

CANADA / JUDGMENT

Regal Ideas Inc. v. Haus Innovations Inc.

2018 BCSC 136

COURT

Supreme Court of British Columbia

DECIDED

29 January 2018

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2018 BCSC 136 Regal Ideas Inc. v. Haus Innovations Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Regal Ideas Inc. v. Haus Innovations Inc.,

2018 BCSC 136

Date: 20180129

Docket: S168709

Registry: Vancouver

Between:

Regal Ideas Inc. and Norm Liefke

Plaintiffs

And

Haus Innovations Inc., Shanel Mishra, Feroz Dean (also known as Nigel Dean),

Ming Niu (also known as Alex Ming) and David Pearson

Defendants

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiffs:

Mark S. Oulton

B.T. Duong

Counsel for the Defendants Haus Innovations Inc., Shanel Mishra, Feroz Dean, and Ming Niu:

Jaspreet S. Malik

Counsel for the Defendant David Pearson:

No one appearing

Place and Dates of Hearing:

Vancouver, B.C.

September 6-7, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 29, 2018

Introduction

- [1] On September 21, 2016, following an ex parte application brought by the plaintiffs, I granted an Anton Piller order over business and warehouse premises in Delta, British Columbia. The order extended to vehicles of the personal defendants. My reasons for granting that order are reported as *Regal Ideas Inc. v. Haus Innovations Inc.*, 2016 BCSC 1883.
- [2] The Anton Piller order appointed an independent supervising solicitor, required that solicitor to retain custody of the items seized, and provided that the plaintiffs are not entitled to inspect the items seized unless the defendants consent or the Court otherwise orders.
- [3] The Anton Piller order was executed on September 22, 2016. The items seized included documents, 112 sheets of glass belonging to the corporate plaintiff, a box of aluminum pieces, railing samples that the corporate plaintiff claims belong to it, copies of the contents of a laptop hard drive, copies of the contents of a phone belonging to the defendant Mr. Niu, and copies of the contents of a phone belonging to the defendant Mr. Dean.
- [4] The defendants other than Mr. Pearson now apply to set aside the Anton Piller order on two grounds: first, they submit that on a consideration of the evidence at the initial hearing together with the additional evidence on this application, the test governing the issuance of an Anton Piller order has not been met; and second, they submit that the plaintiffs failed to make full, fair and frank disclosure at the initial hearing such that, irrespective of the merits, the order should be set aside. For simplicity, I refer to the defendant applicants as the "defendants" even though Mr. Pearson takes no position on this application. The plaintiffs oppose the defendants' application and, if successful, apply for access to the evidence seized under the order.

Background and Summary of the Evidence

- [5] The corporate plaintiff, Regal Ideas Inc. ("Regal"), manufactures and supplies aluminum railing and tempered glass panel systems. Its systems feature clear glass and interlocking components. The personal plaintiff, Mr. Liefke, is the owner of Regal. He invented the locking component system used in Regal's systems and he owns at least two related patents.
- [6] All four of the personal defendants are former employees of Regal. At the time the Anton Piller order was granted on September 21, 2016, Messrs. Dean, Niu and Pearson were current employees of Regal. Mr. Dean had been employed by Regal for approximately 9 to 10 years and was Regal's warehouse manager in Delta. Mr. Niu had been with Regal since 2011 and worked in the accounting department. Mr. Pearson worked in Regal's glass shipping department. Mr. Mishra was a former employee at the time the order was granted, having been employed by Regal in various capacities between 2005 and 2009. The employment of Messrs. Dean, Niu and Pearson with Regal was terminated following the execution of the Anton Piller order.
- [7] The corporate defendant, Haus Innovations Inc. ("Haus"), was incorporated by Messrs. Dean, Niu and Mishra in March 2016, when Messrs. Dean and Niu were working for Regal.
- [8] In the underlying action, the plaintiffs claim the defendants:
- stole and misused confidential and proprietary information belonging to them, including Regal customer list(s), patents and design specifications;
 - stole inventory from Regal;
 - misappropriated business opportunities belonging to Regal; and
 - Messrs. Dean, Niu and Pearson breached express or implied terms of their employment contracts and duties they owed to Regal.
- [9] The evidence before me at the initial hearing included three affidavits sworn by Mr. Liefke and two affidavits sworn by Gary Greer, a private investigator retained by plaintiffs' counsel to investigate the possible theft of Regal's product. I summarize this evidence in paragraphs 10 to 15 below. I make no findings of fact.
- [10] Mr. Liefke first became aware of Haus and concerned about the activities of the personal defendants when he received a telephone page from Ace Courier on April 6, 2016 that was meant for Mr. Dean. When he returned the page he was told that a pickup of Regal products had been scheduled by Shanel Mishra, and that the products were bound for "Railing Experts" after delivery to STI Transport Inc. He became suspicious because he was unfamiliar with the name Shanel Mishra and Regal had not done business with STI Transport for more than year. He asked Mr. Dean about the page and Mr. Dean said he was not aware of the scheduled pickup but, after some pressing, Mr. Dean acknowledged that he knew a person named Shanel Mishra and that Mr. Mishra was a former employee of Regal. After cancelling the scheduled pickup, Mr. Liefke discovered that Railing Experts had a

