IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation*:* *Millennium Speciality Alloys Ltd. v. Sali,* 2023 BCSC 914

Date: 20230531
Docket: S133823
Registry: Kelowna

Between:

Millennium Speciality Alloys Ltd. and Dammipace Holdings Corp.

Plaintiffs

And

Robin J. Sali, Rhonda L. Sali, and Samuel, Son & Co., Limited/ Samuel & FILS & CIE LTEE

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Plaintiffs:	A. Spraggs C. Janzen
Counsel for the Defendants, Robin J. Sali and Rhonda L. Sali:	C.J. Edstrom
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Place and Date of Hearing:	Kelowna, B.C. February 22, 2023
Place and Date of Judgment:	Kelowna, B.C. May 31, 2023

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I. INTRODUCTION

[1] The plaintiffs apply under Rule 10-4 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, for an interlocutory injunction enjoining the defendants from engaging in conduct that contravenes a non-competition and non-solicitation agreement. The defendants oppose the application.

[2] The notice of application as filed sought additional orders. Those matters were settled by agreement during the course of the hearing.

II. BACKGROUND

[3] The plaintiffs in this action are Millennium Specialty Alloys Ltd. ("Millennium") and Dammipace Holdings Corp. ("Dammipace"). The defendants, Robin Sali and Rhonda Sali (collectively, the "Sali Defendants"), are spouses and the former shareholders of Millennium. Mr. Sali is a current employee of the defendant, Samuel, Son & Co., Limited/ Samuel & FILS & CIE LTEE ("Samuel" or "SSC").

[4] The Sali Defendants founded Millennium in 1999. On January 11, 2019, the Sali Defendants sold their entire interest in Millennium – comprising all of the issued and outstanding shares of the capital in the company – to Dammipace pursuant to a share purchase agreement ("SPA"). Appended to the executed SPA was a non-solicitation and non-competition agreement ("NSA") which, among other things, prohibited the Sali Defendants from competing with Millennium or soliciting any of Millennium's customers.

[5] Notably, following the general prohibitory provisions, s. 1.2 of the NSA then carved out an exception expressly permitting Mr. Sali to engage with Samuel, a company that operates in the same industry as Millennium, provided it was not done in a manner that negatively impacted Millennium or its business ("Carveout Clause").

[6] The Carveout Clause reads as follows:

> Notwithstanding any other provision in this Agreement, Robin has the right to be engaged as an employee, consultant, agent, or independent contractor of Samuel Son Co. ("SSC") or any subsidiary of SSC as long as Robin's

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> involvement with SSC does not harm or negatively impact the Company or its Business in any way.

A. The Companies

[7] Both Millennium and Samuel operate in the business of processing, distributing and selling industrial metal products. The two companies, however, operate at different positions in the supply chain.

[8] Samuel operates upstream from Millennium as a product wholesaler, primarily selling products in large volumes to metal resellers. Millennium, by contrast, purchases product from wholesalers, such as Samuel, and then resells that product in smaller volumes to end-users. The two companies had and have shared customers.

[9] David Melillo is the president, secretary, director and principal shareholder of Dammipace. Mr. Melillo is also the current director of Millennium. The plaintiffs rely primarily on an affidavit of Mr. Melillo as the evidentiary basis for their application.

B. Alleged Breaches of the NSA

[10] In or about September 2019, Mr. Sali began providing contracting services to Samuel as a sales agent. It was Mr. Sali's understanding at the time that his actions were permitted under the Carveout Clause of the NSA.

[11] Shortly thereafter, the plaintiffs allege that Mr. Sali began providing services to Samuel in a manner that directly harmed Millennium and its business and thereby breached the NSA. In particular, the plaintiffs allege that Mr. Sali:

a) solicited clients that he knew to be customers of Millennium;

b) acted as account manager for Samuel's customers that he knew, or ought to have known, were existing customers of Millennium;

c) knowingly undercut Millennium's pricing with Millennium's existing customers;

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d) used Millennium's email account to solicit Millennium's customers for Samuel;

e) ordered materials processed using Millennium's property, despite knowing that Millennium had revoked its authorization for Samuel to use said property; and

f) hired Millennium employees.

[12] On February 7, 2023, the plaintiffs filed a notice of application under which they sought the following orders:

> 1. Pursuant to Rule 10-4 of the *Supreme Court Civil Rules*, the Defendants Robin J. Sali and Rhonda L. Sali, as vendors of Millennium Specialty Alloy Ltd. are enjoined and restrained from competing with, soliciting the clients of, or disclosing the confidential information of Millennium Speciality Alloys Ltd. in a manner that contravenes the non-competition and non-solicitation agreement attached as Exhibit "B" of the 1st Affidavit of David Melillo.
> 2. The period set out at section 1.1 of the non-competition and non-solicitation agreement attached as Exhibit "B" of the 1st Affidavit of David Melillo will continue to run until mutual agreement in writing of the Plaintiffs and the Sali Defendant or until further order of this court.
>
> …
>
> 6. Costs in any event of the cause, payable forthwith.

