

Case Name:

Brown v. First Contact Software Consultants Inc.

**RE: Geoff Brown, Plaintiff, and
First Contact Software Consultants Incorporated, Defendant,
AND RE: First Contact Software Consultants Incorporated,
Plaintiff by counterclaim, and
Geoff Brown and Runit Consulting Ltd., Daryl Morgans, Mark
Roque, Matthew Dufresne, 1770158 Ontario Inc. and 1767073
Ontario Ltd., Defendants to the counterclaim**

[2009] O.J. No. 3782

77 C.C.E.L. (3d) 295

2009 CarswellOnt 5482

Court File No. 09-CV-370373

Ontario Superior Court of Justice

D.G. Stinson J.

Heard: August 7, 2009.

Judgment: September 14, 2009.

(71 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- Sufficiency of damages in lieu of injunction -- Interlocutory or interim injunctions -- Application by the defendant for an interlocutory injunction against the respondents, who were formerly affiliated with it, from using its confidential information to solicit customers and hire employees, dismissed -- Defendant relied on the respondents' alleged breaches of restrictive covenants and fiduciary duties -- Defendant either failed to raise triable issues regarding the covenants or failed to demonstrate irreparable harm or that the balance of convenience favoured it regarding the fiduciary duties.

Application by the defendant and plaintiff by counterclaim First Contact Software Consultant Incorporated for an interlocutory injunction. The respondents were former employees or contractors of First Contact and its associated corporations. The injunction was sought to restrain them from using its confidential and proprietary business information to solicit customers and hire employees. It would also require the respondents to image the hard drives on their computers. The litigation was initiated by Brown, a former employee, who alleged he was wrongfully dismissed by First Contact. First Contact alleged it subsequently discovered that Brown engaged in activities which breached his contractual obligations to it and which violated the fiduciary duties that he owed. All of the respondents, who had

been associated with First Contact, became associated with a consulting company set up by Brown after his termination. This represented a significant loss of the consulting expertise and person-power of First Contact of more than half of its workforce. The claim against the respondents was based on their breaches of restrictive covenants and fiduciary duties.

HELD: Application dismissed. The restrictive covenants that First Contact relied upon were too broad and were not in the public interest of promoting trade and competition. First Contact did not satisfactorily demonstrate their reasonableness. It did not have a strong prima facie case based on the prohibitions against the contractual solicitation of customers and against the solicitation of employees. The agreements that First Contact had with the respondents also included a prohibition against the misuse of proprietary or confidential information. In regard to this contractual provision there was a serious question as to whether any of the allegedly misused information was proprietary to First Contact. First Contact therefore did not make out a strong prima facie case of misappropriation of proprietary information. There was, however, a serious issue to be tried regarding Brown's status as a fiduciary. There was also a serious issue to be tried regarding the fiduciary obligation not to use confidential or proprietary information. First Contact, however, failed to demonstrate irreparable harm. It could not prove that it could not be compensated adequately by an award of damages should it be determined at trial that any of the respondents breached a legal obligation and caused it harm. The balance of convenience favoured the respondents and not First Contact. If the injunction was denied First Contact would have another competitor in the marketplace. If the injunction was granted the respondents would be unable to carry on business. The request to image the respondents' hard drives was not granted. There was no evidence that they engaged in conduct designed to hide or delete electronic or other information.

Counsel:

Karen E. Jolley and Krista Bulmer, for the moving party First Contact.

Robert A. Betts, for the responding parties Geoff Brown, RunIT Consulting Ltd., Daryl Morgans and Mark Roque.

Albert S. Frank, for the responding parties Matthew Dufresne and 1767073 Ontario Ltd.

ENDORSEMENT

1 D.G. STINSON J.:-- This is a motion for an interlocutory injunction brought by the defendant and plaintiff by counterclaim First Contact Software Consultant Incorporated ("First Contact"). The responding parties are former employees or contractors of First Contact and their associated corporations. As originally framed, the injunction motion sought to enjoin the responding parties from competing with First Contact until the merits of the case have been decided. It also sought an order enforcing the terms of various employment, confidentiality, non-disclosure and consulting contracts. As ultimately revised, based on the draft order submitted by counsel for First Contact at the hearing before me, First Contact sought an order that would restrain the responding parties from using its confidential and proprietary business information, directly or indirectly soliciting a list of 130 customers, hiring any employees or former employees of First Contact, and would require the responding parties to "image" the hard drives on their computers.

