
CANADA / JUDGMENT

Pacific Newspaper Group v. Niche Plus Digital Inc.

2016 BCSC 181

COURT

Supreme Court of British Columbia

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2016 BCSC 181 Pacific Newspaper Group v. Niche Plus Digital Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pacific Newspaper Group v. Niche Plus Digital Inc.,

2016 BCSC 181

Date: 20160205

Docket: S153052

Registry: Vancouver

Between:

Pacific Newspaper Group and Postmedia Network Inc.

Plaintiffs

And

Niche Plus Digital Inc., Niche Media, Niche Plus Digital, Christopher Severs, Carolyn Berg,
Edward Yap-Chung and Norman Craig Brown

Defendants

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

November 2-3, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 05, 2016

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- [1] The plaintiff, Postmedia Network Inc., is the proprietor of Postmedia Network Group (collectively "PNG"). PNG is in the business of publishing newspapers both online and in paper format and, as part of its business, sells advertising in both digital and print format.
- [2] The defendants, Carolyn Berg, Christopher Severs and Edward Yap-Chung (collectively the "Employee Defendants") are former employees of PNG.
- [3] The defendants, Niche Plus Digital Inc., Niche Media and Niche Plus Digital (the "Niche Defendants") are related entities which are in the business of selling advertising in both digital and print format. The Employee Defendants are now employed by the Niche Defendants.

- [4] The defendant, Craig Brown, is the principal of the Niche companies.
- [5] PNG seeks damages against the defendants for wrongful interference with its business operations, breach of duty on the part of the Employee Defendants and wrongful use of its proprietary information. PNG's allegations will be set out in detail later in these reasons.
- [6] While employed by PNG, the Employee Defendants' terms and conditions of employment were governed by a collective agreement between PNG and the Communications, Energy and Paperworkers Union of Canada, Local 2000 (the "Union").
- [7] The Employee Defendants submit that this court has no jurisdiction to decide the claims made against them in the notice of civil claim because the claims arise out of their employment with PNG. The terms and conditions of that employment were governed by the collective agreement, which contains a provision requiring all disputes with respect to that employment to be determined by arbitration. They apply for orders dismissing or staying this action against them pursuant to Rule 21-8 and 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

Position of the Parties

- [8] The position of the Employment Defendants is that the essential character of the dispute between them and PNG arises from the interpretation, application, administration or violation of the collective agreement and is thus within the exclusive jurisdiction of an arbitrator appointed pursuant to the collective agreement. They, therefore, submit that this court has no jurisdiction over the dispute and that the claim should be struck or dismissed against them.
- [9] The Employee Defendants also submit that this action was brought against them for an improper purpose--to intimidate other employees of PNG from going into competition with it--and is, thus, an abuse of process that warrants an award of special costs.
- [10] The position of PNG is that the essential character of the dispute is a claim that the Employee Defendants participated in unlawful activities with the Niche Defendants and Mr. Brown, who were not parties to the collective agreement, which does not, in its essence, involve the interpretation, application, administration or violation of the collective agreement. In addition, PNG submits that it will be denied an effective remedy if it is denied access to this court and the court should, therefore, assume jurisdiction over the dispute.
- [11] PNG also submits that the principles of judicial efficiency, avoidance of a multiplicity of proceedings and the integrity of the administration of justice all militate in favour of this court assuming jurisdiction over the dispute.
- [12] For the reasons which follow, I have decided that this action must be stayed against the Employment Defendants because this court lacks jurisdiction to hear it.

