IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Natural Trade Ltd. v. MYL Trading Ltd.,*
2023 BCSC 964

Date: 20230519
Docket: S1710413
Registry: Vancouver

Between:

Natural Trade Ltd. and Global Forest, S.A. de C.V.

Plaintiffs

And

MYL Trading Ltd., Michel Mizrach, Juan Carlos Quintana, Damian Niron, Eduardo Garcia Elizondo, Valley Lumber & Packing Trading LLC, Proterey, S.A. de C.V., Tarimas El Sabino S de RL, and Maderas Y Pallets EYM, S.A. de C.V.

Defendants

Before: The Honourable Justice G.P. Weatherill

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	M.F. Robson
No other appearances	
Place and Date of Hearing:	Vancouver, B.C. May 17–19, 2023
Place and Date of Judgment:	Vancouver, B.C. May 19, 2023

[1] **THE COURT:** These are my oral reasons for judgment. If a transcript is ordered, I reserve the right to edit them for clarity, but the result will not change.

[2] Firstly, I want to thank Mr. Robson for his helpful and comprehensive written submissions comprising some 178 pages, which I have filed as Exhibit A in this proceeding. They greatly assisted my understanding of the background, the evidence, and the legal issues surrounding this somewhat complex commercial case. I am grateful to Mr. Robson for the obvious hard work that went into the preparation of his submissions.

I. INTRODUCTION

[3] The plaintiffs obtained default judgment against six of the nine defendants in this action and now seek an assessment of damages against those six defendants. This action concerns the theft of highly privileged and confidential information (the "Confidential Information") by several of the defendants from the plaintiff Natural Trade Ltd. ("Natural Trade"). Three of the defendants—Michel Mizrach ("Mizrach"), Juan Carlos Quintana ("Quitana") and Damian Niron ("Niron")—are former employees of Natural Trade. The plaintiffs claim that these defendants secretly took the Confidential Information, then conspired together with the other defendants to cause financial harm to the plaintiffs by using it to unfairly compete with and undercut the plaintiffs' business.

[4] The plaintiffs allege a number of causes of action against the various personal and corporate defendants, including breach of employment, nondisclosure, and confidentiality agreements; breach of fiduciary duty; breach of the duty of fidelity and good faith; conspiracy to steal the plaintiffs' suppliers and customers inducing breach of contract; and unlawful interference with economic relations. I will refer to these causes of action collectively as the "Conspiracy".

[5] The plaintiffs seek significant damages by way of disgorgement of profits resulting from the defendants' unlawful conduct, general damages, special damages and punitive damages. Specifically, the plaintiffs claim that Mizrach, Quintana and Niron, personally and through the defendant MYL Trading Ltd. ("MYL"), a company

they incorporated to compete with the plaintiffs, conspired with the other defendants to undercut, undermine and take away the plaintiffs' business through the use of the Confidential Information. The other defendants are Eduardo Garcia Elizondo ("Elizondo") personally, and his companies: Valley Lumber & Packing Trading LLC ("Valley Lumber"); Proterey, S.A. de C.V. ("Proterey"); Tarimas El Sabino S de RL ("Tarimas"); and Maderas Y Pallets EYM, S.A. de C.V. ("EYM") (collectively, the "Elizondo Defendants").

[6] Default judgment was entered against Niron on August 13, 2019, and against the Elizondo Defendants on November 30, 2022 (collectively, the "Defaulting Defendants"). The default judgment against the Elizondo Defendants excludes the plaintiffs' claims for unpaid invoices as set out in the notice of civil claim because they have either subsequently been paid or are being dealt with in a separate lawsuit in Texas.

II. BACKGROUND

[7] The plaintiffs are sister companies in the business of marketing, distributing, brokering, importing, exporting, trading and selling lumber products, including softwood lumber, hardwood lumber, plywood, OSB panels, MDF, veneer, timber decking, and other building products. Natural Trade is headquartered in North Vancouver, and it exports lumber products to Global Forest, S.A. de C.V. ("Global Forest"), headquartered in Mexico.

