
CANADA / JUDGMENT

Landmark Solutions Ltd. v. 1082532 B.C. Ltd.

2019 BCSC 2487

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2487 Landmark Solutions Ltd. v. 1082532 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Landmark Solutions Ltd. v. 1082532 B.C. Ltd.,

2019 BCSC 2487

Date: 20191106

Docket: VER-S-55914

Registry: Vernon

Between:

Landmark Solutions Ltd. and

Woodland Spirit Contracting Ltd.

Plaintiffs

And

1082532 B.C. Ltd. and

Edward John Raspberry

Defendants

Before: The Honourable Madam Justice E. McDonald

(Appearing via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs

appearing by teleconference:

K. Burnham

Counsel for the Defendants

appearing by teleconference:

B. Hambly

S. Dvorak

Place and Date of Hearing:

Kelowna, B.C.

October 16, 2019

Place and Date of Judgment:

Kelowna, B.C.

November 6, 2019

- [1] THE COURT: Given the urgency and the issues at stake in this application, I am providing my reasons for judgment orally. Should the parties request a transcript, I reserve the right to edit my reasons and to add citations, although the result will not change.

Overview

- [2] This application relates to a dispute about whether the defendants, Edward Raspberry and 1082532 B.C. Ltd. ("108"), are in breach of a written contract by wrongfully competing with and diverting business away from the plaintiffs.
- [3] On August 28, 2019, on a without-prejudice basis, the defendants consented to an injunction effective as of August 1, 2019, to remain in place until such time as the order is varied or set aside by the court.
- [4] The plaintiffs, Landmark Solutions Ltd. and Woodland Spirit Contracting Ltd., now seek an interlocutory injunction restraining the defendants, 108 and Edward John Raspberry, from a variety of activities including from canvassing or soliciting current, former, or prospective customers or suppliers of Woodland to supply them with goods or services that are the same or similar to those offered by Woodland for a period of three years starting on May 1, 2019.

- [5] This application arises from Landmark's purchase of Woodland for \$2.3 million in 2016. I will refer to this agreement as the "2016 Agreement". Robert Udy is the principal of Landmark. Landmark acquired Woodland to gain access to its business performing earthwork contracts specializing in environmentally sensitive areas as well as integrity services, which I understand includes maintenance work for gas and utilities lines. Woodland's customers includes FortisBC, the City of Kelowna, and others.
- [6] Woodland was previously owned and operated by Barbara and Wayne Raspberry. The defendant, Edward Raspberry, is their son. The other defendant, 108, is Mr. Edward Raspberry's company.
- [7] Prior to the 2016 Agreement, Edward Raspberry also agreed to carry on working as the operations manager for Woodland following the sale. Edward Raspberry understood that this arrangement was meant to preserve his know-how and contacts for Woodland.
- [8] In late 2017, Edward Raspberry offered to sell Landmark his remaining Woodland shares, i.e. the shares that were held by his company, 108. On May 1, 2018, Landmark purchased those shares for \$270,000 and the parties entered into a purchase agreement and a non-solicitation, non-disparagement, and confidentiality agreement. I will refer to this agreement as the "Non-Solicitation Agreement".
- [9] Edward Raspberry continued working for Woodland until April 1, 2019. Upon leaving Woodland, he started an excavation contracting business under the name "North Star Contracting". There is no dispute that upon leaving Woodland, he started providing excavation and integrity services through North Star. He also performed those services for customers such as FortisBC and the City of Kelowna.
- [10] The plaintiffs filed a notice of civil claim on July 16, 2019, alleging multiple breaches of the Non-Solicitation Agreement and breach of fiduciary duty. The plaintiffs seek injunctive relief, damages, disgorgement of profits, punitive damages, and costs, including special costs.
- [11] The plaintiffs submit that they have no objection to Edward Raspberry competing with Woodland or doing work such as small jobs for private owners. The plaintiffs do, however, object to Edward Raspberry performing work for Woodland's customers and prospective customers because they say he contractually agreed not to do so.
- [12] The defendants deny that they violated the Non-Solicitation Agreement. They alleged the Non-Solicitation Agreement does not reflect the parties' intentions and it is unenforceable because it contains no geographic limitations and it is vague regarding the activities that are restricted. They have also filed a counterclaim alleging that the plaintiffs constructively and wrongfully dismissed Edward Raspberry from his employment.