website displaying what appeared to be Regal product, including clear tempered glass, despite there being no prior business relationship between Railing Experts and Regal.

- [11] On June 9, 2016, Regal received GPS tracking records from the owner of DHE Transporter, a transport company used by Regal to transport its products, showing two deliveries in May 2016 from Regal to STI Transport. These deliveries were made by a DHE driver suspected by DHE of making unscheduled, off-book deliveries. Mr. Liefke deposed that Regal has no record of making these deliveries to STI Transport.
- [12] Mr. Liefke's suspicions led to a review of the computer workstations of Messrs. Dean and Niu, which revealed that Messrs. Dean, Niu and Mishra had together established Haus. The information obtained from Mr. Dean's and Mr. Niu's workstations included correspondence between Messrs. Dean, Niu and Mishra (via personal and Railing Experts' email addresses) about Haus's business, and information indicating that Haus was selling product to Rona and Home Hardware, existing customers of Regal.
- [13] Mr. Liefke discovered, from Haus's website, that Haus had an address at 7188 Progress Way in Delta, which is less than 1 km from Regal's warehouse. The website also stated that Haus's products include aluminum railing and glass panels--the very products that Regal manufactures and supplies. On June 15, 2016, at about 9:30 p.m., Mr. Liefke went to Haus's warehouse. He looked through the windows and identified what he estimated to be hundreds of thousands of dollars of Regal product in Regal packaging, including flat white cardboard boxes. His view through several other windows was blocked by Regal boxes that were propped or stacked in front of the windows. He took photographs of what he saw inside Haus's warehouse. Those photographs clearly depict boxes labelled "Regal".
- [14] In August 2016, Mr. Liefke engaged TCS Forensics Limited to image the work computer hard drives of Messrs. Dean and Niu. He also engaged Mr. Greer to assist in gathering further evidence. Mr. Liefke deposed that those efforts revealed:
- Photographs taken by Mr. Greer depict Regal's glass panels being stored in Haus's warehouse and being moved out from the warehouse. Mr. Liefke attached as Exhibit H to his first affidavit copies of two photographs taken by Mr. Greer which Mr. Liefke said depicted Regal product "in and being taken from" Haus's warehouse. He deposed that the product in these two photographs is identifiable by the Regal product number shown on the boxes.
 - Photographs taken by Mr. Greer show persons Mr. Liefke identified as Messrs. Mishra, Niu, Dean and Pearson involved in the movement of product from Haus's warehouse.
 - Mr. Dean's and Mr. Niu's workstation computers contained, in personal drives, photographs of Regal parts and other parts featuring modifications to Regal's design, drawings of railing product labelled in Chinese, which are nearly identical to Regal's drawings, and side-by-side comparisons between Regal products and what appears to be products to be manufactured by Haus to compete with Regal.

· Mr. Niu's Google Drive folder, located on his workstation at Regal but accessible remotely, contained copies of Regal documents including Regal's master customer list.