[8] Global Forest imports lumber products for customers who do not have the capacity or permits to import them into Mexico. Natural Trade has been in the business for 18 years, and Global Forest has been in the business for ten years. Both have established close relationships with suppliers and customers who are located mainly in Mexico, the USA, and the Caribbean. Natural Trade's core business is exporting lumber products into the Mexican market.

[9] Mizrach was Natural Trade's chief financial officer from 2010 through April 2017, when he abruptly resigned. His last day of work was May 5, 2017. Quintana was a sales representative employed with Natural Trade who also abruptly resigned

in April 2017. Niron is Mizrach's cousin and is believed to currently reside in Argentina. At all material times, he was employed with Natural Trade as a purchasing agent in Argentina and Brazil. Niron, too, resigned his employment with Natural Trade in May 2017. Mizrach and Quintana signed employment contracts and confidentiality and nondisclosure agreements with Natural Trade. Niron did not have a written employment contract with Natural Trade, but did sign a confidentiality and nondisclosure agreement.

[10] Elizondo is a Texas-based businessman. At all material times, he owned and was a controlling mind of the defendants Valley Lumber, Proterey, Tarimas, and EYM. From September 2009 through May 2017, the Elizondo Defendants, save EYM, which is a Mexican corporation incorporated in January 2017 by Elizondo and Mizrach in order to compete with the plaintiffs, were very good customers of Natural Trade with annual sales averaging in the range of $1.2 to $1.3 million in US funds. MYL is a corporation owned and controlled by Mizrach and his spouse, Laura Canapa [phonetic]. Quintana is a director of MYL.

[11] Commencing at the latest in November 2016 and probably much earlier, the defendants jointly hatched a scheme to unfairly compete with the plaintiffs' lumber export and import business using the Confidential Information. The plaintiffs had spent years cultivating the Confidential Information, which concerned lumber suppliers and customers. The defendants used the Confidential Information to undercut the plaintiffs' prices and thereby take business and profits away from the plaintiffs. The defendants did this while Mizrach, Quintana, and Niron were employed by Natural Trade, Mizrach as its CFO.

[12] The plaintiffs did not discover this scheme until after an exhaustive and extensive investigation following the resignations of Mizrach, Quintana, and Niron. That investigation included the retaining of an external forensic computer expert and an external forensic accountant. In addition to participating in the Conspiracy, the plaintiffs bring a separate claim against Niron for other financial harms caused to the

plaintiffs, including causing lumber suppliers in Brazil and elsewhere to cancel orders and thereafter refuse to deal with the plaintiffs.

[13] On November 8, 2017, the plaintiffs filed this notice of civil claim against Mizrach, Quintana, MYL, and the Defaulting Defendants. Some defendants were served personally, some substitutionally pursuant to various orders for substitutional service. Mizrach, Quintana, and MYL filed responses to the civil claim and defended the action. To say that their defence was vigorous is an understatement. The Defaulting Defendants did not appear and did not defend. On May 18, 2021, the plaintiffs entered into a settlement agreement with Mizrach, Quintana, and MYL, and a notice of discontinuance was filed with respect to the claims against them. The settlement amount was $400,000.

[14] The plaintiffs now seek to prove damages against the Defaulting Defendants. The basis of the plaintiffs' claim is summarized in their notice of application filed on April 13, 2023, which was served substitutionally on the Defaulting Defendants, together with the supporting material. None of the Defaulting Defendants chose to attend the damage assessment hearing, and it proceeded undefended.

[15] After much effort and expense, the plaintiffs' computer forensic expert was able to confirm the plaintiffs' allegations that the defendants stole and made use of the Confidential Information for themselves, including information respecting Natural Trade's suppliers, customers and leads, shipping contacts, and contact information. Specifically, the computer forensic expert has confirmed that Mizrach took the Confidential Information while he was employed as Natural Trade's CFO.