2 As the foregoing summary indicates, this case involves a claim for injunctive relief in the post-employment context. It is somewhat unusual in that the litigation was initiated by a former employee, Geoff Brown, alleging he had been wrongfully dismissed by First Contact. First Contact asserts that it

subsequently discovered that Brown had engaged in the activities following his departure that not only breached Brown's contractual obligations to it, but also fiduciary duties which it asserts he had. Subsequent to his departure from First Contact Brown has provided consulting services to certain First Contact customer, working with several former First Contact employees or contractors who have been added as co-defendants to the counterclaim and against whom the injunctive relief is also sought.

FACTUAL OVERVIEW

3 I think it is important to mention an initial cautionary point. As is not unusual in many interlocutory injunction motions, the parties before me presented radically different versions of many events and characterizations of the underlying evidence and its significance. A proper determination of what happened and why and what legal consequences ultimately flow from it must await a trial, following production and discovery, and will entail a much more detailed examination of events than is possible in the context of an interlocutory motion. Simply stated, as the motions judge, I am not in a position to make assessments of credibility or findings of fact in the same way that a trial judge can. My references to and comments upon the facts and evidence and the legal issues arising from them are, therefore preliminary only and not in any event determinative of those issues. Rather, my comments on the factual and legal issues are with reference to their significance to the issues raised on this injunction motion.

The Parties

4 As its full name suggests, First Contact is a software consulting company that provides training and consulting services with respect to automated testing software, principally developed by Mercury Interactive Corp. ("MIC"). First Contact has been a Hewlett-Packard ("HP") authorized qualified software implementer since Hewlett-Packard acquired MIC in about 2006.

5 Brown has an extensive background in the IT industry as a technical software consultant. Between 1999 and 2007 Brown was employed with MIC, which had developed a suite of software testing tools for managing software application development. After HP purchased MIC in 2006, Brown continued his employment with HP until April 2007. During Brown's time with MIC and then HP, he built and developed relationships, and contacts, with numerous individuals within both MIC and HP. He also had the opportunity to build and develop relationships with clients of both MIC and HP.

6 In early 2007, Brown was approached to come and work for First Contact, and was offered a lucrative sales commission plan as well as a guaranteed base salary. In March 2007, First Contact hired Brown. He executed employment and confidentiality agreements, containing several provisions that are material for the present motion. His employment agreement included the following provisions:

You shall not, either during your employment with First Contact or thereafter for a period of one year, directly or indirectly, solicit, canvass, interfere with or endeavour to entice from First Contact, any of the persons who are now or become customers or employees of First Contact, if such soliciting, canvassing, interference or enticement assists or is related to any business similar to or competitive with the business now or hereafter carried on by First Contact.

The confidentiality agreement also contained a non-solicitation provision, as follows:

For a period of two years from the last date of consultant's engagement by the company, consultant shall not directly or indirectly, alone or in conjunction with another person in any manner:

- (a) solicit or encourage any officer or employee of the company or its

affiliates to leave the employ of the company or its affiliates or to otherwise harm their relationship with or commitment to the company or its affiliates, as the case may be;

- (b) hire any officer or employee who has left the employment of the company or its affiliates within six months of the termination of such officers or employees' employment with the company or its affiliates as the case may be; or
- (c) solicit or encourage any independent contractors, suppliers or referral sources performing services for the company or its affiliates to cease or modify such performances or to otherwise harm their relationship with or commitment to the company or its affiliates as the case may be.

7 When Brown first joined First Contact in March 2007 he was a sales representative for consulting services. Brown alleges that he was hired by First Contact because of his extensive network of contacts and relationships that he had built up in the IT industry over the preceding twenty years. Brown believes that First Contact was interested in profiting from his existing contacts and relationships with MIC, HP and their respective clients. Brown asserts that he was never provided with a listing of First Contact's clients nor was he responsible for "managing" existing clients. He asserts he was never provided with documentation relating to First Contact's business model or business plan. He was never given a written job description.