III. LEGAL FRAMEWORK

[13] The parties agree on the governing legal framework for granting an interlocutory injunction. Under *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR*], an applicant must establish that:

(1) the claim that forms the basis for the injunction raises a serious issue to be tried;

(2) it will suffer irreparable harm if the injunction is not granted; and

(3) the balance of convenience favours granting the injunction.

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[14] Additionally, for an injunction to be granted, the party seeking the order must set out its terms with clarity and specificity: *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at para. 52; see also *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 at para. 24. As Justice Marchand (as he then was) stated in *Natural Trade Ltd. v. MYL Trading Ltd.*, 2018 BCSC 1176 at para. 79, "…it is not the court's function to try and construct a sensible order from overly broad language proposed by the party seeking relief."

[15] In this regard, a court can refuse to grant an injunction where the proposed terms are impermissibly vague: *Este v. Esteghamat-Adrakani*, 2020 BCCA 202 at para. 55. The Supreme Court of Canada explained the rationale for this requirement in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62:

> [97] … The exercise of the court power to grant injunctions may lead, from time to time, to situations of non-compliance where it may be necessary to call upon the drastic exercise of courts' powers to impose civil or criminal penalties, including imprisonment… Therefore, proper notice to the parties of the obligations imposed upon them and clarity in defining the standard of compliance expected of them must be essential requirements of a court's intervention. Vague or ambiguous language should be strictly avoided.

IV. ANALYSIS

A. The Terms of the Proposed Order

[16] As noted above, the plaintiffs seek an order enjoining the defendants from "competing with, soliciting the clients of, or disclosing the confidential information of Millennium Specialty Alloys Ltd. in a manner that contravenes the non-competition and non-solicitation agreement." In effect, the plaintiffs seek an order requiring the defendants to comply with the NSA.

[17] The order sought by the plaintiffs lacks specificity. In *Tiger Tool International Incorporated v. Cool-It Hi-Way Services Inc.*, 2015 BCSC 1606, this Court stated that an injunction that requires "compliance generally with an agreement is far from a clear order": at para. 37. That is precisely what the plaintiffs here seek – a general order prohibiting the defendants from contravening the NSA without particularizing the types of activity that would constitute a contravention. To order compliance with

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the terms of NSA would provide little to no guidance to the defendants as to how they should regulate their future conduct.

[18] I find that the injunction sought by the plaintiffs is impermissibly vague. It lacks the clarity and specificity needed for the defendants to know exactly what has to be done to comply with the order. That alone is reason to dispose of the plaintiffs' application. Nevertheless, in the alternative, I will consider whether the plaintiffs have met the requirements for granting an injunction under *RJR*.

B. Serious Issue to be Tried

[19] The defendants concede that the first element of the test is satisfied.

C. Irreparable Harm

[20] Harm is irreparable when it cannot be quantified in monetary terms or cannot be cured through the collection of damages: *RJR* at para. 64. The plaintiffs must provide a sound evidentiary foundation, beyond mere speculation, that irreparable harm will result should an injunction not be granted: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 60.

[21] The plaintiffs claim that they have suffered irreparable business loss in the form of lost customers and decreased sales. They also claim that they have suffered irreparable damage to their business reputation resulting from their efforts to bring back clients that were lost due to Mr. Sali's conduct.

[22] I acknowledge that the plaintiffs have alleged losses that fall within established categories of relevant losses. The jurisprudence is clear that loss of market share and damage to one's business reputation can constitute irreparable harm: *RJR* at para. 64; *Teal Cedar Products Ltd. v. Mashari*, 2021 BCCA 353 at para. 36. The question, then, is whether the plaintiffs have provided sufficient evidence that they will suffer such harm absent an interlocutory injunction.

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[23] As noted, the plaintiffs rely on the affidavit of Mr. Melillo to establish irreparable harm. Mr. Melillo alleges that Millennium suffered harm as a result of Mr. Sali engaging in the following conduct while working for Samuel:

a) Soliciting Millennium's clients and undercutting Millennium's pricing;

b) Acting as account manager for Samuel's customers that were existing customers of Millennium;

c) Using a Millennium email account to solicit Millennium customers;

d) Ordering materials using Millennium's property without Millennium's authorization; and

e) Hiring a former Millennium employee.

[24] I will address each of Mr. Melillo's allegations in turn.