III. DISCUSSION

[16] The voluminous evidence presented by the plaintiffs easily satisfies me of the existence of the Conspiracy and persuades me that it resulted in devastating financial consequences for the plaintiffs' business. The claims made against the Defaulting Defendants are similar but not identical factually, but it is clear that there were intentional acts of civil conspiracy at their core. The evidence against them is overwhelming. The plaintiffs are entitled to judgment and damages against the

Defaulting Defendants under all claimed causes of action. Specifically, the Defaulting Defendants, in concert with Mizrach, Quintana, and MYL, used the Confidential Information to:

a) identify and target the plaintiffs' best customers with the strongest financial position and the largest orders;

b) identify and contact the best suppliers;

c) use pricing and costing information from Natural Trade to negotiate lower prices with those suppliers than they would have otherwise been able to;

d) repeatedly contact decision-makers at the plaintiffs' customers, identified using the Confidential Information, with the aim of selling them lumber products that the customers would otherwise have purchased from the plaintiffs;

e) use the sales history of each customer to learn exactly which products in which quantities they had purchased in the past, and then offer to sell either those exact products or ones with similar qualities to that customer;

f) use the pricing information from the plaintiffs to offer prices to the customers below those that the plaintiffs were offering to the customers;

g) use customers' credit information, which belonged to the plaintiffs, to offer the customers equivalent or better credit terms than what the plaintiffs had offered in the past;

h) identify and contact the best logistics suppliers, including shipping and customs brokers, and then use the Confidential Information to provide the products sought by the customers with as little trouble as possible;

i) negotiate better terms, pricing, and costing with logistics suppliers than they would otherwise have been able to without the Confidential Information; and

j) generally unfairly compete with the plaintiffs using the Confidential Information against them.

[17] Further, I am easily persuaded that the plaintiffs are entitled to damages against Niron with respect to transactions he orchestrated with certain of the plaintiffs' Brazilian suppliers and Mexican customers, both while he was employed with Natural Trade and afterwards, by using the Confidential Information to undercut Natural Trade's pricing and sabotage Natural Trade's relationships with its suppliers and customers.

[18] It is impossible to know or quantify the dollar amount that the Conspiracy has caused the plaintiffs in lost profits, or what the plaintiffs' position would have been but for the Conspiracy. What is clear, however, is that the losses have been substantial. As a result of the Conspiracy, the plaintiffs have lost:

a) the right to control the Confidential Information;

b) significant sources of products supply, particularly from Brazil;

c) a significant number of customers;

d) an even more significant number of sales;

e) profit margins on the sales that they were able to make;

f) good will with their suppliers and customers; and

g) significant market share in certain markets, particularly in Mexico.

[19] As mentioned, the full extent of the losses and damages caused to the plaintiffs by the misconduct of the defendants will never be known with certainty. The main categories of losses relate to the following:

a) purchases and sales of lumber and lumber products by the defendants using the Confidential Information;

b) the virtually complete destruction of the plaintiffs' established market in the Reynosa area of Mexico;

c) lost sales to Valley Lumber, Proterey, and Tarimas;

d) purchases made by Niron of products from the plaintiffs' suppliers which were then sold by Niron to direct competitors of the plaintiffs, who are not parties to this action, for resale to the plaintiffs' buyers;

e) Niron's direction to its Brazilian suppliers to cancel open orders that those suppliers had with the plaintiffs after the Conspiracy had started; and

f) special damages incurred because of the Conspiracy and the interference with the contractual relations of the plaintiffs by Elizondo in relation to Proterey, Tarimas, and Valley Lumber.