- [15] On August 13, 2016, Mr. Greer installed a surveillance camera pointed at the back entrance of Haus's warehouse. On the same day, he took photographs of the contents inside the warehouse through a small window. Those photos showed, among other things, flat white cardboard boxes. The footage from the surveillance camera showed people loading flat white cardboard boxes, of the same type that Mr. Greer had seen in the warehouse, into a pickup truck on August 15, 2016; the loading of more white cardboard boxes, similar to the ones he had seen in the warehouse, into two vehicles on August 17, 2016; the movement of pallets stacked with flat white cardboard packages on August 19, 2016; and the unloading of pallets of white packages from a pickup truck on August 22, 2016.
- [16] After the Anton Piller order was executed, the defendants were served with the Notice of Civil Claim. Since then, they have filed Responses to Civil Claim, produced documents and undergone examinations for discovery. Messrs. Mishra, Niu and Dean have sworn affidavits in support of the current application. Mr. Liefke has sworn another affidavit providing additional information in response to the defendants' application.
- [17] On discovery, Mr. Niu admitted that he started developing a competing railing system in 2014, while employed with Regal, and engaged in correspondence with a Chinese manufacturer to that end. As mentioned, emails, schematic drawings and photographs found on Mr. Dean's and Mr. Niu's work computers at Regal suggest that the railing system Mr. Niu was developing while employed at Regal was based, at least in part, on Regal's systems.
- [18] On discovery, Messrs. Niu, Dean and Mishra admitted that Haus was incorporated to sell frosted, tinted and clear glass, the latter of which was also sold by Regal, and Haus's own railing systems.
- [19] Haus invoices and sales records produced by the defendants since the Anton Piller order was executed indicate that Haus was operating and had sold at least some clear glass, in competition with Regal, while Messrs. Dean and Niu were working for Regal. Information obtained prior to the initial application from Mr. Niu's and Mr. Dean's workstations at Regal showed that price lists, customer lists and sales reports had been copied onto Mr. Niu's Google Drive, and revealed efforts by Haus to sell product to existing customers of Regal.
- [20] In his Response to Civil Claim, Mr. Dean admits to the theft of approximately 125 pieces of glass from Regal. He asserts that he committed this theft "on his own and without the consent or approval of the remaining Defendants", and that he earned about \$3,000 in profit from the sale of the stolen glass.

- [21] Counsel for the defendants emphasized that the DHE tracking records showing deliveries from Regal to STI Transport in May 2016 do not provide a link to Haus or Haus's warehouse. That is true but it has now been discovered through production of Haus's warehouse lease, that Haus did not take possession of the warehouse until June 1, 2016.
- [22] Messrs. Mishra, Dean and Niu have not adequately explained the presence of Regal product in Haus's warehouse as observed by Mr. Liefke on June 15, 2016. They offer little more than the blanket assertion that Regal product has not been delivered or shipped to or from the Haus warehouse. Obviously, this begs the question of how the Regal product seen and photographed by Mr. Liefke got there.
- [23] In specific response to Mr. Liefke's photographs of product labelled "Regal" in the warehouse in June 15, 2016, Mr. Dean says only that his materials were on one side and Mr. Mishra's were on the other. He also says that among the items seized following execution of the Anton Piller order were 112 pieces of glass, which he has admitted to stealing from Regal. He estimates those 112 pieces to be worth between \$5,000 and \$6,000. He does not say, directly and unequivocally, that all the Regal product in Haus's warehouse on June 15, 2016 was the product he stole. Further, as mentioned, in his Response to Civil Claim he admits to the theft of approximately 125 pieces of glass and says he profited approximately \$3,000 from the sale of the stolen glass. If he stole 125 pieces of glass and there were 112 pieces remaining at the time the Anton Piller order was executed, then he could have sold only 13 pieces of glass. If 112 pieces of glass were worth between \$5,000 and \$6,000, it is very unlikely that he generated profit of \$3,000 from the sale of 13 pieces. In his affidavit he admits to the theft of approximately 160 pieces of glass and claims to have sold 50 pieces at a profit of about \$3,000. However, if 112 pieces of glass were worth between \$5,000 and \$6,000 (between \$45 and \$53 per piece), one would expect that the profit on the sale of 50 pieces would not exceed \$2,650.
- [24] In his affidavit, Mr. Niu does not address the Regal product Mr. Liefke saw in Haus's warehouse on June 15, 2016. All Mr. Mishra says in this respect is that his materials were on one side of a photograph and Mr. Dean's materials were on the other. None of the defendants has said that the Regal products depicted in the photographs taken by Mr. Liefke on June 15, 2016 are the same 112 pieces of glass seized following execution of the Anton Piller order three months later.
- [25] Messrs. Mishra and Niu deposed that the product Mr. Greer saw being moved out of Haus's warehouse in August 2016 was Haus product. A bill of lading disclosed by the plaintiffs at the initial hearing showed the purchase by Haus of 23,000 kg of glass from China. Documents subsequently produced by the defendants indicate that this glass was delivered to Haus's warehouse on June 20, 2016. The June 20, 2016 delivery date was confirmed by Mr. Dean, on discovery. Accordingly, the product Mr. Liefke saw on June 15, 2016 could not have been the product Haus purchased from China. However, it is possible that all or some of the product Mr. Greer saw being moved from Haus's warehouse in August 2016 was the Chinese-sourced product.