- [13] The defendants submit that the parties never agreed to prohibit competition by Edward Raspberry or 108. Rather, the plaintiffs agreed only to prohibit solicitation of Woodland's customers. In other words, they say the parties agreed that if customers approached Edward Raspberry rather than the other way around, he was not precluded from accepting such work even if his services were in competition with Woodland's.

Relief Sought

- [14] The issue I must decide on this application is whether an interlocutory injunction should be issued based on the evidence and submissions before me.
- [15] As a preliminary matter, I will begin by examining the Non-Solicitation Agreement to address whether it is subject to a strict approach under the test for granting an injunction.
- [16] After addressing this preliminary question, I will consider the three elements of the legal test that the plaintiffs must satisfy before obtaining an injunction. Under that applicable test, the plaintiffs must prove, first, that there is a serious issue to be tried; second, that the plaintiffs will suffer irreparable harm if the injunction is not granted; and third, that the balance of convenience favours the granting of an injunction: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, para. 43.

Preliminary Consideration: Nature of Non-Solicitation Agreement

- [17] Turning to the preliminary considerations, I note that the parties disagree on the standard of proof to be applied in light of the competing arguments about the nature of the Non-Solicitation Agreement. The defendants allege the Non-Solicitation Agreement is, in fact, a non-competition agreement and it arises from an employer and employee relationship between the parties and, as such, it ought to attract the stricter standard of a strong prima facie case. The defendants also submit that because an injunction may effectively put an end to the litigation, the threshold is higher.
- [18] The plaintiffs deny that the agreement the parties entered into on May 1, 2018, is properly characterized as a non-competition agreement. They also deny that it arises principally in an employment context. The plaintiffs say the Non-Solicitation Agreement is more akin to a contract containing restrictive covenants in a purely commercial context since it is part of Landmark's purchase of Woodland. As such, the plaintiffs say a lower burden ought to apply.
- [19] The law recognizes that in certain cases where an injunction is sought, a more extensive review of the merits of the claim should be undertaken *RJR-MacDonald* at paras. 56 and 59. Where the injunction seeks to enforce a restrictive covenant that would inhibit the ability of the defendants to earn a living, the plaintiffs must establish a strong prima facie case: *Ipsos S.A. v. Reid*, 2005 BCSC 1114 at para. 69.

- [20] The characterization of the restrictive covenants entered into by the parties ought to be determined taking into account the factual matrix under which the Non-Solicitation Agreement was made: Ipsos, para. 73. Those facts include the following:
- (a) Edward Raspberry's role as the son of the original owners of Woodland and the history of his involvement in Woodland's business;
 - (b) The importance to Landmark of acquiring the goodwill and business of Woodland;
 - (c) As part of the 2016 Agreement, Edward Raspberry agreed to stay on as the manager of Woodland;
 - (d) Edward Raspberry's role as an officer and indirect shareholder of Woodland following the 2016 Agreement;
 - (e) Edward Raspberry's admission that when he sold the remaining shares of Woodland to Landmark, the sale included the business and the client relationship;
 - (f) Edward Raspberry's belief that the Non-Solicitation Agreement had to be signed immediately on May 1, 2018, or else Landmark could back out of the lucrative share purchase deal with him and 108;
 - (g) As one condition of the 2018 purchase agreement, Edward Raspberry was required to sign an employment agreement and to continue working as an employee of Woodland; and
 - (h) The preamble of the Non-Solicitation Agreement that included a statement that the parties recognized it is reasonable and necessary for the parties to enter into an agreement whereby the defendants agree not to directly or indirectly solicit the customers or prospective customers of the business in order to protect and facilitate Landmark's purchase of the Woodland shares.
- [21] The factual matrix and evidence presented leads me to conclude that the Non-Solicitation Agreement was largely intended to protect Landmark's investment in Woodland. A higher standard should be applied to an injunction seeking the enforcement of a restrictive covenant in a contract involving the sale of a business. Therefore, I will approach this application on the basis that the plaintiffs must show a strong prima facie case: Belron Canada Inc. v. TCG International Inc., 2009 BCSC 596 at para. 47, aff'd. at 2009 BCCA 577.