Background

- [13] The plaintiff is a publisher of print and online newspapers. It depends on selling advertising for a large percentage of its revenue.
- [14] The Employee Defendants are all former employees of the plaintiff who, while employed by the plaintiff, worked in its advertising department.
- [15] PNG commenced this action in April 2015. In the notice of civil claim, PNG alleges that the Employee Defendants acted in concert with the Niche Defendants and Mr. Brown to use proprietary and/or confidential information of the plaintiff for the benefit of the defendants, to solicit the plaintiff's advertising clients and to appropriate business opportunities that were the property of the plaintiff.
- [16] PNG also alleges that Mr. Severs made a false claim for short-term disability benefits at a time when he was not disabled and was, in fact, working with the Niche Defendants.
- [17] In February 2015, Mr. Severs resigned from PNG.
- [18] In February 2015, Ms. Berg gave notice of resignation from her position with PNG. During her notice period, PNG terminated Ms. Berg from her employment for alleged just cause.
- [19] In March 2015, the plaintiff terminated Mr. Yap-Chung from his employment with PNG for alleged just cause.
- [20] On April 15, 2015, the day after the notice of civil claim was filed, the plaintiff instituted a grievance against Mr. Severs alleging that he fraudulently claimed and received disability and sick benefits, expressly relying on Article 15 of the collective agreement.
- [21] On May 7, 2015, Ms. Berg requested that the Union file a grievance against PNG under the collective agreement with respect to the termination of her employment.
- [22] To date, no grievances have been filed by the Union with respect to the terminations of any of the Employee Defendants, including Ms. Berg. The time for doing so has now expired.
- [23] While employed by PNG, each of the Employee Defendants' duties included the selling of advertising in PNG's print or electronic media.
- [24] PNG alleges that the Employee Defendants began working for, or on behalf of, the Niche Defendants while they were still employed by PNG. PNG also alleges that the Employee Defendants appropriated proprietary information belonging to it and have used that information to seek to solicit business from PNG's existing customers.
- [25] PNG did not file any evidence in this application with respect to the merits of this dispute. It relies on the allegations made in the notice of civil claim, filed on April 14, 2015. The parts of the notice of civil claim relevant to the issue of jurisdiction are as follows:

29. While still employed and paid by the Plaintiffs, the Individual Employee Defendants breached their duties to the Plaintiffs by acting for their own benefit and for the benefit of one or more of the Niche Defendants and to the detriment of the Plaintiffs, the particulars of which include:
- a. making arrangements in respect of their resignations from the Plaintiffs and the subsequent hiring or entering into a business relationship with the Individual Employee Defendants by one or more of the Niche Defendants;
 - b. regularly performing work for themselves and for one or more of the Niche Defendants during working hours and using PNG's computer, electronic and other equipment;
 - c. using the PNG Information for the benefit of one or more of the Niche Defendants and to the detriment of the Plaintiffs;
 - d. soliciting or assisting one or more of the Niche Defendants to solicit clients from the Plaintiffs;
 - e. appropriating business opportunities or assisting in appropriating business opportunities from the Plaintiffs for one or more of the Niche Defendants;
 - f. misappropriating the PNG Information; and
 - g. continuing on in their employment despite their involvement with one or more of the Niche Defendants and the conflict of interest and unfair competition that the relationship with one or more of the Niche Defendants created.
30. In addition to the breaches set out in paragraph 29, Severs, while still employed and paid by the Plaintiff, breached his duties to the Plaintiffs by continuing to receive disability benefits under the Plaintiffs' self-insured disability benefits program while working and selling advertising for one or more of the Niche Defendants in competition with the Plaintiffs.
31. While still employed and being paid by the Plaintiffs, the Individual Employee Defendants or any of them, misappropriated the PNG Information and converted it to their own use or for the use of one or more of the Niche Defendants, the particulars of which include:
- a. using customer lists, customer histories and other of the PNG Information to wrongfully solicit the customers of the Plaintiffs and obtain their business for one or more of the Niche Defendants; and
 - b. using pricing information and providing pricing information to one or more of the Niche Defendants so that they could use it to solicit customers of the Plaintiffs for their own business.
32. By virtue of the actions described in paragraphs 29 to 31 in this Notice of Civil Claim, the Individual Employee Defendants competed unfairly with the Plaintiffs while still employed and being paid by PNG.

33. In order to gain a competitive advantage over the Plaintiffs, Brown and one or more of the Niche Defendants encouraged the Individual Employee Defendants to engage in the unlawful conduct set out in paragraphs 29 to 32 of the Notice of Civil Claim. In doing so, Brown and one or more of the Niche Defendants directly or indirectly induced the Individual Employee Defendants to breach their contracts of employment with the Plaintiffs and their duties of loyalty and confidence, before and at the time of, and after their resignations and/or terminations.
34. Brown and one or more of the Niche Defendants unlawfully interfered with the economic interests of the Plaintiffs for the sole purpose of advancing its own economic and competitive interests.
35. In addition, Brown and one or more of the Niche Defendants knowingly used the PNG Information, knowing that it belonged to the Plaintiffs and unlawfully converted by the Individual Employee Defendants for the benefit of Niche Media and Brown and to the detriment of the Plaintiffs.

