

CITATION: Tar Heel Investments Inc. v. H.L. Staebler Company Limited et al, 2025 ONSC 240

COURT FILE NO.: CV-19-69132

DATE: January 10, 2025

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
TAR HEEL INVESTMENTS INC.) *S.F. Gleave and B. Needham, for the*
) *Plaintiff*
Plaintiff)
)
- and -)
)
H.L. STAEBLER COMPANY LIMITED,)
LISA ARSENEAU and DEBBIE SUTTON) *P.A.N. Gupta and M. Van Vliet, for*
) *the Defendants*
Defendants)
)
)
) **HEARD:** November 27, 29, 30,
) December 1, 4, 5, 6, 7 and 8, 2023;
) and March 4, 5 and 6, 2024 in
) Hamilton

2025 ONSC 240 (CanLII)

REASONS FOR DECISION

MacNeil J.:

Introduction

[1] The plaintiff, Tar Heel Investments Inc. (“Tar Heel”), is the corporate successor and assignee of Pearson Dunn Insurance Inc. (“PDI”) and advances “wrongful competition” claims as against the defendants. Tar Heel asserts an ownership, confidentiality, and proprietary interest in the transportation insurance book of business that was worked by the defendants, Lisa Arseneau (“Arseneau”) and Debbie Sutton (“Sutton”), from 2009 to 2015, while both were employed by PDI. At its core, the plaintiff’s claim is that Arseneau, supported by Sutton and in cooperation with the defendant, H.L. Staebler Company Limited (“Staebler”), sold the PDI transportation insurance book of business to Staebler using PDI’s confidential business information. Various causes of action are pleaded in the statement of claim.

[2] The defendants deny that PDI owned the transportation insurance book of business as alleged. They submit that Arseneau always owned her book of business and was entitled to deal with it as she saw fit, both before and after her departure from PDI. They also argue that there were no restrictions on Arseneau's ability to solicit the transportation insurance clients or compete with PDI after she left its employ, and that Staebler was entitled to enter into the transactions it did with Arseneau and Sutton.

[3] The action originally came on for trial commencing in November 2019 before another judge, with the trial decision being released on July 19, 2021. The findings and conclusions made therein are summarized in the decision of the Ontario Court of Appeal allowing the appeal and cross-appeal from that judgment and directing a new trial.

[4] A twelve-day trial was then held before me. After the close of evidence, the parties submitted written closing submissions.

THE PARTIES

[5] PDI was an independent brokerage that offered a full range of insurance and risk management services to its personal and commercial clients. It had offices in Stoney Creek, Hamilton, Mississauga and Woodbridge. PDI had a number of branch locations and its head office was in Hamilton. It had approximately 70 employees. A third of those employees were in a sales or producer role. PDI had a senior vice president in charge of operations, a vice president of finance, and several vice presidents responsible for various divisions of the company.

[6] George McCarter ("McCarter"), who was a witness at the trial for the plaintiff, was the principal of PDI at the material time. McCarter began working in the insurance brokers industry in 1984. In or around 2008, he bought out the partners of PDI and became owner, sole shareholder, and president of the business. In 2015, PDI was sold to Jones Brown Inc. ("Jones Brown"). McCarter's PDI shares were converted to shares in Jones Brown and he became a member of the board of directors and an executive of the company. Jones Brown was subsequently purchased by a different company in January 2019. McCarter did not have any further involvement after that purchase. He then began working for the plaintiff, Tar Heel. By an agreement dated December 20, 2018, Tar Heel was assigned the within litigation.

[7] The defendant Arseneau became involved in the transportation insurance sector in 1987 and is a specialist in trucking insurance. She began working with Kimberley & Associates in 1999 as a producer/salesperson but she had no written agreement. While there, Arseneau had a guaranteed salary and the company took off all source deductions and taxes. Russ Elliott ("Elliott") became an owner of Kimberley & Associates in or about 2004. Arseneau and Elliott decided to "strike up a partnership". The defendant Sutton, who also worked at Kimberley & Associates, and Arseneau became the "boots on the ground" and Elliott a "silent partner". Arseneau testified that she owned the clients in the book of business that she directly serviced at Kimberley & Associates. She left the company in 2009 to join PDI after some concerns with the financial viability of Kimberley & Associates came to her attention.

[8] Arseneau joined PDI as Manager of the Transportation Division commencing on June 1, 2009. She was employed in its Mississauga office until December 14, 2015, when she submitted a notice of resignation. That same day, she was walked out of the office with her access to PDI and its computer systems removed, and told that she would not be required to work the two weeks' notice she had provided. The next day, December 15, 2015, Arseneau joined Staebler as an employee. She then worked at Staebler's for 8 years producing trucking insurance policies, finding trucking clients, and servicing their insurance needs. Arseneau was called as a witness at the trial for the defendants.