Strong Prima Facie Case

- [22] Turning now to consider the existence of a strong prima facie case, a preliminary matter arises due to the defendants' position that the contract contains restrictive covenants that are unenforceable because they are vague, etc.
- [23] To be enforceable, a restrictive covenant must be reasonable as between the parties and the public interest and the plaintiffs have the onus of establishing reasonableness: IRIS The Visual Group Western Canada Inc. v. Park, 2017 BCCA 301 at para. 16.

- [24] The restrictive covenants in issue in this case arise in the context of a share purchase agreement between the plaintiffs and defendants. Therefore, I find that a lower standard of scrutiny is to be applied to the scope and reasonableness of the restrictive covenants in issue: *DaKow Ventures Ltd. v. Daski Contracting Ltd.*, 2018 BCSC 2016 at para. 14.
- [25] After determining the level of scrutiny to apply, I must consider three questions: (1) whether the claimant has a proprietary interest worthy of protection; (2) whether the interest can be protected by less restrictive measures than a non-competition covenant; and (3) whether the geographic scope and duration of the clause are reasonable: *IRIS*, at para. 25.
- [26] There was no dispute that Landmark paid Edward Raspberry \$270,000 for the shares held by 108 in Woodland. Edward Raspberry believes that in exchange for \$240,000, he sold Landmark the "business", and in exchange for \$30,000, he sold Landmark "the relationship value of the clients". There is no doubt that the plaintiffs have a proprietary interest worth protecting. There is also no doubt considering the context of the sale that restrictive covenants ensuring non-solicitation and non-interference by the defendants were appropriate in the circumstances.
- [27] However, the defendants say the non-solicitation provisions are, in fact, a non-competition clause. The plaintiffs admit that they removed all competition terms from an earlier draft agreement on the advice of counsel to enhance enforceability.
- [28] Article 2.1(a) of the Non-Solicitation Agreement states the defendants agree not to directly or indirectly canvass or solicit business of any customer or prospective customer to supply any goods or services that are substantially the same as or in competition with goods or services supplied by Woodland. The words "in competition with" appear in Article 2.1(a) through sub (c) of the Non-Solicitation Agreement.
- [29] The non-solicitation provisions define "who" may not be solicited and "what" may not be solicited for. In my view, the phrase "in competition with" specifies the goods and services that may not be solicited for.
- [30] The Non-Solicitation Agreement also defines the terms "customers" and "prospective customers". The defendants say that these defined terms are uncertain because, for example, the plaintiffs do not attach a list identifying the customers and prospective customers by name.
- [31] That allegation of uncertainty must be considered in light of Edward Raspberry's role in Woodland that included maintaining existing client relationships and generating new work. There is evidence that he communicated with people prior to leaving Woodland about potentially providing services only to take up that work himself after leaving Woodland.

