from scratch.

A From scratch? Depends on the complexity of the part. It could be as simple as five minutes to an hour even.

Q So between five minutes and an hour?

A Yeah.

[157] Fairly read, Mr. Ho's evidence was only that a simple drawing could be created in as little as five minutes to an hour. He did not say that any engineering drawing (or even all "simple" component drawings) could be accomplished from scratch in an hour. I note that there were AutoCAD drawings in evidence that showed editing times in the hundreds of hours.

[158] The appellants also emphasized Mr. Chang's estimate that drawings for a freezer would take 400-600 hours. It is important to recognize, first, that the judge did not find Mr. Chang to be a credible witness, and rejected his evidence to the effect that FPS freezer drawings were prepared from scratch. It appears that she accepted the 400-600-hour estimate as a reasonable amount of time for completing freezer drawings where they were based on drawings from previous projects. This number tells us very little about the length of time it would take to design a freezer from scratch.

[159] The judge was left with some evidence as to the complexity of the task of designing a hygienic freezer, but little in the way of a concrete estimate of how long it would take competent engineers to design and build a high quality hygienic freezer without engineering drawings for an existing freezer. It was, nonetheless, up to her to do the best she could with the limited evidence, and to make an assessment of damages. The judge's estimate of four years for the duration of the springboard period, while not definitively supported by the evidence, was not out of line, given the initial complexity of the task, the need to build and test prototypes, and the need to refine designs as work progressed. I conclude that it did not represent an error by the trial judge.

[160] I note that the judge also considered that the large contract obtained by FPS to produce freezers for Simplot supported a multi-year springboard period. To the extent that the early appropriation of confidential information had long-term effects, it makes sense that an equitable remedy would take that into account. However, in my view, it was not necessary for the judge to refer to the Simplot contract as a basis for establishing the duration of the springboard period at four years.

D. The Disgorgement Remedy

[161] The trial judge recognized that the law allows for a broad range of remedies for breach of confidence:

[665] A broad range of remedies is available for a breach of confidence, including damages, injunctive relief, an equitable accounting of profits, and the imposition of a constructive trust. Unfettered by strict doctrinal considerations, the court will adopt a flexible approach in fashioning a remedy, with a careful eye on the specific facts of the case: Cadbury at para. 61.

- [166] While the court's discretion to grant a remedy is not limited by whether the breach of confidence has a contractual, tortious, proprietary or trust flavour, that factor may nonetheless inform the appropriateness of the remedy in a given case: *Cadbury* at para. 26; *Lac Minerals* at 615 per Sopinka J. Another informing consideration finds expression in the common sense notion that not all confidential information has an equal degree of importance. The law recognizes a continuum of specialness with respect to confidentiality, and the placement of confidential information on that spectrum may also affect the nature of the remedy or the quantum awarded for a breach, or both: *Cadbury* at paras. 75-76.
- [162] As I read *Cadbury*, a court should carefully consider the circumstances of a case before choosing the remedy. Disgorgement focuses on the benefits obtained by the wrongdoer by reason of its breach of confidence, rather than on the damage suffered by the party whose confidential information has been misused. Such a remedy may be particularly appropriate where a fiduciary is guilty of a breach of trust. As Binnie J. noted for a unanimous Court at para. 29 of *Cadbury*, "[t]he law takes a hard line against faithless fiduciaries" such that sales of products by a fiduciary who has been guilty of a breach of confidence may justifiably be treated as if they belonged to the wronged party. An example of a case in which a disgorgement remedy was applied in a fiduciary context is *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134.
- [163] A disgorgement remedy may also be appropriate where there is a close connection between the gains made by the wrongdoer and the deprivations suffered by the wronged party. In such situations, a disgorgement remedy is similar to a constructive trust imposed in cases of unjust enrichment. *Lac Minerals* is a case where disgorgement was imposed on that basis.
- [164] This case is neither one in which there was a breach of confidence by a fiduciary nor one in which there was a clear correspondence between the gains made by FPS and deprivations suffered by GEA. Nonetheless (and in contrast to the result in *Cadbury*), the judge considered that disgorgement was the appropriate remedy. While doing so, she articulated correctly the considerations that must be taken into account in deciding whether the appropriate remedy is damages or disgorgement. No appeal is taken from the judge's decision to impose a disgorgement remedy against FPS, so it is unnecessary to further analyse her reasons in that regard.

XI. The Assessment of Compensatory Damages Against the Individual Appellants

- [165] The judge also found that the individual appellants had breached express or implied obligations of confidence in their contracts of employment with GEA, and awarded damages against them.

- [166] It does not appear that any attempt was made to differentiate the roles of the individual appellants in assessing their liability for breach of confidence, though it is clear that they participated in the various breaches in different ways and to different degrees. The individual appellants do not seek any order on appeal reapportioning the judgment as between them, so it is unnecessary to consider that issue.
- [167] The appellants take issue with the judge's assessment of damages, however. They say that the judge erred in finding that GEA would, on the balance of probabilities, have obtained certain contracts if FPS had not used its confidential information to obtain them for itself.
- [168] In my view, it was open to the judge to make such a finding. There were few companies competing in the hygienic freezer business, particularly in respect of high-end freezers. GEA's product and FPS's were quite similar. GEA had a track record with Simplot, the company that tendered the most lucrative contracts at issue in this case.
- [169] While there certainly could have been better evidence supporting the proposition that GEA would have obtained the contracts if FPS had not been able to bid on them, I am of the view that the evidence was adequate for the trial judge's finding, and that it should not be disturbed.