...

Discussion

[26] Applications with respect to the jurisdiction of this court are now governed by Rule 21-8 of the Supreme Court Civil Rules:

- (1) A party who has been served with an originating pleading or petition in a proceeding, whether that service was effected in or outside British Columbia, may, after filing a jurisdictional response in Form 108,
 - (a) apply to strike out the notice of civil claim, counterclaim, third party notice or petition or to dismiss or stay the proceeding on the ground that the notice of civil claim, counterclaim, third party notice or petition does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding,
 - (b) apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding, or
 - (c) allege in a pleading or in a response to petition that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[27] The Employee Defendants also apply to strike out the action against them as an abuse of process pursuant to Rule 9-5(1):

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[28] The parties agree that the jurisdictional application is governed by the principles set out in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, in which the Court held that an arbitrator has exclusive jurisdiction in any dispute between employer and employee arising from the interpretation, application, administration or violation of a collective agreement.

[29] *Weber* directs that a court considering whether it has jurisdiction over a dispute in which the parties are bound by a collective agreement to examine the essential nature of the dispute and the ambit of the collective agreement. If, as result of that examination the court concludes that the essential character of the dispute arises from the interpretation, application, administration of the collective agreement it has no jurisdiction over the dispute.

[30] The plaintiff and the Employee Defendants were subject to the provisions of a collective agreement that contained an arbitration clause. Therefore, *Weber* is applicable and requires me to determine the essential nature of the dispute and the ambit of the collective agreement.

[31] The British Columbia Court of Appeal considered and applied *Weber* in *Haight-Smith v. Neden*, 2002 BCCA 132, at paras. 28-30:

[28] The Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, decided that if the "essential character" of a dispute arises from the interpretation, application, administration or violation of the collective agreement, then the dispute must be dealt with by the dispute resolution process provided in the collective agreement and labour relations statutes and not by litigation in the courts. The "exclusive jurisdiction" approach to labour disputes was affirmed in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360.

[29] In both of these cases, the Supreme Court made it clear that to determine whether a dispute arises out of a collective agreement, two elements must be considered: the nature of the dispute and the ambit of the collective agreement (*Weber* at para. 51; *Regina Police* at para. 25). The legal characterization of the dispute (as a claim in tort, for example) is not determinative of jurisdiction. If the dispute arises under the collective agreement, the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it (*Weber* at para. 43).

- [30] The courts retain jurisdiction, however, over disputes which do not expressly or inferentially arise out of the collective agreement (Weber at para. 54) and where a remedy is required that an arbitrator is not empowered to grant, in order to avoid a "real deprivation of ultimate remedy" (Weber at para. 57, citing *Estey J. in St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 at p. 723).
- [32] Haight-Smith also reiterates that the Weber principles must be applied analytically to the particular facts of the case before it.

Essential Nature of the Dispute

- [33] PNG submits that the essential nature of this dispute is whether all defendants, including the Employee Defendants, engaged in the tortious conduct alleged in the notice of civil claim. It argues that it is impossible to separate the conduct of the Employee Defendants from the conduct of the Niche Defendants and Mr. Brown and that the essential nature of the dispute in this case is PNG's right to protect the goodwill of its business and its proprietary information from unlawful interference by the defendants collectively.
- [34] The difficulty I have with that submission is that the core of PNG's allegations against the Employee Defendants relates to breaches by them of their duties as employees of PNG. For example, in para. 29 of the notice of civil claim, PNG alleges that, while still employed by it, the Employee Defendants breached their duties to the plaintiff by engaging in activities that were for their own benefit and not for the benefit of their employer. These allegations raise squarely the issue of the nature and extent of the Employee Defendants' duties to PNG. In my view, that issue cannot be determined without interpreting the terms and conditions of the Employee Defendants' employment as set out in the collective agreement.
- [35] Similarly, the plaintiff alleges that the Employee Defendants unfairly competed with it while under its employ and that they were induced by the Niche Defendants and Mr. Brown to breach their contracts of employment with the plaintiff. This again raises squarely the nature and extent of the terms and conditions of their employment pursuant to the collective agreement.