8 It is not disputed that during Brown's employment with First Contact, he did not have any ownership interest in the company, nor was he an officer or director. He did not have authority to sign contracts and he asserts that he had no authority to hire or fire employees. All sales contracts required the approval of First Contact's principal, Sam Mathi ("Mathi"). At the time Brown was hired, First Contact had approximately seven employees, including four consultants.

9 The defendant to the counterclaim, Roque, is a 2005 computer science graduate. He began working as a software consultant with First Contact in March 2005. The defendant to the counterclaim, Morgans, is an acquaintance of Roque who began working as a software consultant with First Contact in 2007.

10 The defendant to the counterclaim, Dufresne, is a software expert with particular expertise in HP software known as "Project and Portfolio Management" ("PPM") and in implementing that software at major companies. Dufresne claims to be one of fewer than ten people in the world who has his high level of software and business knowledge and experience in implementing PPM. Dufresne and/or his personal services company, 1767073 Ontario Ltd. ("176"), began working as consultants for First Contact in approximately June 2008.

11 Each of Roque and Morgans signed an employment agreement with First Contact that contained the same non-solicitation provision quoted above in Brown's employment contract. Morgans also signed a confidentiality agreement in the same terms as the one signed by Brown.

12 Although the motion material contained photocopies of fax copies of several similar agreements purportedly executed by Dufresne and/or 176, Dufresne asserts that these documents are "fakes", an issue that clearly can only be determined after a trial.

Events of late 2008 and early 2009

13 As noted, Brown began employment with First Contact in March 2007. Over the next twenty months he was successful in bringing a number of significant consulting assignments to First Contact. As a consequence, he earned significant commissions. By the fall of 2008, however, a dispute emerged between Mathi and Brown concerning the calculation, amount and timing of payment of commissions to

Brown. Matters came to a head on November 21, 2008, when Brown and Mathi had a meeting at which Mathi asked for specific information from Brown. On November 24, Mathi handed Brown a termination letter, informing him that his employment was terminated effective immediately.

14 I should add that there is some controversy between the parties as to whether Brown resigned or was dismissed and the circumstances under which the severance of the employment relationship took place. Once again, these matters cannot be resolved at the motion stage. What is significant for present purposes is that, as at November 24, 2008, Brown ceased to be an employee of First Contact. On January 16, 2009, he commenced an action claiming damages for outstanding commission in excess of \$190,000 and \$250,000 for damages for wrongful dismissal.

15 According to Brown, following his dismissal from First Contact, he developed the idea of setting up his own consulting company as a way to earn income. He came up with the name "RunIT Consulting" ("RunIT") and created a website. He asserts that he was subsequently approached by Dufresne, who offered to provide hardware infrastructure in exchange for a 50% interest in RunIT. They agreed and subsequently incorporated RunIT Consulting Ltd. in January 2009.

16 On December 22, 2008, Morgans and Roque both submitted e-mail applications for positions with RunIT. They were subsequently retained as independent contractors by RunIT and by 176, Dufresne's personal services company. Another employee of First Contact, Amanda Bond, applied for a part-time office position with RunIT and was hired in January 2009.

17 All of the responding parties, who had been associated in one way or another with First Contact prior to the end of November 2008, were associated with RunIT by February 2009. This represented a significant loss of the consulting expertise and person-power of First Contact of more than half of the workforce.

18 First Contact subsequently discovered that a number of customers for whom it had performed computer consulting work retained RunIT and 176 to do work for them. Once again, the circumstances under which these customers came to be clients of RunIT and 176 is a topic of some controversy and debate. Brown and Dufresne deny that they approached or solicited any of these customers to direct work to them; rather, the approach was by the customers who were looking for the expertise they knew that Brown and Dufresne could provide. Brown concedes that he did let some of his contacts know that he was no longer working with First Contact and was planning to establish or had set up his own company. Whether any of his or Dufresne's conduct amounted to solicitation will have to await determination at a trial.