- [26] Mr. Mishra acknowledges using Regal products in his Railing Experts business but says he bought that product from Rona or on Craigslist. He provided a series of Rona receipts that he says show purchases of Regal product. Those receipts show purchases of items referred to as brackets, posts, and glass, among other things, but the items are not actually identified on the receipts as Regal products. Mr. Mishra has not provided any records of any purchases of Regal product on Craigslist. He said he dealt with Craigslist purchases exclusively over the phone. This is somewhat surprising given the importance of documenting the cost of goods sold for financial accounting purposes.
- [27] As mentioned, information obtained prior to the initial application from Mr. Niu's workstation at Regal showed documents that the plaintiffs say contain sensitive and confidential information that had been copied on to Mr. Niu's Google Drive. These documents include price lists, customer lists and sales reports, as well as emails, schematic drawings and photographs, which suggested that Haus was creating a competing product based on Regal's system. Neither Mr. Dean nor Mr. Niu has denied possessing these documents. Rather, they assert that these documents are public and not confidential. This has been specifically denied by Mr. Liefke in his new affidavit sworn for the current application. Specifically, Mr. Liefke says Regal's customer lists contain information not publically available, including the identity of the particular sales employee contacts for each store and whether the customer is active, inactive or a prospective customer that Regal is targeting or may target. He says the drawings and specifications available on Regal's website or provided to customers are not specifications for the manufacture of Regal products. He says the published specifications contain limited information and that the drawings and specifications necessary for the manufacture of the components of Regal's railing systems are confidential and never made available to the public.
- [28] The defendants have produced an unsigned opinion letter from a patent lawyer concluding that Haus's railing system does not infringe the patents held by Mr. Liefke. The plaintiffs object to the admissibility of that opinion on a variety of bases and, in the alternative, say it should be given little or no weight. I agree. It is not necessary to address all of the plaintiffs' objections. Suffice it to say, it is not apparent from the letter what product the expert actually examined such that it is impossible for the plaintiffs to test the lawyer's conclusion. In any event, whether the Haus system infringes Mr. Liefke's patents is not determinative of anything as this is not a patent infringement case. Rather, the material question is whether the Haus design uses confidential information belonging to Regal, and the letter does not assist in resolving that question.

Issues

[29] The issues to be determined are:

1. Did the plaintiffs make full, fair and frank disclosure at the initial hearing?
2. If so, should the Anton Piller order nevertheless be set aside?

3. If not, should the plaintiffs have access to the evidence seized and, if so, on what, if any, terms?

Discussion

1. Did the plaintiffs make full, fair and frank disclosure at the initial hearing?

[30] It is trite and fundamental that an applicant for an ex parte order must make full, fair and frank disclosure of all material facts and potential defences, and if the court subsequently concludes that the applicant failed to do so the court may set aside the order without regard to the merits of the application: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149 at paras. 32-34; *Pierce v. Jivraj*, 2013 BCSC 1850 at paras. 36-38.