Ambit of the Collective Agreement

- [36] Paragraph 6(4)(a) of the collective agreement provides for arbitration of all disputes in accordance with the requirements of s. 84(2) of the Labour Relations Code, R.S.B.C. 1996, c. 244:
- 4) a) Any matter involving the interpretation, application, operation or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, may be submitted to final and binding arbitration.

[37] The record is clear that PNG and the Union have proceeded at all times on the basis that PNG has the right to bring forward grievances for arbitration pursuant to the collective agreement, as it did in the case of Mr. Severs. Moreover, under the heading "Grievance Procedure" in the collective agreement, the parties agreed that either the employer or the Union may be the "initiating party" of a grievance and that "either party" may refer a dispute to arbitration (at 6(3)(a) and (b)).

[38] The collective agreement also contains the following provision:

23(3) Employees of the Company shall be free to engage in any activities outside of working hours, provided such activities are not demonstrably in conflict with the duties and responsibilities as employees of the Company or in competition with the business of the Company.

[39] Counsel for the plaintiff described this provision as a "moonlighting" clause. Nevertheless, any tribunal considering this dispute would be required to consider and decide the scope of that provision with respect to the dispute before it.

The Authorities

[40] The plaintiff relies on the decision of Willcock J., as he then was, in *Insurance Corporation of British Columbia v. Canadian Office and Professional Employees Union, Local 378*, 2012 BCSC 1244 [ICBC], in support of its submission that the courts retain jurisdiction over tortious conduct by defendants even if the parties are subject to a collective agreement. However, in my view ICBC is distinguishable from the case before me. In that case the court concluded that the essential nature of the dispute was the protection of the plaintiff's intellectual property in its trademarks.

[41] In addition, in ICBC, the issue before the court was whether the Labour Relations Board had exclusive jurisdiction to grant injunctive relief in respect of any conduct that was undertaken in the course of a strike. Neither party suggested that the dispute was amenable to arbitration pursuant to an extant collective agreement.

[42] In my view, ICBC is illustrative of the principle that the facts and circumstances of each case must be examined to determine the essential nature of the dispute before the court. In ICBC, the union was clearly motivated to act as it did by the labour dispute with the employer. However, the court found that the essential issue before the court was the protection of ICBC's copyright and intellectual property.

[43] The Employee Defendants rely on the decision of Bruce J. in *Acuren Group Inc. v. Tremblay*, 2010 BCSC 689. In that case the employer made allegations against the defendants that are similar to those made in the case before me. The plaintiff alleged that a group of former employees had appropriated confidential information from it and were soliciting business from the plaintiff's customers and clients.

- [44] In Acuren, the collective agreement contained an express provision giving the employer the right to initiate a grievance. There is no such specific provision in the collective agreement in this case, but, as indicted above, the parties to the collective agreement have acknowledged the right of the plaintiff to do so and the language of the collective agreement contemplates that either party may initiate a grievance.
- [45] Bruce J. had little difficulty in finding that the dispute before her was within the exclusive jurisdiction of an arbitrator:
- [39] While Acuren argues the actions of the defendants fall outside the scope of their duties as employees, and as such, are beyond the Collective Agreement, I disagree. It could be argued that any wrongful act by an employee was outside the scope of their duties. However, it is the employer's authority to monitor and regulate the conduct of employees in the workplace that is the cornerstone of management rights. In the Collective Agreement, this authority is expressly recognized in Article 22.01. The rules promulgated by Acuren pursuant to this provision define the parameters of the employee's duty of loyalty to their employer and form the basis of Acuren's claim against the defendants. Thus it is mere sophistry to argue that the dispute does not arise out of the Collective Agreement.
- [40] The dispute or difference between the parties is also intimately connected with the workplace. It is alleged that the defendants improperly took possession of confidential and proprietary information belonging exclusively to Acuren that they had access to due to their status as employees. The confidential information originated in the workplace. Computer equipment owned by Acuren was allegedly used to secretly transfer it out of the workplace to a personal laptop owned by Mr. Tremblay. The offending activities also occurred during the course of the employment relationship, albeit during the notice period. Acuren also took steps to confront the defendants with their wrongful actions prior to the end of the employment relationship.
- [46] I find the reasoning in Acuren to be persuasive. In both Acuren and this case, the essential issue between the plaintiff and the former employee defendants was whether those employees breached duties of confidentiality and loyalty that arose from their contracts of employment. In both cases, the relevant contract of employment was the collective agreement. In my view, the resolution of the dispute between the plaintiff and the applicant defendants has, at its core, the nature and extent of the defendants' duties as employees and, therefore, is one that requires the interpretation of the collective agreement and the rights and obligations of both parties under it.
- [47] Given this conclusion, I find this court lacks jurisdiction over the dispute unless the plaintiff can demonstrate that it will be denied an adequate remedy if it cannot pursue its claim in this court.