[9] Sutton became an insurance broker in 1997 and has worked in the industry ever since. Around 2000, Sutton went to work at Kimberley & Associates doing predominantly transportation insurance, as a client service representative working with clients and underwriters. When Sutton joined Kimberley & Associates, Arseneau was already working there as a transportation producer. After Arseneau moved to PDI, Sutton also decided to join PDI assisting Arseneau in the transportation insurance division. Sutton was employed by PDI in its Mississauga office commencing June 1, 2009. She resigned on December 18, 2015. Her last day of work at PDI was January 1, 2016. Sutton joined Staebler as an employee effective January 4, 2016. Sutton was called as a witness at the trial for the defendants.

[10] Staebler is an Ontario insurance broker. Kim Philpott ("Philpott") was the President of the company for about 12 or 13 years before retiring. As of her testifying at the trial, she had been retired from Staebler for about 3-4 years. Philpott also testified at trial on behalf of the defendants.

CREDIBILITY

[11] The court heard testimony from four fact witnesses and two experts. Generally, I found all of the witnesses who testified to be credible. There were some reliability issues that arose which I find primarily stemmed from the degradation of memories due to the passage of time, as this was the second trial of this matter and took place more than eight years after the events in question.

[12] The plaintiff raised a number of challenges to the credibility of Arseneau and the other fact witnesses who testified on behalf of the defendants. The defendants also challenged the credibility and reliability of McCarter in many aspects of his evidence. Very few of the findings of fact on which the outcome of the case depends required an assessment of credibility. In those instances in which a particular finding of fact required resolution of a credibility issue, I have indicated whose evidence I preferred and why.

FACTS

Arseneau's Move to PDI

[13] In 2009, PDI had an existing transportation insurance business which generated approximately \$100,000 in commissions.

[14] In early April 2009, McCarter received a call from Arseneau requesting a meeting. They met for lunch during the first week of April. During the lunch meeting, Arseneau described her

concerns about the brokerage where she was then working, Kimberley & Associates. Arseneau expressed an interest in joining PDI, along with her co-workers, Sutton and A. Bartlett (“Bartlett”), at the same salaries that they were then making and with all of their expenses paid. Arseneau was not looking to take on any sort of risk. She also brought up a journal article about McCarter and the Broker Support Network (“BSN”) that he had created. The BSN was something that appealed to Arseneau and she wanted to find out more about it.

[15] Brokers signed a contract with PDI to become part of the BSN. To be a party to the BSN, one had to be a licensed brokerage with an incorporated business operating with its own client list, annual revenues, and employees. PDI provided to the BSN partners the “backstage” of the brokerage operations, including accounting, human resources, technology, and access to PDI’s group of insurance companies. The BSN partner continued to perform as a brokerage doing the sales side of the business and managing their clients, while PDI took care of the operations part of their business for them, for a 2% co-commission. Under the BSN agreement, all commission income for a BSN would flow into PDI and then be managed in a subcategory under PDI’s broker management system. Internal financial controls created a separate income statement. All of the BSN partner’s income, less their co-commission fee and all their expenses, were tracked in a monthly statement. PDI bought one master Errors and Omissions policy for itself and its BSNs. For a BSN partner, a formula was used to properly allocate a charge back for its E&O insurance. Outside a BSN partner, all insurance costs were borne by PDI for all of its employees/staff. BSN producers and their staff had to be employees of PDI, in order to satisfy RIBO requirements.

[16] RIBO is the acronym for the Registered Insurance Brokers of Ontario, a self-governing organization of general insurance brokers in Ontario. RIBO regulates the licensing, professional competence, ethical conduct and insurance related financial obligations of insurance brokers in the Province. No person can act as an insurance broker unless they are a registered insurance broker governed by RIBO.

[17] On April 7, 2009, after their lunch meeting, McCarter sent Arseneau an email. In it, he wrote, “I am very excited about the prospects of you and your assistant joining PDI in a new venture that I believe will be a long term and very profitable relationship.” He asked her to consider how she envisions success in their “business relationship”. McCarter then proceeded to set out his own proposal, as follows:

- 2) I am suggesting that we incorporate a new company to make this a clean and separate entity. How do you see the:
 - a. Ownership structure
 - b. Relationship with PDI (I am attaching a copy of our Broker Support Network agreement which we currently use)
 - c. Revenue and expense estimates
 - d. Use of employment and partnership agreements (I know that this is important to you)
 - e. A name for the new company. I have Transportation Risk and Incident Management Inc. and Transportation Risk and Insurance Protection Inc. available for consideration. Kim likes the TRIP acronym.