[31] However, not every omission necessarily results in an ex parte order being set aside. The full, frank and fair disclosure requirement is not a standard of perfection and it is impractical to expect every nuance of the situation to be brought to the attention of the court: *K.P.I.N. v. K.N.N.*, 2005 BCSC 1259 at para. 14. The materiality of any alleged non-disclosure must be assessed by considering the importance of the alleged non-disclosure to the issues decided at the ex parte hearing: *Pierce* at para. 37.

[32] The defendants rely on two alleged shortcomings in the plaintiffs' submissions at the original application. First, they say the plaintiffs' application was based on a false assumption that all the product observed by Mr. Greer at Haus's warehouse was Regal product. Second, they say the plaintiffs ought to have more explicitly advised the Court of the potential defences available to some of the defendants in respect of the breach of employment duty claims; specifically, that absent a covenant of non-competition, an employee is generally free to compete with an employer after his or her employment is terminated.

[33] The defendants' assertion that there was a false assumption that all the product at Haus's warehouse was Regal product is based on the fact that the plaintiffs had in their possession the bill of lading evidencing that Haus had purchased 23,000 kg of glass from China. The defendants acknowledge that this document was disclosed to the Court at the original hearing but submit that the plaintiffs failed to expressly point out that the large volume of product Mr. Greer saw being moved from Haus's warehouse in August 2016 could have been this glass sourced from China.

[34] Counsel for the plaintiffs says that Mr. Greer's evidence of the significant movement of product in August 2016 was intended to highlight the risk that stolen Regal product would disappear if an Anton Piller order was not granted and that there was no assertion that all the product being moved in August 2016 was Regal product. They say the bill of lading was brought to the attention of the Court as evidence of Haus's immediate execution on its plan to compete with Regal. The plaintiffs also emphasize that the bill of lading represented the first order of Haus glass received at Haus's warehouse on June 20, 2016 and, as such, it provides no explanation for the large volume of product that Mr. Liefke saw at the

warehouse on June 15, 2016.

- [35] It was not assumed at the original hearing that all the product being moved from Haus's warehouse in August 2016 was Regal product. The bill of lading was brought to my attention and I was aware that Haus had purchased product from China. However, there was an assumption that some of the product that Mr. Greer saw being moved out of the warehouse was Regal product. For example, at paragraph 10 of my original reasons I said that there were photographs "confirming the loading and unloading of Regal product at the Haus warehouse". This finding was based on Mr. Liefke's first affidavit, which, in retrospect, was ambiguous on this particular point. I wish to emphasize that I do not consider that the affidavit was intentionally misleading. Rather, as explained below, the phrasing indicated that Mr. Liefke had definitively identified Regal boxes in the photographs taken by Mr. Greer of product being moved from the warehouse (as opposed to the photographs Mr. Greer took of product inside the warehouse), but the photographs Mr. Liefke referred to in support of that statement did not bear it out. Again, this ambiguity was not recognized at the original hearing but I do not suggest that it reflected any attempt to deceive or mislead.
- [36] In his affidavit, Mr. Liefke said that "[r]ecent photographs taken by Mr. Greer depict Regal's glass panels being stored in Haus Innovations' warehouse and being moved out from the warehouse". Mr. Liefke then attached, as Exhibit H, copies of two photographs taken by Mr. Greer, which Mr. Liefke said depicted Regal product "in and being taken from" Haus's warehouse. I am satisfied that those two photographs show boxes of Regal product but, on closer examination, they do not appear to show the product being taken from the warehouse. The same two photographs appear to be attached as Exhibits B and H to Mr. Greer's first affidavit. Mr. Greer deposes that he took those photographs on August 13, 2016 and that they depict the contents inside the warehouse. Mr. Greer deposes that other photographs taken by the surveillance camera show the movement of similar boxes later in August 2016. Those photographs were attached as Exhibits C, D, E and F to Mr. Greer's first affidavit. Mr. Liefke deposed that he understood from Mr. Greer that significant amounts of "this particular product", clearly suggesting Regal product, were being moved in and out of the warehouse. However, Mr. Liefke did not actually identify the boxes shown in the photographs attached as Exhibits C, D, E and F to Mr. Greer's first affidavit as Regal boxes.
- [37] The question is whether the Anton Piller order ought to be set aside as a result of this ambiguity and the finding that flowed from it; that is, the photographs confirmed the loading and unloading of Regal product at Haus's warehouse. This turns on the importance of this finding to the issues decided at the ex parte hearing.
- [38] I have concluded that this finding was of minimal importance. First, although it was an overstatement to say the photographs "confirmed" the movement of Regal product from the warehouse, the evidence as a whole did suggest that Regal product was being moved. Mr. Liefke clearly identified Regal boxes in the photographs Mr. Greer took of the inside of the warehouse and Mr. Greer clearly stated that he saw the same type of boxes being moved from the warehouse. Second, irrespective of what Mr. Greer observed in August 2016, Mr.