- [32] In the event that I am incorrect in my conclusion and there are indeed aspects of the Non-Solicitation Agreement that are unenforceable, I think there is a strong prima facie case for striking out the offending provisions: DaKow, para. 21. I reach that conclusion because the Non-Solicitation Agreement may reasonably be regarded as flowing from the sale of a business which lends itself more readily to this remedy. I also reach this conclusion because the Non-Solicitation Agreement itself provides for severance of offending provisions.
- [33] Turning now to the first part of the test to obtain an interlocutory injunction, I proceed keeping in mind that the onus is on the plaintiffs to establish a strong prima facie case that the Non-Solicitation Agreement is being breached.
- [34] Where a party must establish a strong prima facie case, the applicable standard is that "there is a strong likelihood on the law and evidence presented [on the motion] that at trial, the applicant will ultimately prove successful in proving the allegations": R. v. Canadian Broadcasting Corp., 2018 SCC 5. A finding of a strong prima facie case bears on the second and third branch of the RJR-MacDonald test: Toronto (City) v. Ontario (Attorney General), 2018 ONCA 761, at para. 20.
- [35] The plaintiffs allege they can satisfy the first branch of the test for the following reasons:
- (a) Various provisions of the Non-Solicitation Agreement signed by the defendants stipulate that the defendants will not, for three years after ceasing to be employed directly or indirectly, canvass or solicit any customer or prospective customer, accept any business from any customer or prospective customer, or supply goods or services to any customer or prospective customer, and employ any individual employed by Woodland Spirit;
 - (b) Provisions of the Non-Solicitation Agreement also state that the defendants will not attempt to persuade any customers or prospective customers to discontinue or alter their relationship with Woodland nor will the defendants make remarks damaging to the reputation or goodwill of Woodland;
 - (c) The Non-Solicitation Agreement provides that the defendants agreed that the terms were reasonable and that they irrevocably waived and agreed not to raise reasonableness as a defence to the agreement and they agreed that the intention was to provide the broadest scope and possible duration and widest territory allowed by law;
 - (d) The Non-Solicitation Agreement also provided that the defendants were entitled to permanent or temporary injunctive relief; and
 - (e) Finally, the Non-Solicitation Agreement includes an entire agreement clause stating that there are no representations, warranties, conditions, or agreements expressed or implied other than what is contained in the Non-Solicitation Agreement.

- [36] The defendants, on the other hand, raise a number of defences including, as I have mentioned before, that the Non-Solicitation Agreement did not prevent the defendants from accepting work from Woodland's customers and that the restrictive covenants are unenforceable. Regardless of whether these defences will ultimately succeed at trial, I am of the view that they do not prevent the plaintiffs from establishing a strong prima facie case based on the evidence before me.
- [37] I am satisfied the plaintiffs can demonstrate a strong prima facie case that the Non-Solicitation Agreement is being breached based on the following:
- (a) The evidence that Edward Raspberry received the Non-Solicitation Agreement ahead of the May 1, 2018 filing date and, while he is unable to recall receiving it before signing it, he has no evidence to dispute that he received it before May 1;
 - (b) Edward Raspberry's admission that on May 1, 2018, he read and signed the Non-Solicitation Agreement; and
 - (c) The evidence indicates that prior to leaving his employment at Woodland, Edward Raspberry had communications with clients of Woodland such as FortisBC regarding supplying services that were services Woodland supplied and that, after his departure from Woodland, Edward Raspberry performed these services through North Star.

Irreparable Harm

- [38] The second part of the test to obtain an interlocutory injunction requires me to decide whether the plaintiffs have established that they will suffer irreparable harm if the injunction is not granted. That means I must be satisfied that the nature of the harm is such that it cannot be quantified in monetary terms or is incapable of being cured: *RJR-MacDonald*, at para. 64.
- [39] In deciding whether there is irreparable harm, the court may look to what the parties agreed to. For example, in Article 5.2 of the Non-Solicitation Agreement, the defendants agreed that the agreement is reasonable and valid in all respects and they irrevocably waive as a defence any issues of reasonableness. In Article 5.6, the parties agreed that in the event of a breach of the agreement, the plaintiffs would be entitled to both temporary and permanent injunctive relief.
- [40] These contractual terms are something I may consider in deciding whether irreparable harm has been established. However, these types of contractual terms are not determinative: *Renfrew Insurance Ltd. v. Cortese*, 2014 ABCA 203 at para. 16; *Payette v. Guay Inc.*, 2013 SCC 45, para. 60.
- [41] There is evidence that one of Landmark's main objectives was to acquire Woodland's goodwill and business. As part of that objective, 108 received Woodland's shares and Edward Raspberry was to continue as an employee of Woodland. After Edward Raspberry sold the last of the shares held by 108 to Landmark, he acknowledges that he had secured a lucrative

deal to sell the business and the clients to Landmark. He understood that as part of this lucrative deal, he was required to sign the Non-Solicitation Agreement and remain on as an employee pursuant to an employment agreement. He candidly admits that even though he did not want a non-competition clause in the agreement, he knew Mr. Udy did not want him working for Woodland's existing clients.