Should the Court Exercise its Residual Power in this Case?

[48] In *Weber* the Court recognized that the courts do have a residual discretion to permit an action to proceed if the arbitration process will not provide an adequate remedy to the party seeking relief. It is this principle that the plaintiff most heavily relies on in this case. In *Weber*, it is stated as follows:

57 It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy".

[49] PNG submits that this case is one in which it seeks a remedy that an arbitrator cannot give because the action is against not only the Employee Defendants but also against the Niche Defendants and Mr. Brown, over whom an arbitrator has no jurisdiction. While there is nothing to prevent the plaintiff from proceeding with this action against the Niche Defendants and Mr. Brown and initiating a separate grievance against the Employee Defendants, the plaintiff submits that such an outcome would be inconsistent with the objectives of judicial economy and would impose an unjust hardship on it.

[50] PNG also submits that this would amount to a real deprivation of remedy because no arbitrator could right the wrongs done by the Niche Defendants and, in particular, could not enjoin the Niche Defendants from benefiting from the Employee Defendants wrongful acts.

[51] PNG relies on *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd*, [1996] 2 S.C.R. 495 [Canadian Pacific] in support of its position that recourse may be had to the courts when no adequate remedy is available from an arbitrator.

[52] In *Canadian Pacific*, the Court held that the British Columbia Supreme Court had the jurisdiction to grant an interim injunction to restrain the employer from imposing a new work schedule on its employees pending a decision from an arbitrator on a grievance filed by the union against the change in work schedules. The Supreme Court held that the issuance of the injunction was an exercise of the court's inherent jurisdiction to prevent a real deprivation of an adequate remedy to the union if it succeeded in its grievance. In that case, the arbitrator had no power to issue an injunction and there would have been no effective recourse for the union employees who would have been required to perform Sunday work, had they been forced to work while the arbitration of the grievance was pending.

- [53] PNG argues that there is an analogy between that situation and this case because in this case the arbitrator would have no power to grant an injunction against the Niche Defendants and Mr. Brown. PNG submits that denying it the right to have all of its claims against all defendants decided in a single proceeding would, in substance, amount to a denial of an effective remedy. In addition, PNG argues that there is a real risk of inconsistent verdicts if it is required to pursue what is essentially the same claim in two different forums and that this would be unjust.
- [54] In *Acuren*, the plaintiff made a similar argument that Bruce J. rejected, but in that case the alleged third party was a corporation entirely owned and controlled by the former employees. However, Bruce J. did make reference to an Ontario decision, *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2002] O.J. No. 4266, in which the court refused an application to dismiss a claim against a former employee subject to a collective agreement when the former employee was one of a large number of defendants against whom judgment for unlawful conspiracy was sought jointly and severally.
- [55] Bruce J. distinguished *Ontario Realty* in part on that ground and, in part, because in that case the presiding judge, Farley J., had reached the conclusion that the only realistic avenue of redress against the former employee was in the action. From the style of cause in *Ontario Realty*, it appears that there were over 30 defendants, only one of whom, the applicant, was bound by a collective agreement. Further, Farley J. determined that the essential character of the dispute did not arise from the interpretation, application, administration or violation of the collective agreement and that no violence would be done to the collective bargaining scheme by the court assuming jurisdiction (at paras. 13-14).
- [56] I am of the view that the allegations against the Employee Defendants are ones that squarely engage the duties and responsibilities of the applicant defendants as employees of the plaintiff and will require the tribunal hearing the claim to determine the nature of those obligations in light of the collective agreement.
- [57] I am satisfied that were it not for the fact that the claim is made against persons over whom an arbitrator would have no authority, the action would be stayed in its entirety, essentially for the reasons articulated by Bruce J. in *Acuren* at paras. 39 and 40.
- [58] There is no doubt that dismissing the action against the Employee Defendants would cause significant difficulties for PNG in pursuing its claims because it would be required to pursue those claims in two separate forums. There would also be a great deal of overlap and duplication of evidence that the plaintiff would be required to lead before the arbitrator and in the court proceedings. The plaintiff would, of course, face significantly higher costs in prosecuting two proceedings rather than one.
- [59] The plaintiff has satisfied me that it would be more convenient to permit this action to proceed against all defendants.