Liefke's evidence was that he observed a large volume of Regal product inside the warehouse on June 15, 2016 and that Regal had no business relationship with Haus or Railing Experts and had never received payment from either of them for any Regal product. The evidence adduced at the original application suggested that:

- a) Messrs. Niu and Dean, then current employees of Regal, were engaged in a business with Mr. Mishra, through Haus, that competed with Regal;
- b) Mr. Niu had copies of Regal's customer lists and schematic drawings;
- c) Haus was developing a railing product and appeared to be using Regal's manufacturing specifications in doing so;
- d) Haus was cultivating customer relationships with Regal customers;
- e) as of June 15, 2016, there was a significant volume of Regal product in Haus's warehouse even though Regal had no business relationship with Haus; and
- f) as of August 2016, there was a significant volume of product being moved out of the warehouse, which, in packaging at least, was similar to Regal products.

[39] Considered in context, it is immaterial whether the evidence adduced at the original application established, definitively, that all or even any of the product Mr. Greer saw being moved out of the warehouse in August 2016 was Regal product. What is important is that the evidence showed there was Regal product at the warehouse and there was a real possibility that, without an Anton Piller order, it would be removed before discovery proceedings could be taken.

[40] As noted, the defendants also assert that the plaintiffs ought to have more explicitly advised the Court of the potential defences available to some of the defendants in respect of the breach of employment duty claims. As noted, this aspect of the defendants' application is founded on the distinction between the duties owed by current and former employees.

[41] There is no merit to this aspect of the defendants' application. First, counsel for the plaintiffs emphasized at the original hearing that Messrs. Niu and Dean were, at that time, current employees of Regal and explained that their status as current employees was important to some of the claims being advanced. Second, the evidence adduced at the original application suggested the defendants were competing with Regal while Messrs. Niu and Dean were employed by Regal and that they and Mr. Mishra were using Regal's customer lists and manufacturing specifications to do so. Engaging in a competing business while still employed will normally constitute a breach of the duty of fidelity owed by an employee to his or her employer: *McMahon v. TCG International Inc.*, 2007 BCSC 1003 at para. 72. Furthermore, it is well-established that some employment duties survive termination. Even a former employee is prohibited from using confidential and proprietary information to compete with his or her former employer: *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 at para. 72; *Velsoft Training Materials v. Global Courseware Inc.*, 2011 NSSC 274 at

para. 22.