[20] It serves no purpose to recite the detailed evidence of how the Conspiracy unfolded and how it has affected the plaintiffs' business. The voluminous affidavit materials filed in support of this application fully supports the plaintiffs' claim, and I agree with the plaintiffs' written submissions that summarize that evidence. Very clearly, Mizrach secretly downloaded highly confidential information owned by the plaintiffs and shared it with the other defendants. All defendants then used that information in concert to identify and target the plaintiffs' best customers and those with the strongest financial position and who typically placed the largest orders with the plaintiffs. The defendants were then able to identify and contact the best suppliers and use the plaintiffs' pricing and costs information to negotiate prices with those suppliers that they could not have otherwise reached.

[21] The default judgments entered against the Defaulting Defendants means that liability is established against them due to the deemed admission of all facts and mixed law and facts contained in the notice of civil claim. Additionally, the plaintiffs have provided substantial evidence upon which a conclusion is easily made that the deemed admissions in the notice of civil claim accord with reality and ought to stand. Even without the deemed admissions, the evidence is easily sufficient to make such

findings of fact against the defendants in relation to all claims advanced by the plaintiffs in this action. The evidence led by the plaintiffs substantiates not only their claims, but also the remedies sought in the notice of civil claim.

[22] For substantially the reasons set out in the material before me, the plaintiffs' fulsome written submissions and Mr. Robson's oral submissions, I accept that the plaintiffs are entitled to an order that the defendants be held jointly and severally liable to the plaintiffs for the Conspiracy as set out in the notice of civil claim.

[23] The Defaulting Defendants must answer to the plaintiffs in damages. The plaintiffs, obviously, bear the onus of proving their damages. The overall objective in assessing damages in a case such as this is to find a broadly equitable result. By its nature, it is also going to be a matter of estimations because it is impossible to calculate what the plaintiffs' sales and profits would have been in the ordinary course of business but for the defendants' illegal actions. The defendants chose not to attend the hearing, not to defend the action, and not to provide documents. Accordingly, the assessment of damages must be based on the best evidence available, which by necessity will require an assessment using best efforts not to duplicate the amounts.

[24] The difficulty a plaintiff has in determining damages does not excuse the wrongdoer for paying damages or disgorging profits. Where a defendant's wrongful conduct prevents the plaintiff from establishing its loss, adverse facts will be presumed. Where the defendants fail to keep or produce records that would or could establish the actual measure of damages, the court may draw inferences and make presumptions against them: *XY, LLC v. Canadian Topsires Selection Inc.*, 2016 BCSC 1095 at paras. 284–88.

[25] Here, the defendants created a very deliberate plan to unlawfully use the Confidential Information and otherwise act to damage the plaintiffs. In my view, disgorgement of the benefits the defendants gained as a result of their unlawful conduct is the most equitable solution in the circumstances, and it would be just and equitable to err on the side of a higher award to ensure that the defendants do not

benefit from their wrongful conduct. The doctrine of disgorgement is centred around the restoration of the *status quo*. The assessment of damages is measured not by what the plaintiff has lost but rather what the defendants have gained. As such, disgorgement is a remedy of restitution.

[26] I accept the plaintiffs' submissions that the disgorgement of profits in this case should not only be during the time Mizrach, Quintana, and Niron were employed by Natural Trade, but should include a reasonable period from when they resigned their employ in May 2017 and officially began competing with the plaintiffs in earnest. I say officially because it is clear on the evidence that the defendants were unofficially competing with the plaintiff starting at the very latest in November 2016 and probably as early as 2015. The disgorgement period must include that time as well.

[27] Right from when they left Natural Trade's employ and as a result of their use of the Confidential Information, they were able to hit the ground running without having to cultivate suppliers or customers of their own. In other words, the use of the Confidential Information gave the defendants a massive head start in securing customers and suppliers and earning significant profits.

[28] When assessing the amount of disgorgements of profits, the spring board doctrine operates to disallow a former employee's use of confidential information as a head start in post-employment competition with an ex-employer (*GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, at para. 135). On the basis of the evidence before me, supplemented by the case law to which Mr. Robson has referred, I am persuaded that the post-employment disgorgement period must be three years. In other words, from May 5, 2017 to May 4, 2020.