- f. I have great relationships with our legal and accounting firms. Do you have any problems with us using them? [Emphasis added.]

McCarter requested that Arseneau provide him with a list of insurers and volumes. He also commented that they will need to develop a plan for her exit from Kimberley & Associates. Since a copy of a blank BSN agreement was inadvertently not attached to this email, McCarter sent a copy of same to Arseneau the next day to review.

[18] After sending this correspondence, McCarter went ahead on his own and incorporated a new company, TRIPS – Transportation Risk and Insurance Protection Inc., and had it registered as a business. He testified that he did this in contemplation of having Arseneau and Sutton work with that new company.

[19] Sutton wrote to McCarter by email dated April 28, 2009, providing the address and compensation information for herself and Bartlett. She explained how they did not wish to miss a pay cycle if possible. As a result, start dates for their employment at PDI were arranged so that they would receive their bi-weekly pay in a timely manner. Sutton also provided other information regarding commissions for four clients that Sutton received pursuant to a grandfathered agreement.

[20] On April 29, 2009, Arseneau sent McCarter an email setting out a business projection. It was a spreadsheet showing monthly information, with a projected year-end total, describing annuals, premiums, commissions, summaries of revenue, payroll targets, and net income. The projection sheet showed total annual commission income of \$263,923, estimated premiums of \$2.6 million, and a total annual payroll of \$170,004. The net revenue was shown as \$92,059.

[21] McCarter and Arseneau had further communications about their plans for the new business relationship and her expectations.

[22] On May 22, 2009, an offer of employment was sent to Sutton by PDI for the position of Account Director commencing June 1, 2009, for an annual salary of \$60,000. Sutton accepted the offer on May 25, 2009.

[23] On May 31, 2009, McCarter sent an email to Arseneau attaching an initial business plan he had drafted, entitled “Draft Business Plan for first 30 days”. It read:

Transportation Risk and Insurance Protection Inc.

Initial Business Plan:

- Prepare an announcement letter to PDI staff and to the industry
- Notify RIBO of employment of Lisa, Debbie, and [Bartlett]
- Notify RIBO of the new BSN Transportation Risk and Insurance Protection o/b Pearson Dunn Insurance Inc.

- Finalize employment contracts:
 - Debbie and [Bartlett] are complete except for their employee benefit matter. They have a cheaper and broader plan under the OTA. How do we handle this?
 - Lisa will sign the new Produce[r] contract once finalized
- Review lease once our offer to lease 1330 Mid-Way Drive, Mississauga is accepted
- Develop an integration plan with Joe and [L.B.] which should include [L.U.] and Eva. We may be able to transition Eva out of the department and back into the IBU department (to manage pregnancy leaves) as [Bartlett] should be able to handle the AA duties for all.
- Finalize the internal coding and notify insurers such as AXA, Markel, Old Republic, Zurich, and Aviva. I have also secured a restrictive contract with Lombard to allow Lisa to continue the Buy down program currently underwritten by Lombard.
- Order business cards
- Develop a plan to respond to Lisa's clients who will want to transfer to PDI/TRIP as soon as possible
- The new company has been incorporated through Ross McBride. The ownership is PDI/GM. I have agreed with Lisa that her book of business will be recognized as hers from an ownership perspective. We will structure this around the employment contract.
- PDI will enter into a new BSN agreement with TRIP.
- GM and Lisa will meet with Stan Chambers (current DI for Kimberley) to advise [*sic*] of a way to recognize all of his support of Lisa/Kimberley in the past by way of a form of compensation. [Emphasis added.]

[24] McCarter testified that the purpose of this "Initial Business Plan" was to move things along quickly. Arseneau and Sutton did not want to miss a pay period so there was some urgency and there were a number of things that had to be done. His evidence was that this was a draft plan though and still a work in progress. There is nothing in the record to show that Arseneau responded to McCarter's email of May 31, 2009.

[25] Arseneau and Sutton began work at PDI on June 1, 2009, taking over management of the transportation division. The expectation was that they would manage existing clients of PDI and of Kimberley & Associates who followed Arseneau to PDI, and start to build their own routines and relationships. PDI sent out an announcement to its insurance partners, dated June 1, 2009,

advising that Arseneau, Sutton and Bartlett had joined PDI. It informed that they would operate under PDI's "newly formed company, Transportation Risk and Insurance Protection Inc. (TRIP)" in a Mississauga office location.