1. Soliciting Clients and Undercutting Pricing

[25] Mr. Melillo deposes that, while working for Samuel, Mr. Sali solicited the business of Millennium's clients, including Element Custom Fab ("Element"), Excel Metal Fab ("Excel"), Limitless Manufacturing Ltd. ("Limitless") and Turn and Burn.

[26] Mr. Sali admits that, in or around August 2021, and while working for Samuel, he provided John Richard, the owner of Element, with his business card and offered to assist with a "future project". There is no evidence of what this "future project" would be and therefore no evidence as to whose sales niche it would even fit within under the NSA.

[27] Further, there is no evidence that any further business relationship transpired between Mr. Sali and Mr. Richard. Rather, Mr. Sali deposes, and the plaintiffs do not contest, that Mr. Sali never provided any services to nor contacted Mr. Richard following August 2021.

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[28] This evidence does not establish irreparable harm nor any meaningful risk that irreparable harm will result in the future.

[29] Next, Mr. Melillo alleges that Mr. Sali solicited the business of Excel by offering prices that Mr. Sali knew would undercut the pricing offered by Millennium. In support of this allegation, Mr. Melillo attaches as exhibits emails showing that Excel was offered prices by Samuel that were lower than what was offered by Millennium. There is uncontested evidence that Excel had been a customer of both Samuel and Millennium for many years, including before the SPA was executed.

[30] The plaintiffs have led no evidence pointing to specific conduct on the part of Mr. Sali that has caused Millennium harm. The evidence merely establishes that, at certain times, Samuel has offered Excel more competitive pricing than Millennium to someone who had long been a shared customer. This is not sufficient to establish irreparable harm.

[31] Mr. Melillo additionally reports that Millennium has suffered a dramatic decrease in sales to Limitless, one of Millennium's larger customers. He blames Mr. Sali for the lost revenue.

[32] As the defendants argue, with a basis in background evidence provided by Mr. Sali, it is possible for very successful clients to outgrow the metal resellers market and, once a client is in a position to do higher volume purchases, they will move on to purchasing larger quantities of product from wholesalers in their own financial interest. Given this market structure, it is not logical to infer from the fact that Limitless moved on that Mr. Sali therefore solicited away Limitless' business to Samuel. Limitless may simply have been successful enough to graduate to volume buying.

[33] Last, Mr. Melillo notes that Samuel has sold products to Turn and Burn, another one of Millennium's customers. No evidence was provided by the plaintiffs to establish that Mr. sale had knowledge of Samuel's sales to Turn and Burn or that he

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manages that account. Mr. Sali, on the other hand, has attested that he did not and does not.

[34] I find that the plaintiffs have failed to provide sufficient evidence establishing that Millennium has or will suffer irreparable harm as a result of Mr. Sali soliciting Millennium's clients or undercutting Millennium's pricing.

2. Acting as Account Manager for Existing Customers of Millennium

[35] Mr. Melillo alleges that Mr. Sali contravened the NSA by acting as an account manager or sales representative for a Millennium client, Metal Supermarket. Mr. Sali admits to acting as a sales representative for Metal Supermarket while at Samuel.

[36] Mr. Sali deposes that Metal Supermarket was a customer of Samuel prior to the execution of the SPA, and the plaintiffs have not contested that. The plaintiffs have not provided evidence as to how Mr. Sali has harmed Millennium by dealing with Metal Supermarket.

[37] I find there is no evidence that Millennium suffered harm as a result of Mr. Sali managing the account of Metal Supermarket for Samuel.

3. Using a Millennium Email Account to Solicit Millennium's Customers

[38] Mr. Melillo alleges that Mr. Sali continues to use his former Millennium email account for the purpose of offering Samuel's services to current or former clients of Millennium.

[39] In or around September 30, 2020, Mr. Sali reported to Mr. Melillo that he had deactivated his Millennium email account. Mr. Melillo deposes that he then sent an email to Mr. Sali's account to confirm that it was deactivated. When he did so, he received an automatic reply stating that the email did not exist.

[40] In support of his allegation that Mr. Sali continues to use his Millennium email, Mr. Mellilo states that, on March 17, 2022, he sent another email to the account and

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that this time he did not receive an automatic reply as he had before. No further evidence is provided.

[41] This evidence does not establish any irreparable harm. Proving that a deactivated account has ceased to send automated advisory replies is a far throw from establishing that Mr. Sali has been or is using that email address.

4. Ordering Materials Using Millennium's Property Without Authorization

[42] As noted, Millennium and Samuel both operate in the business of manufacturing and distributing industrial metal products. To better serve its customers, Millennium has a collection of proprietary extrusion dies, which are used to create metal products of specific shapes and dimensions. The creation of the dies is paid for by the customer seeking extruded product, not by Millennium. As is common practice in the industry, Millennium's extrusion dies are controlled by a separate company, Apex Aluminum Extrusions ("Apex"), that is responsible for processing raw materials using the dies once an order is placed by Millennium.