[29] Mr. Robson prepared a helpful summary of the total gross sales and imports of lumber products for the period January 1, 2017 to May 5, 2020, based on the evidence that was available and supplemented by best estimates of what those imports and gross sales were likely to be. That summary has been marked as Exhibit B. Based on that summary, the total sales of lumber products the defendants

achieved from January 1, 2017 to May 5, 2020, using an exchange rate from US dollars to Canadian dollars of 3.35, $36,018,417 Canadian.

[30] Given that the determination of the defendants' profits must be based on an assessment rather than a calculation, I have determined that an appropriate amount to assess as the defendants' gross sales is $35,000,000 Canadian for that period. Having considered the plaintiffs' submissions and the best evidence available as to the gross profits, the defendants earned or expected to earn on those sales between 15.42 percent and 24.27 percent. I assess the gross profits at 20 percent of gross sales, or $7 million Canadian.

[31] The defaulting defendants are joint tortfeasors among themselves and with Mizrach, Quintana, and MYL in relation to the claims of conspiracy and breach of confidence. As a result, each of the defaulting defendants are jointly and severally liable to pay the full amount of this award in relation to the claims of civil conspiracy and/or breach of confidence.

[32] The plaintiffs also seek punitive damages against the defaulting defendants. Punitive damages are appropriate when compensatory damages do not meet the objectives of retribution, deterrence, and denunciation of the defendants' conduct. The focus is not on the plaintiffs' loss but on the defendants' misconduct. While the disgorgement award I have made is substantial, it does not adequately address the highly reprehensible conduct of the Defaulting Defendants, in particular Niron and Elizondo. The plaintiffs are therefore entitled to punitive damages against the Defaulting Defendants, which I will assess in my summary to follow.

IV. RESULT

[33] The plaintiffs developed the Confidential Information over a period of years, including information about customers from whom they legitimately expected to have repeat and ongoing business and earn significant profits. That Confidential Information was privileged and valuable. The defendants' unauthorized use of that information put them in the position to seriously injure the plaintiffs' business, which

they did. It gave them a significant advantage over the plaintiffs, resulting in significant losses to the plaintiffs and significant ill-gotten profits for the defendants.

[34] Accordingly, taking into account the totality of the evidence, the defendants' illegal conduct, and the plaintiffs' able submissions, the plaintiffs have proven they are entitled to judgment as follows:

a) As against the Defaulting Defendants, jointly and severally, the plaintiffs will receive disgorgement of profits of $7 million Canadian that the defendants earned separately or together for the period January 1, 2017 to May 4, 2020. Given that this amount is an assessment of disgorgement profits earned by the defendants, the settlement amount of $400,000 paid by Mizrach, Quintana, and MYL to the plaintiffs must be deducted, leaving a balance of $6.6 million Canadian for the Defaulting Defendants.

b) As against the Defaulting Defendants, the plaintiffs are awarded special damages of $314,063.99 on a joint and several basis. The basis for those special damages is set out in detail in the written submissions filed as Exhibit A, and I do not propose to repeat it here.

c) As against Niron solely, the plaintiffs are awarded judgment in the amount of $1,010,447. Again, the basis for that amount is set out in the written submissions, and I will not repeat it here.

d) As against Niron, Elizondo, Proterey, EYM, for what I consider egregious behaviour as detailed in the written submissions, the plaintiffs are awarded punitive damages of $200,000 Canadian on a joint and several basis.

e) As against Valley Lumber, the plaintiffs are awarded punitive damages of $50,000 Canadian.

f) As against Tarimas, the plaintiffs are awarded punitive damages of $50,000 Canadian.

g) The plaintiffs are entitled to pre-judgment interest on all amounts from May 5, 2020 to today's date pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

h) The plaintiffs are also entitled to Scale B costs against the Defaulting Defendants in an amount to be assessed on a joint and several basis.

[35] Those are my reasons.

"G.P. Weatherill J."