- [42] In my view, the provisions of the Non-Solicitation Agreement stating that in the event of a breach, the plaintiffs would be entitled to both temporary and permanent injunctive relief supports a finding of irreparable harm in this case.
- [43] I have also concluded that a finding of irreparable harm is supported because there is a strong *prima facie* case that the defendants have breached the terms of the Non-Solicitation Agreement: *Toronto (City)*, at para. 20.
- [44] Despite knowing that Mr. Udy did not want him to do work for Woodland's clients, Edward Raspberry communicated with existing and prospective customers of Woodland about providing services that were the same as the services Woodland offered prior to his leaving his employment. That information concerning these potential leads did not make it to Mr. Udy and Mr. Edward Raspberry performed these services after leaving his employment.
- [45] There is also evidence that Edward Raspberry was making statements to Woodland's customers or prospective customers that undermined Woodland's reputation and which had the effect of discouraging customers from using Woodland's services. For example, there is some evidence to establish that statements were made by Edward Raspberry to customers or prospective customers that Woodland was ceasing to operate or that it lacked capacity to perform the services being sought.
- [46] In other words, there is evidence capable of establishing that Edward Raspberry's communications with Woodland's customers or prospective customers negatively impacted Landmark's goal of acquiring Woodland's goodwill and customers.
- [47] I have considered whether most of the harm to the plaintiffs has already been done and whether the balance of the harm is calculable. In view of the fact that the parties are still relatively early in the term of the restrictive covenant and, in view of the evidence that Edward Raspberry breached the Non-Solicitation Agreement within the first year of its term, I conclude that the prospects of irreparable harm have been demonstrated: *DaKow*, para. 40.
- [48] Quantifying the extent of the loss of such actions would be difficult, if not impossible and, because of Landmark's overriding objective to acquire the goodwill and customers of Woodland, I agree that damages would not be an adequate remedy in the circumstances of this case. Accordingly, I find that the plaintiffs would suffer irreparable harm if the injunction is not granted.

Balance of Convenience

[49] The third branch of the test regarding obtaining an injunction requires that I consider the balance of convenience, sometimes also referred to as the balance of inconvenience. In other words, if irreparable harm is made out, the issue is which of the parties will suffer the greater inconvenience or potential damage if the injunction is or is not granted.

[50] At this stage of the analysis, I am to engage in a process of assessing all of the relevant factors to reach an overall conclusion about where the balance of convenience rests. The factors to be weighed include the following:

- a) The strength of the applicant's case;
- b) The adequacy of damages or the remedies if the injunction is or is not granted;
- c) The preservation of contested property;
- d) Other factors affecting whether the harm for granting or not granting the injunction would be irreparable;
- e) Which of the parties acted to either alter the balance of their relationship and so affect the status quo;
- f) the effects on any public interest, and
- g) any other factors affecting the balance of justice or convenience.

Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd., [1992] 3 W.W.R. 279 at p. 10.

[51] The defendants submit that since the parties never intended for Edward Raspberry to be unable to compete, and because he would not be able to earn a living if an injunction is granted, the balance of convenience factor ought to weigh in favour of Edward Raspberry and against granting an injunction.

[52] The plaintiffs submit that the injunction merely gives the plaintiffs what they bargained for under the Non-Solicitation Agreement. They also submit the defendants have been able, despite the assistance of an interim consent injunction to continue earning a living doing work that does not contravene the Non-Solicitation Agreement.

[53] The plaintiffs have demonstrated the strength of their case for the reasons already referred to. In my view, it is the actions of Edward Raspberry that have altered the relationship of the parties so as to affect the status quo. There was also some evidence to suggest that Edward Raspberry deleted emails regarding his contacts with Woodland's customers or prospective customers or that he failed to alert others at the plaintiffs regarding these contacts before he left and ultimately undertook the provision of the services himself.