19 Having become aware of the activities of the responding parties and in particular the fact that they were engaged in consulting work for some of its own sometime customers, First Contact sought injunctive relief. It therefore issued a statement of defence and counterclaim on March 3, 2009 and on March 16, 2009 brought this motion returnable March 19, 2009. Following the exchange of further materials between the parties and cross-examinations, the motion came on for argument before me for a full day on August 7, 2009. As I noted at the outset of these reasons, on that occasion the moving party pared down significantly the scope of the relief that it was seeking, its principal concern now being to restrain the responding parties from soliciting its customers, as opposed to preventing them from competing with it absolutely.

ISSUES AND ANALYSIS

The test for an interlocutory injunction

20 The test for granting a prohibitory interlocutory injunction was set out by the Supreme Court of

Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("RJR"), at 334, as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

21 *RJR* was not meant to be mechanically applied: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 2008) (*Sharpe on Injunctions*) at 2.290. It is sometimes preferable to demand a higher burden of proof from the moving party - that is, proof of a strong *prima facie* case, which exists when (1) the granting of an injunction will, in effect, be the conclusive determination of the action; or (2) when only a question of law is at issue; or possibly (3) when facts aren't disputed (*RJR, supra* at 338, 340).

22 The branches of the test are not meant to be treated as watertight compartments in a step-by-step analysis. A proper assessment of an injunction motion considers foremost the substance of the parties' dispute, and:

The checklist of factors ... should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief: *Sharpe on Injunctions, supra*, at 2.630.

23 It is important to note that First Contact claims both breach of restrictive covenant and breach of fiduciary duty. These claims are not interdependent; one does not rise and fall on the strength of the other. Fiduciary duties originate in the common law, while restrictive covenants arise from contract, and the divergent nature of these claims means they must be addressed individually at the first stage of the test.

Restrictive covenants

24 Since *RJR*, the strong *prima facie* test has been applied in several employment law cases involving restrictive covenants: see *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 (S.C.J.) (*Jet Print*) at paras. 10 and 11; *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418 (S.C.J.) at paras. 13 to 16; and *Phytoderm Inc. v. Urwin*, [1999] O.J. No. 383 (S.C.J.) (*Phytoderm*) at para. 9. In *Imperial Sheet Metal v. Landry* (2007), 315 N.B.R. (2d) 328 ("*Imperial Sheet Metal*") at para. 24, Robertson J.A. aptly interpreted these exceptions to the general "serious question to be tried" threshold in the employment context as:

- (1) Those cases involving a question of law, such as the interpretation of a contractual provision; (2) cases in which there has been oral cross-examination; and (3) cases where it is reasonable to predict that the request for injunctive relief will become moot by the time the matter goes to trial.

25 Restrictive covenant cases can fit in both the first and the third categories, and thus impose upon the moving party the higher onus of establishing a strong *prima facie* case.

26 In support of its claims against the responding parties, First Contact alleges that Brown, Morgans, Roque and Dufresne are bound by covenants which mandate that they may not, for a period of one year after their employment with First Contact, "directly or indirectly, solicit, canvass, interfere with, or endeavour to entice from First Contact any of the persons who are now or become customers or

employees of First Contact, if such soliciting ... assists or is related to any business similar to or competitive with the business now or hereafter carried on by First Contact." First Contact also alleges that Brown, Morgans and Dufresne are bound by two-year non-solicitation obligations that prohibit them from soliciting any employees of First Contact to leave its employ and further prohibits them from hiring any employee of First Contact within six months of the termination of that employee's position with First Contact.

27 The foregoing contractual provisions are all "restrictive covenants" in an employment context, in that (a) they have their origins in an employer-employee relationship and (b) they purport to limit or restrict the post-employment activities of the ex-employee. As such, the moving party must establish a strong *prima facie* case to obtain injunctive relief.

28 As was observed by Low J. in *Phytoderm, supra*, at para. 8:

Covenants in restraint of trade are enforceable only if they are reasonably necessary to protect a legitimate interest of the covenantee and are at the same time reasonable from the perspective of the public interest, which requires adequate protection to the covenantor.