- [42] For the foregoing reasons, the defendants have failed to demonstrate any material failure by the plaintiffs to make full, frank and fair disclosure.
2. Should the Anton Piller order nevertheless be set aside?
- [43] An application to set aside an Anton Piller order on its merits is heard as a *de novo* application. All of the evidence at the initial hearing and on the application is to be considered: *Pierce* at para. 23.
- [44] The test for granting an Anton Piller order, as expressed in *Celanese Canada v. Murray Demolition Corp.*, 2006 SCC 36 at para. 35, requires the applicant to establish four elements:
1. a strong *prima facie* case;
 2. actual or potential serious damage from the defendant's alleged misconduct;
 3. convincing evidence that the defendant has possession of incriminating documents or things; and
 4. a real possibility that the defendant may destroy such material before discovery proceedings can be taken.
- [45] Having reconsidered the evidence at the initial hearing together with the additional evidence before me on this application, I have concluded that all four elements of the test are met and the order will, as a result, be maintained.
- [46] The Notice of Civil Claim alleges three causes of action:
1. a conspiracy by the defendants to participate in unlawful conduct directed towards the plaintiffs, which they knew or should have known was likely to cause injury, by conspiring to steal and misuse confidential and proprietary information belonging to the plaintiffs, steal inventory from Regal, and misappropriate business opportunities of Regal;
 2. conversion of Regal products; and
 3. breach of the employment duties owed to Regal by Messrs. Dean, Niu and Pearson.
- [47] Since the original application, Mr. Dean has admitted to stealing Regal product. There clearly was some Regal product in Haus's warehouse in June 2016. Mr. Niu was employed by Regal at the time. Mr. Mishra had formerly been employed by Regal. It is likely that both of them would know Regal product to see it. Neither Mr. Niu nor Mr. Mishra have denied that there was Regal product in the warehouse and neither has offered an explanation for its presence there. Mr. Mishra has admitted to selling Regal product in his Railing Experts business. He claims that he purchased that product but has been unable to provide corroborating documentary evidence, even though one would expect such evidence to exist.

- [48] Haus was incorporated by Messrs. Niu, Dean and Mishra at a time when Messrs. Niu and Dean were employed at Regal. On discovery, Messrs. Niu, Dean and Mishra admitted that Haus was incorporated to sell frosted, tinted and clear glass, the latter of which was also sold by Regal, and Haus's own railing systems. Haus invoices and sales records produced by the defendants since the Anton Piller order was executed indicate that Haus was operating and had sold at least some clear glass, in competition with Regal, while Messrs. Dean and Niu were working for Regal. Again, engaging in a competing business while still employed will normally constitute a breach of the duty of fidelity owed by an employee to his or her employer.
- [49] On discovery, Mr. Niu admitted that he started developing a competing railing system in 2014, while employed with Regal, and engaged in correspondence with a Chinese manufacturer to that end. As mentioned, emails, schematic drawings and photographs found on Mr. Dean's and Mr. Niu's work computers at Regal suggest that the railing system Mr. Niu was developing while employed at Regal was based, at least in part, on Regal's systems. Mr. Liefke deposed that at least some of this information is confidential. Again, even a former employee, like Mr. Mishra, is prohibited from using confidential and proprietary information to compete with his or her former employer.
- [50] In the circumstances, I have no difficulty concluding that a strong prima facie case against each of the defendants has been demonstrated.
- [51] The defendants say the evidence does not demonstrate serious potential or actual damage. They submit the evidence shows that there were only a few sales of clear glass and, contrary to Mr. Liefke's assertion that he saw Regal product worth hundreds of thousands of dollars in Haus's warehouse on June 15, 2016, only 112 panels of Regal glass were seized on execution of the Anton Piller order.
- [52] I do not find these submissions persuasive. First, it almost goes without saying that the fact that 112 panels of Regal glass were found in September 2016 does not mean that there were only 112 panels of Regal glass in the warehouse on June 15, 2016. Second, the fact that, so far, the evidence shows few sales of clear glass does not lead to the inference that the potential damage to the plaintiffs is not serious.
- [53] Mr. Dean has admitted to stealing product from his employer that was worth, even on his own evidence, thousands of dollars. Again, Mr. Liefke deposed that he saw a large volume of Regal product in Haus's warehouse in June 2016. Mr. Greer has said that he saw product in similar boxes being moved from the warehouse in August 2016. There is evidence that the defendants were competing with Regal at a time when three of the defendants were employed by Regal, at least some of the defendants have acknowledged using Regal's products to develop competing products, and, if Mr. Liefke is ultimately believed, they have used Regal's confidential information in doing so. In the circumstances, I have no hesitation in concluding that the evidence demonstrates potential serious damage to the plaintiffs.