- [54] I am of the view that because the Non-Solicitation Agreement arose in the context of the sale of Woodland's shares that this commercial context should be taken into account. Edward Raspberry feared that delaying signing the Non-Solicitation Agreement would risk Landmark pulling out of the share purchase deal that he had negotiated. He read the Non-Solicitation Agreement before he signed it and he also told Mr. Udy that he had legal advice before signing it even though he later said that he did not have legal advice.
- [55] Assessing the evidence as a whole, I have concluded that the balance of convenience favours the plaintiffs.
- [56] The plaintiffs are therefore entitled to an injunction restraining 1082532 B.C. Ltd. and Edward John Raspberry, for a period of three years from May 1, 2019, from directly or indirectly canvassing or soliciting any person or company who has been a customer or supplier or who has been canvassed or solicited by Woodland in the 24 months prior to May 1, 2018, from:
- (a) supplying any goods or services that are substantially the same or in competition with the services supplied by Woodland Spirit Contracting Ltd.;
 - (b) accepting any business from any person or company who has been a customer or supplier, or who has been canvassed or solicited by Woodland Spirit Contracting Ltd. in the 24-month period prior to May 1, 2018;
 - (c) supplying any goods or services to any person or company who had been a customer or supplier or had been canvassed or solicited by Woodland Contracting Ltd. in the 24-month period prior to May 1, 2018, for a period of three years from May 1, 2019;
 - (d) not work in violation of the agreement dated May 1, 2018;
 - (e) directly or indirectly employing, offering employment to, or soliciting employment or engagement of, or otherwise entice away from employment with Woodland Spirit Contracting Ltd. any individual who is employed by Woodland Spirit Contracting Ltd.;
 - (f) procuring or assisting any person to employ, offer employment, or solicit the employment or engagement of or otherwise entice away from the employment of Woodland Spirit Contracting Ltd. any such individual;
 - (g) directly or indirectly interfering or attempting to interfere with the business carried on by Woodland Spirit Contracting Ltd.;
 - (h) persuading or tempting any person or company who has been a customer or supplier or has been canvassed or solicited by Woodland Spirit Contracting Ltd. in the 24 months prior to May 1, 2018, or a Woodland Spirit Contracting Ltd. employee to discontinue or alter such person's relationship with Woodland Spirit Contracting Ltd.; and

- (i) directly or indirectly making or publishing written or oral statements or remarks including without limitation the repetition of or distribution of derogatory rumors, allegations, negative reports, or comments which are disparaging, deleterious, or damaging to the integrity, reputation, or goodwill of Woodland Spirit Contracting Ltd. for a period of three years from May 1, 2019.

Costs

- [57] Costs are typically awarded in the cause. However, where a strong prima facie case has been made out and where the granting of an injunction may effectively bring the litigation to an end, costs may be awarded. Under Article 5.1 of the Non-Solicitation Agreement, the defendants specifically undertake to indemnify the plaintiffs for their costs of any proceedings to enforce the agreement.
- [58] I have therefore concluded that the plaintiffs shall recover their costs against the defendants to be assessed.
- [59] Those are my reasons. Thank you. Counsel, are there any questions?
- [60] MR. BURNHAM: No, not from where I am, My Lady. Thank you.
- [61] THE COURT: Ms. Hambly?
- [62] MR. DVORAK: My Lady, it is Dvorak speaking, initial S.
- [63] THE COURT: Or, pardon me, Mr. Dvorak.
- [64] MR. DVORAK: May I ask one question in connection with the scope of the injunction order you granted? Does it have any geographic restrictions upon it?
- [65] THE COURT: Sorry, I am unable to hear?
- [66] MR. DVORAK: The question was with respect to geographic restriction on the injunction, My Lady. Sorry to speak [indiscernible].
- [67] THE COURT: I have effectively granted the injunction that was sought in the notice of application. So the words of the injunction should track with what is in the notice of application.
- [68] MR. DVORAK: Understood. Okay, thank you, My Lady.

"E. McDonald J."

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