29 To be enforceable, a restrictive covenant must be reasonable between the parties and with respect to the public interest. The court considers whether the plaintiff has a legitimate proprietary interest that is entitled to protection; whether the temporal and spatial restrictions are too broad; and whether the covenant is against competition generally or limited to proscribing solicitation of the clients of a former employer: see *Aon Consulting Inc. v. Watson Wyatt & Co.*, [2005] O.J. No. 3472 (S.C.J.) at para. 16.

30 Dealing first with the customer non-solicitation covenant, I am prepared to assume that First Contact has a legitimate interest in protecting its established client relationships. I have serious concerns, however, about the scope of the activity prohibited by the covenants in question. In essence, they prohibit any of the individual responding parties from directly or indirectly soliciting business from companies who may have been customers of First Contact at any time after the commencement of their employment. This would include, for example, a company that might have been a client of First Contact several years prior to the date of the employee's termination, but with whom First Contact had no business relationship since that time. The prohibition against solicitation would also extend to customers with whom the responding parties had no contact with whatsoever during the course of their work at First Contact, and even those of whom they had no knowledge whatsoever. Such a sweeping prohibition is overbroad and goes farther than is necessary to protect the legitimate interests of First Contact. Moreover, in the case of at least Brown and Dufresne, it disregards the reality that each of them had extensive industry contact of their own before they joined First Contact. Prohibiting solicitation of their pre-employment contacts is not a reasonable restriction.

31 These covenants are too broad and are not in the public interest of promoting trade and competition. First Contact has not satisfactorily demonstrated their reasonableness, and I conclude that the moving party does not have a strong *prima facie* case based upon the prohibition against contractual solicitation of customers.

32 I turn now to the prohibition against solicitation of employees. I note at the outset there are multiple variations on this prohibition. To begin with, the employment contracts and consultant contracts purportedly signed by the individual responding parties prohibit the covenantor from soliciting "persons who are now or become ... employees of First Contact for a period of one year following the termination of the covenantor's employment." In the consultant confidentiality agreements, there is a two-year prohibition against soliciting employees of First Contact and an additional prohibition against hiring an ex-employee of First Contact within six months of the termination of such employee's

employment with First Contact.

33 Once again, I will assume for purposes of this analysis that First Contact has a legitimate interest in preserving its workforce. The true question is whether the covenants in question are reasonable in all the circumstances. As I noted above, the two restrictions against solicitation of employees are temporally inconsistent; one is for two years while the other is for one year. This suggests that First Contact itself may not know how long a prohibition is necessary to protect its interests. Secondly, I note that the one year prohibition extends to anyone who is or may become an employee of First Contact. As such, the prohibition would include persons who have long since ceased to be employed by the First Contact prior to the departure of the covenantor; in other words, the prohibition would extend to someone who was no longer an employee of First Contact at the time the solicitation was made. It is patent that that is an unreasonable prohibition.

34 With respect to the six months "no hire" provision, I have serious concerns whether this provision is enforceable, given that it would extend to hiring any ex-employee of First Contact, regardless of his or her prior function in the company, the length of their service or the circumstances of their departure. In addition, it imposes limits on the ability of departed First Contract employees to find new positions, where they might legitimately exploit their personal skills and abilities, without violating any obligations they might have to their ex-employer. It therefore seems likely to be more than is reasonably necessary to protect any legitimate interest that First Contact might have.

35 I therefore conclude that, in relation to the employee solicitation and hiring prohibition, First Contact has not made out a strong *prima facie* case regarding the enforceability of these covenants, either.

36 Before leaving the topic of the agreements relied upon by First Contact, I note that they also include a prohibition against misuse of proprietary or confidential information.

37 In the present case, First Contact asserts misappropriation of confidential information; the responding parties deny any misuse of corporate information from their former employer. While it is true that some of the work currently being done by the responding parties is for clients for whom they previously worked at First Contact, there is no direct evidence that in doing so the responding parties have misused or misappropriated information that is proprietary to First Contact. To begin with, there is a serious question in my mind whether any of the allegedly misused information is or was proprietary to First Contact.