[43] Mr. Melillo alleges that, while working for Samuel, Mr. Sali continued to place orders with Apex using Millennium's extrusion dies. Notably, prior to the execution of the SPA, Millennium had granted authorization to Samuel to use certain of Millennium's extrusion dies for a shared customer. On June 21, 2021, Mr. Melillo revoked that authorization.

[44] Mr. Melillo provides evidence demonstrating that Samuel continued to place orders that used Millennium's extrusion dies after June 21, 2021. He further claims that Samuel's unauthorized use of the extrusion dies amounts to Mr. Sali using information acquired while working at Millennium for the benefit of Samuel.

[45] Mr. Melillo, in effect, infers from the fact that Samuel engaged in the unauthorized use of Millennium's extrusion dies that such use must have been the result of wrongdoing on the part of Mr. Sali. However, the plaintiffs have adduced insufficient evidence to support such an inference.

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[46] Further, there is no evidence that Mr. Sali was made aware that Mr. Melillo revoked Samuel's authorization to use Millennium's extrusion dies. There is also no evidence that any further orders were made on behalf of Samuel by the defendants after the cancellation of the authorization was expressly brought to the defendants' attention. There is also no evidence to suggest that any of the defendants will continue using Millennium's extrusion dies. Notably, Samuel and Mr. Sali both acknowledge that the plaintiffs take the position that the defendants no longer have authorization to use the dies.

[47] Finally, I note that it was not established to my satisfaction that Millennium even has the right to revoke an authorization where the result would be to deny access to the customer who paid for the die to be created for their custom extrusion work.

5. Hiring Millennium's Employees

[48] Mr. Melillo deposes that an employee of Millennium, Ms. Dena Peters, quit her employment and later began working for Alloyboy Laser Ltd., a company owned by Mr. Sali. The fact that an employee has changed her employer is not, in and of itself, any evidence that she was solicited to do so. The defendants have put forward no evidence relating to conduct by Mr. Sali.

6. Conclusion on Irreparable Harm

[49] In sum, the plaintiffs, through the affidavit of Mr. Melillo, have identified a series of acts engaged in by Mr. Sali which, they claim, form the evidentiary basis justifying the granting of an interlocutory injunction. I acknowledge that there remains a serious issue as to whether the identified conduct contravenes the NSA. However, the plaintiffs have failed to establish that there is a meaningful risk that they will be at risk of irreparable harm in the absence of an injunction.

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Balance of Convenience

[50] The analysis at the balance of convenience stage focuses on which party would suffer greater harm from the granting or refusal of the interlocutory injunction: *RJR* at para. 67.

[51] The plaintiffs argue that Samuel is a large company with many account managers and sales representatives. As such, Samuel would suffer little harm by an order enjoining Mr. Sali from providing services in a manner that harms Millennium. Further, the plaintiffs emphasize that the Sali Defendants were compensated fairly for agreeing to the terms of the NSA and therefore suffer no harm as a result of being required to comply with it.

[52] The defendants take the position that the plaintiffs, in effect, are not seeking an interim injunction but a final determination as to the correct interpretation of the NSA. The defendants argue that this is inappropriate on a preliminary application and therefore the balance of convenience favours refusal of the injunction.

[53] I agree with the defendants and find that the balance of convenience does not favour granting the injunction.

[54] First, as noted, the plaintiffs have not established that the defendants have engaged in any conduct that has caused them any actual harm to date.

[55] Second, as evidenced by the parties' opposing positions on the current application, the scope and effect of the Carveout Clause is contentious. The Carveout Clause permits Mr. Sali to be engaged by one of Millennium's established competitors – Samuel – provided his engagement does not harm Millennium. The Carveout Clause applies notwithstanding the general and typical competition and solicitation prohibitions that precede it. The question of what "harm" means in the context of the Carveout Clause is an open one. The Carveout Clause is expressly stated to be notwithstanding to the form of clauses that are generally understood to intended to address the very forms of harm the plaintiffs invoke in seeking this injunction.

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[56] What the plaintiffs actually seek is injunctive relief to enforce their asserted interpretation of the NSA on an interim basis. The defendants assert that the plaintiffs' interpretation negates the very benefit the Carveout Clause was designed to confer. This is a case in which both sides would find it difficult to prove monetary harm: the plaintiffs, if they succeeds on the merits, and the defendants should they seek damages on the undertaking proffered in support of this application. The appropriate avenue to resolve the parties' disagreement is the trial on the merits.

V. CONCLUSION

[57] For the reasons provided, the plaintiffs' application for an interlocutory injunction is dismissed.

[58] Costs of this application are awarded to the defendants in the cause.

"Tucker J."

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