XII. Other Breaches

- [170] The judge found that Mr. Chang breached the non-solicitation provisions of his employment contract with GEA by recruiting a GEA employee to work for FPS in April 2010.
- [171] Very little turns on this allegation, as the judge did not find that it gave rise to any additional claim for damages.
- [172] Mr. Chang contends that the recruitment was not caught by his non-solicitation agreement, which prohibited him from recruiting or training any GEA employee "to provide services to any person who engages in a business similar to the [GEA's] business". He says that, at the date of the recruitment (April 2010) FPS was not actively engaged in a business similar to GEA's. Indeed, he says that it did not commence to be involved in that business until well after the expiry of the non-solicitation agreement in June 2010.
- [173] In my view, the judge made no error in finding that Mr. Chang violated the non-solicitation agreement. The recruited employee, Mr. Wong, was expressly mentioned in the Business Plan produced by Mr. Chang in respect of FPS. While FPS was not, at the date of the recruitment, actually producing hygienic freezers, it was already situating itself in that industry, and Mr. Wong was recruited for the express purpose of assisting in that business.
- [174] With respect to Mr. Lai, the judge held that he had breached his duties of fidelity to GEA by actively taking steps to set up FPS while still an employee of GEA.
- [175] Again, little turns on this issue, as no assessment of damages was made in respect of it.

[176] Mr. Lai contends that his activities on behalf of FPS while employed by GEA were limited to "planning" and did not violate his obligations to GEA. The judge set out the law on this issue in great detail, and correctly. Her finding that Mr. Lai's activities went beyond mere planning, and constituted actual participation in a competing company during the currency of his employment with GEA is entitled to deference, and I would not interfere with it.

XIII. The Award of Punitive Damages

[177] Neither Mr. Chang nor Mr. Lai appeals from the award of punitive damages.

XIV. Defamation Counterclaim

[178] The appellants seek the reinstatement of their counterclaim in defamation only in the event that the Court orders a new trial on other issues. As I am not convinced that the trial judge made any reversible errors, it is unnecessary to deal with the counterclaim.

XV. Sealing Order

[179] Finally, I will address the sealing orders in this case.

[180] On July 27, 2012, when the action was commenced in the Supreme Court, GEA sought and obtained a without notice order sealing the file in that court. The purpose of the sealing order was to protect GEA's confidential information with respect to the design of its freezers.

[181] On October 25, 2012, the defendants filed an application to set aside the sealing order. That application was set down, but adjourned generally and not heard. The entire Supreme Court file remains sealed, including the reasons for judgment.

[182] When the appeal was brought, the appeal file was temporarily sealed at the request of FPS. FPS did not, however, follow up on the temporary order in a timely manner, and the registry unsealed the Court of Appeal file for a period of time. However, on October 15, 2018, on an application by FPS, a judge in chambers made an order sealing the entire Court of Appeal file.

[183] During the hearing of the appeal, we heard an application to unseal the reasons for judgment in the court below. Of our own motion, we also heard arguments on the issue of whether the entirety of the Court of Appeal file ought to remain sealed.

[184] As we indicated in the course of argument, we are of the view that the application to unseal the Supreme Court file, or parts of it, should be addressed, in the first instance, to that court. That court is the master of its own procedure, and controls access to its files. While it may be that this Court can make orders in respect of access to Supreme Court files, it is my view that any such jurisdiction should be exercised sparingly. At the very least, the Supreme Court should (where practical) have an opportunity to consider the issue of unsealing its files in the first instance.

- [185] GEA has suggested that the Supreme Court, having issued a final judgment on the merits, and having entered an order, is functus in respect of the file, and cannot make any order unsealing materials. I do not agree with that proposition.
- [186] While the Supreme Court has dealt with the substance of the action before it, it remains able to deal with procedural and ancillary matters that have not been dealt with in its final judgment. Such matters include the court's inherent jurisdiction to control access to its own files.
- [187] I do not read *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 185 as precluding the Supreme Court from varying an order sealing its files, though that case clearly counsels a cautious approach to varying such orders. Where, as here, a sealing order was made to protect commercial confidences, the court may safely consider varying the order to ensure that it does not restrict access to non-confidential material. A court can also consider whether circumstances have changed, so that material that was once confidential but does not retain that characteristic can be unsealed.
- [188] I understand that GEA recently applied in the Supreme Court to have that court unseal its judgment. As I understand it, the judge who heard the application declined to unseal the file, pending this Court's release of this judgment.
- [189] With respect to this Court's own file, the existing sealing order is overly broad. The parties do not suggest that the Appeal Record (including the judgment in the court below) or the factums contain any material that would endanger commercial confidences. Equally, there is no reason to seal or restrict publication of this judgment. Indeed, it is only the Appeal Book and the Transcript that contain confidential materials that should be sealed.
- [190] The open court principle demands that we not prevent public access to court documents without good reason. Accordingly, I would order that this Court's file be unsealed, except that the Appeal Book and Transcript will remain sealed. If either party considers that this order is too broad or too narrow, they have liberty to apply in writing to the court for a variation.
- [191] I recognize that in making the appeal record available, items that are sealed in the Supreme Court file will be available from the Court of Appeal registry. That is a function of the fact that each court, at least in the first instance, has the power to manage its own records.

XVI. Conclusion

- [192] I would dismiss the appeal. I would also dismiss the motion to unseal the judgment in the Supreme Court file, without prejudice to the parties' right to pursue such a remedy in the Supreme Court. On the other hand, I would make an order unsealing the Court of Appeal file, with only the Appeal Book and Transcript to remain sealed.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Hunter"

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