38 Secondly, while it is true that Brown retained certain billing-related customer information following his termination, the fact that he did so does not equate to its misuse. He had a pre-termination dispute with First Contact regarding the sums due to him for sales commissions, the calculation of which depends in part on the information he retained. Whether Brown is due any of the sums for which he has sued First Contact remains to be determined. In the circumstances of this case, however, it does not automatically follow that his retention of that information equates to its misuse or use for an improper purpose. Based on the material before me, I am unable to conclude that First Contact has made out a strong *prima facie* case of misappropriation of proprietary of information.

39 Although First Contact has failed to establish a strong *prima facie* case in relation to its contractual claims, I must still consider irreparable harm and balance of convenience: see *Sharpe on Injunctions* at 2.310, 2.620. Because the factual allegations concerning the harm suffered due to the breaches of the restrictive covenants overlap with those concerning the harm due to the breach of fiduciary duty, I will consider the second and third branches of the test together, following my analysis concerning the threshold test to be applied when injunctive relief is sought to restrain an alleged breach of fiduciary duty.

Fiduciary Duty

40 A fiduciary duty exists when (a) the person in question has the power to exercise some discretion that could (b) be unilaterally exercised in a way that affects the beneficiary's interests, especially when (c) the beneficiary is particularly vulnerable to the fiduciary: see *Frame v. Smith* [1987] 2 S.C.R. 99 at 136.

41 First Contact argues that, by reason of his status as a key employee, Brown was a fiduciary and therefore his post-employment competition with his ex-employer amounts to a breach of fiduciary duty that should be restrained.

42 The parties disagree as to the appropriate test to be applied where an interlocutory injunction is sought to restrain a breach of fiduciary duty. Relying on *Aon Consulting Inc. v. Watson Wyatt & Co.*, *supra*, *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255 (S.C.J.) and *Matrix Photocatalytic Inc. v. Purifics Environmental Technologies Inc.* (1994), 58 C.P.R. (3d) 289 (Ont. Gen. Div.), First Contact submits that the test is merely whether there is a serious issue to be tried. For his part, Brown asserts that the higher test of a strong *prima facie* case must be met, relying on *Phytoderm*, *supra* and *Jet Print*, *supra*.

43 *Imperial Sheet Metal*, *supra*, at para. 15, examined the applicability of the "serious issue" threshold when dealing with a claim involving a breach of fiduciary duty. The court held that the strong *prima facie* case threshold will apply when (a) the central issue is based on a question of law, (b) oral-cross examination has been conducted, or (c) the decision whether or not to grant an injunction will cause the issue to become moot. In breach of fiduciary duty claims, the court concluded, the less onerous "serious issue" standard applies because an allegation of a breach of fiduciary duty did not fit into one of the prescribed exceptions.

44 In my opinion, the *Imperial Sheet Metal* exceptions flow from the same principle: if, at the injunction stage, the nature of the dispute is such that it is easier to predict the result at trial, the plaintiff bears the onus of showing a strong *prima facie* case. In such case, interlocutory injunctive relief is only suitable where the plaintiff can demonstrate that it is clearly in the right, since much of the information needed to form a conclusion on the underlying merits is available at this stage; as a result, it should be easier for the moving party to demonstrate that the injunction is appropriate and the court will therefore require it to do so.

45 Claims for relief based on restrictive covenants will ordinarily fail at trial because the covenants are *prima facie* void. As a consequence, a strong case showing otherwise is needed to convince the court to grant an interlocutory injunction. By contrast, claims based on the existence and scope of a fiduciary duty are ones in which it is much harder to predict an outcome since they raise questions of both fact and law, capable of proper elucidation only at trial.

46 Unlike a finding of a *prima facie* enforceable restrictive covenant, a preliminary finding of the existence of a fiduciary duty may or may not end a claim: fiduciary duties are of variable duration, scope and nature. There may be some aspects of the enterprise that give rise to a post-employment fiduciary duty that is greater than would be found in a restrictive covenant. Due to the vagueries and uncertainties in these cases, the court will consider granting interlocutory relief using the lower threshold.