- [54] Turning to the third branch of the test, the evidence continues to demonstrate that the defendants had in their possession incriminating documents or things. The execution of the Anton Piller order has confirmed that there was some Regal product at Haus's warehouse. The forensic evidence gathered before the Anton Piller order was granted from Mr. Dean's and Mr. Niu's work computers indicates the existence of electronic documents related to the defendants' conduct in competing with Regal at a time when Mr. Dean and Mr. Niu were employed with Regal and their apparent use of confidential information in doing so. The third branch of the test is satisfied.
- [55] Finally, I am satisfied that the evidence demonstrates a real possibility that the defendants may have destroyed evidence before discovery proceedings could be taken. Mr. Dean has admitted to stealing Regal product. Neither Mr. Niu nor Mr. Mishra have denied that there was Regal product in the warehouse and neither has offered an adequate explanation for its presence there. Mr. Mishra has admitted to selling Regal product in his Railing Experts business. He claims that he purchased that product but has been unable to provide corroborating documentary evidence, even though one would expect such evidence to exist. There is evidence that strongly suggests the defendants were surreptitiously competing with Regal when Messrs. Dean and Niu were employed with Regal. The independent supervising solicitor's report regarding the execution of the Anton Piller order noted that Messrs. Niu and Dean initially denied that the email address railingexperts@gmail.com and the addresses using the domain name "hausinnovations.ca" belonged to them or that they had access to them. Mr. Niu advised later that day that he did send and receive emails from ming@hausinnovations.ca. Mr. Dean maintained that he was not involved with the account dean@hausinnovations.ca. A search of Mr. Dean's vehicle produced Regal railing samples, shipping documents, parts codes, and lists of Regal product and pricing. Considered as a whole, the evidence is sufficiently suggestive of dishonesty to justify the drawing of an inference of a real risk of destruction of evidence.
- [56] For the foregoing reasons, the Anton Piller order will be maintained.
3. Should the plaintiffs have access to the evidence seized and, if so, on what if any terms?
- [57] As mentioned, the Anton Piller order provided that the plaintiffs are not entitled to inspect the items seized unless the defendants consent or the court otherwise orders.
- [58] The plaintiffs apply for access to the evidence seized under the order.
- [59] The defendants submit that they should first be granted time to review the evidence seized to object to any privileged documents or irrelevant documents or materials unnecessarily being disclosed to the plaintiffs.
- [60] The plaintiffs acknowledge that they are not entitled to privileged or irrelevant materials but oppose any order that would put them at risk of losing the very evidence they sought to preserve through the Anton Piller application. They propose giving the defendants' counsel access to the seized evidence on terms:

- a) the independent supervising solicitor will maintain a record of all the seized evidence and review all of it for relevance and privilege;
 - b) the results of that review will be disclosed to counsel for the defendants to permit them an opportunity to examine the evidence and make any submissions regarding relevance or privilege to the independent supervising solicitor;
 - c) the independent supervising solicitor will attempt to resolve any concerns raised by the defendants and, if necessary, seek direction from the Court; and
 - d) all relevant, non-privileged evidence will be disclosed to counsel for the plaintiffs.
- [61] Given my conclusion that there is a real risk of destruction of evidence, it would not be appropriate to turn the seized evidence over to the defendants. I agree with the plaintiffs' proposal with one modification. If a dispute arises between the independent supervising solicitor and the defendants' counsel with respect to whether any particular evidence seized is irrelevant or privileged then either the independent supervising solicitor or the defendants may seek direction from the Court.

Costs

- [62] The plaintiffs seek costs of this application, together with the costs of the independent supervising solicitor and any forensic assistance required to conduct the review of the seized evidence, in any event of the cause. I am not persuaded, yet, that costs should be awarded in any event of the cause. Either party may, at or following the trial, advance any arguments as to the costs of any aspect of the proceedings. If no specific order concerning the costs of this application or the costs of the review of the seized evidence is ultimately made, then those costs shall be in the cause.

"WARREN J."

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