- [60] However, the principle that all disputes in their essential character require the interpretation, administration or violation of collective agreement are within the exclusive jurisdiction of an arbitrator is based on the Supreme Court's interpretation of the Labour Relations Code. The jurisprudence has established that once that essential character is determined, the court can assume jurisdiction only if it is satisfied that a party would be denied an adequate remedy without recourse to the court.
- [61] I have concluded that the authorities preclude this court from taking jurisdiction over a matter which in its essential character involves the interpretation, application, administration or violation of a collective agreement even if it would be more convenient and efficient for the dispute to be decided in a single forum. Having found that this is such a case, it is not open to me to permit the claims against the Employee Defendants to proceed.
- [62] The plaintiff relies on *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 and *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.) Local 79*, 2003 SCC 63, for the principle that a multiplicity of proceedings is to be avoided. However, those cases dealt with the relitigation of a final determination in a different forum and not the inconvenience of having to proceed against different defendants in two different forums from the outset.
- [63] I am also of the view that PNG could obtain much of the relief it seeks in an action against the Niche Defendants and Mr. Brown alone. The notice of civil claim alleges that it is the Niche Defendants who instigated the alleged wrongful actions of the Employee Defendants. It also alleges that the Niche Defendants are the entities that are presently unfairly competing with it as a result of having obtained confidential information. PNG describes the central feature of the case as the conduct of the Niche Defendants and Mr. Brown. PNG is, thus, in a position to obtain an effective remedy in this court without having the Employee Defendants continue to be defendants, albeit at greater expense than it would incur if it could pursue a single action against all alleged wrongdoers.
- [64] PNG has not persuaded me that it will be denied an adequate remedy if it is required to pursue separate proceedings against the Employee Defendants and Niche Defendants. PNG has, therefore, not met the necessary requirements to have this court assume jurisdiction over the dispute between it and the Employee Defendants.
- [65] I consider that the appropriate remedy to grant in this case is to order that this action be stayed against the Employee Defendants, subject to their right to enforce the order for costs I make below. Article 6(4) of the collective agreement gives the board of arbitration jurisdiction to decide whether any matter before it is arbitrable, as required by s. 84(2) of the Labour Relations Code. In my view, that is a question that it is open to PNG to take up before the board of arbitration. If the board of arbitration decides that the dispute with the Employee Defendants is not arbitrable, PNG should have leave to apply to lift the stay of proceedings.

[66] I therefore find that the applicants are entitled to an order staying this action against them.

Costs

[67] The applicants seek an order for special costs of the action against the plaintiff. They submit that the bringing of this action was an abuse of process.

[68] The law is well settled that an award of special costs is an extraordinary remedy to be imposed only when a party is guilty of reprehensible conduct in the litigation; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740, 9 B.C.L.R. (3d) 242 (BCCA).

[69] An action constituting an abuse of process would ordinarily be regarded as reprehensible conduct warranting an award of special costs. However, in this case I can see no basis for concluding that PNG has brought this action for an improper purpose or is otherwise guilty of reprehensible conduct. I therefore conclude that this action is not an abuse of process.

[70] The Employee Defendants are therefore entitled to their costs of this action on scale B.

"The Honourable Mr. Justice Sewell"

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