47 First Contact asserts that Brown was a fiduciary. Brown denies that he was. First Contact describes Brown as a "key employee" who carried out management tasks such as instructing others as to the projects on which they were to work and when and how long they were to be deployed on those projects. Brown also earned a significant income; he had access to client information; he had knowledge of key

financial information relating to the business that gave him particular insights into its operation. As such, First Contact asserts that it is peculiarly vulnerable to competition by Brown and he should be therefore considered a fiduciary.

48 Brown, however, points out that he was not an owner, not an officer and not a director of First Contact. He had no authority as to hiring or firing employees. He had no job description. Although he was well-remunerated, he did not have sufficient seniority or control over the operations to qualify as a fiduciary.

49 Based on the evidence presented on the motion, I conclude that there is a serious issue to be tried regarding Brown's status as a fiduciary. I therefore propose to continue to evaluate First Contact's submissions with respect to the second and third branches of the test in relation to the relief sought under this head.

Confidential information

50 First Contact also seeks to enjoin the responding parties from using any of its confidential or proprietary corporate information, including such things as knowledge of particular customer requirements, contacts, financial information and the like, relying on common law principles. There is no dispute that the threshold for the first branch of the test for injunctive relief to prevent a breach of this obligation is a serious issue to be tried.

51 The moving party's materials indicated that, in relation to certain particular customers, the respondents have "seamlessly" taken over business opportunities that could only have been known to them by reason of confidential information of which they became aware as employees of First Contact. The responding parties concede that they are doing work for two specific former customers of First Contact, but assert that they have not taken advantage of or exploited any confidential or proprietary information of First Contact in either obtaining or performing this work.

52 First Contact also points to the fact that, subsequent to his departure, Brown submitted a detailed calculation of the amounts he says are owed to him that incorporated information about clients and contracts that First Contact asserts is confidential proprietary information. Once again, Brown denies any misuse and argues, in effect, that without this information he would be unable to advance his claim for payment.

53 As with other the factual controversies previously described, at this stage I am unable to resolve this one. I am, however, able to conclude that the assertions and evidence of First Contact relating to this topic meets the threshold of a serious issue to be tried.

Irreparable harm

54 The second stage in the test for an interlocutory injunction is whether a refusal to grant the injunctive relief could so adversely affect the moving party's interests that the harm could not be remedied by a favourable outcome after the trial. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. It is harm "which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": see *RJR*, *supra*. at para. 59.

55 As was stated in *Medtronic of Canada Ltd. v. Armstrong*, [1999] O.J. No. 4860 (S.C.J.) (at para. 38):

The onus is on the plaintiff to demonstrate that the applicant will suffer irreparable

harm if the application is refused. Medtronic has the onus of establishing on the evidence that it will suffer actual harm which is not compensable in damages. The law is reasonably clear that the applicant must lead evidence of irreparable harm which is not founded upon mere speculation.

56 First Contact has alleged the loss of various clients and contracts as a result of the actions of the responding parties. According to the responding evidence, however, RunIT has only eight contracts, of which only two are with clients identified in First Contact's customer list, which details approximately 130 clients. Counsel for First Contact conceded that her client is not at risk of going out of business by reason of the competition by the responding parties.

57 The evidence does indicate, however, that the volume of business formerly done by First Contact is down significantly. First Contact has been slow, however, to rebuild its capacity to perform the work in which it is ordinarily engaged. It is important to bear in mind the nature of the services in which all these parties are engaged: computer consulting work of necessity entails harnessing the individual expertise of the particular consultant who has the ability to provide the service requested. It entails carrying out specific contracts, relating to discreet IT services required by a particular customer. It is by no means a situation where generic services or fungible goods are being supplied to customers. That this is so is shown by the evidence of Brown and Dufresne, each of whom has sworn that it is customers who approached them seeking their expertise and not they who solicited business from customers.

58 Returning to the subject of irreparable harm, First Contact points to the loss of these contracts and the loss of its former employees as establishing that the conduct of the responding parties is responsible for causing it damage to its goodwill and reputation. With respect, I consider that assertion speculative and unsupported by the evidence. Rather, the evidence suggests that First Contact would have been unable to perform this work without the assistance of the responding parties. None of them was obliged to continue his employment with First Contact indefinitely; indeed on the face of the record, First Contact terminated Brown, the individual it describes as its key employee. To the extent First Contact is experiencing a loss of business, such loss is not necessarily attributable to any improper actions by the responding parties, but rather arising from the natural ebb and flow of the consulting business. This does not equate to irreparable harm.

59 There is no admissible direct evidence of supposed inappropriate comments by Brown or others to customers of First Contact, and that those allegations were specifically denied. This further supports my view that First Contact's evidence falls short of establishing irreparable harm.

60 First Contact has failed to persuade me that it cannot be compensated adequately by an award of damages, should it be determined at a trial that any of the responding parties has breached a legal obligation and caused harm to First Contact. For example, to the extent that the responding parties have wrongfully appropriated consulting contracts that would have been awarded to First Contact, the responding parties will have records of the value of that work and the profits earned. As was stated by Kerschman J. in *Henry Co. Canada v. Rust-oleum Corp.*, [2007] O.J. No. 5253 at para. 74:

In Ontario, there are numerous cases that have concluded that lost sales or lost market share can be measured with the availability of sales history, sales projections and sophisticated accounting.

61 In the confidentiality agreements signed by Brown and Morgans irreparable harm is purportedly established upon any breach of the agreement. By inserting such a clause in an employment agreement, however, an employer cannot (by simple drafting of a document) usurp the exclusive jurisdiction of the court to determine whether injunctive relief is appropriate and, more specifically, whether or not irreparable harm has been established: see *Jet Print Inc.*, *supra*, at paras. 26 to 29.

Balance of convenience

62 The third branch of the test to be applied in a motion for interlocutory injunction involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. Although First Contact has resiled from its initial request for an order enjoining the responding parties from competing against it at all until the merits of the case has been decided, the relief currently requested would prohibit the responding parties from offering their services to well over 100 significant customers, including many of the major banks and insurance companies in this country. First Contact describes its customer list as a "respected roster of national clients".

63 The denial of the injunctive relief sought by First Contact would simply result in another competitor in the marketplace. The absence of reliable evidence of significant contact during the course of their employment between the responding parties and the vast majority of First Contact's customers suggest that there is no special relationship that would be exploited were the responding parties permitted to do business with those companies.

64 By contrast, the relief sought would put a significant restriction on the ability of the responding parties to exploit their personal expertise for the benefit of customers who choose to do business with them. Indeed, in the case of Dufresne, his expertise is such that granting the relief sought against him would remove that expertise from customers who very well may require it and be unable to obtain it from First Contact.

65 In the circumstances of this case, I conclude that the balance of convenience clearly favours the responding parties.

Conclusion as to injunctive relief

66 First Contact has failed to satisfy the prerequisites for obtaining injunctive relief. The motion for an interlocutory injunction is therefore dismissed.

ANCILLARY RELIEF

67 First Contact requests an order that would require the responding parties to "image" the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them. There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

COSTS

68 The responding parties have been successful in resisting the relief sought by First Contact, and they should recover costs of the motion.

69 With respect to quantum, each of the cost estimates presented by counsel was in the order of \$25,000 to \$30,000, which would indicate significant time was invested by all parties. First Contact argues that there was no need for separate representation of Dufresne and 176. Their position is somewhat different from that of Brown, however, and there may be some adversity of interest. There is no reason to deny them any recovery on that ground.

70 The principle response to the motion was mounted by Mr. Betts' clients. I would therefore award

them a higher proportion of their expenses. Given the amount expended by First Contact, the sums sought by the responding parties are not excessive, nor are they unexpected. As well, only at the hearing before me did First Contact abandon its request for an injunction against all competition by the responding parties.

71 I order First Contact to pay cost of \$20,000 to Brown et al. and \$15,000 to Dufresne et al, within 30 days. Both sums are inclusive of disbursements and GST.

D.G. STINSON J.

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