[26] At TRIP, Arseneau managed Sutton and Bartlett as her team. Arseneau managed the forward-facing client relationships with new and existing clients, working at maintaining and building the relationships and renewing policies. Sutton managed the day-to-day activities of the clients (e.g., changing policies, certificates, taking a claim notice).

[27] On June 1, 2009, the same day she had commenced her employment with PDI, Sutton signed a two-page employment contract, and she was presented with a restrictive covenant agreement which she was required to sign.

[28] Sutton signed the restrictive covenant agreement with PDI on June 1, 2009, whereby she agreed to abide by the prescribed confidentiality, non-competition and non-solicitation covenants set out therein. Among its terms were the following:

5. "Confidential Information" means all of the materials and information (whether or not reduced to writing and whether or not patentable or protected by copyright) provided by the Employer to the Employee, or which is available to the Employee during the course of the Employee's employment with the Employer, including, but not limited to, the following:
 - (a) customer lists, records and statistics;
 - (b) profits, costs and pricing data, sales policies, marketing plans and strategies, and any other information relating to the distribution, sale or supply of the Employer's services and/or products;
 - (c) personnel information ...
 - (d) records and other materials in the form of notes, letters, data, tapes, reference items, models, sketches, blueprints, drawings and writings, in any way relating to the Employer's business and any and all copies or extracts thereof; and
 - (e) any other materials or information related to the Employer's business which is not generally known to others,

regardless of whether such materials or information are in paper or electronic format or any other format.

...

8. Accordingly, the Employee agrees as follows:
 - (a) Both during and after the termination of this Agreement, the Employee will:
 - (i) keep in confidence all Confidential Information and not, directly or indirectly, disclose any Confidential Information to any person whatsoever;

- (ii) not, directly or indirectly, use any Confidential Information for the Employee's own benefit or for the benefit of any person or business whatsoever; and
- (iii) not, directly or indirectly, use or copy any Confidential Information for any reason,

except for the purpose of receiving training from the Employer or performing duties on behalf of the Employer or with the Employer's written consent.

- (b) In the event of the termination of this Agreement, for any reason or cause, the Employee agrees to promptly deliver to the Employer all Confidential Information in the Employee's possession and the Employee will not take, copy or retain any records or other materials in any way relating to any Confidential Information without the Employer's prior written permission.

...

- (f) The Employer agrees that the obligations imposed upon the Employee in respect of Confidential Information shall not apply to information which:

...

- (iv) is already legitimately known to the Employee prior to disclosure;

...

10. The Employee agrees with the Employer that, upon the termination of her employment with the Employer, for whatever reason or cause, the Employee shall not, for a period of one year, directly or indirectly, as principal, agent, shareholder, partner, or employee solicit any Customer of the Employer, for sales or services of a nature or kind similar to sales or services offered by the Employer to Customers of the Employer.

[29] Arseneau joined PDI as an employee because McCarter advised her that this was a requirement of RIBO. At her request, she was paid by way of a salary instead of commission because she wanted the security of a guaranteed income. Arseneau had broad discretion in managing and operating TRIP which was located in Mississauga largely to accommodate Arseneau. She did not engage in the organization and management of any of the other divisions or activities of PDI. The success of TRIP depended almost entirely on the efforts of Arseneau and her immediate team. While some other PDI employees did assist with TRIP over the years, their contribution appears to have been limited.

[30] As of July 20, 2009, Arseneau still did not have a signed agreement with PDI. That evening, at 6:18 PM, Arseneau sent an email to McCarter and others at PDI, setting out her comments regarding a recent meeting that had been held to discuss their working arrangement and a draft employment agreement that had been provided to her for review. The email reads (with emphasis added):

Hello All,

I apologize for the delay in getting this to you, and hope that you will find it complete:

After our meeting I looked over the employment agreement and then went back over the emails between George and I dating back to May 2009. I feel our agreement in principle has turned into a simple employment arrangement and I and my staff have been hired by PDI. This is not to say that that is not desirable, however, it's not really what I had in mind when I was [sic] decided to leave Kimberley.

In all fairness, the move has not gone exactly as planned and the JDIMI involvement has been an unexpected challenge. As discussed, the protection afforded us by PDI and getting it out there that we are employees is a good move, externally, however, for me it's not what I want out of our relationship.

Your suggestion of a BSN is a large part of the attraction for me to PDI and although I have not been able to bring all of the business over that I wanted to right away, I still believe that we intended it to be that way and it is not. Below is an email discussing this and I was hoping to keep it a little closer to the below than to our last discussion.

After reading the ATBS press release and the [sic] especially the industry structure that was sent to Deb today, I feel that we have moved very far away from what we initially discussed. It has Lynn being a larger part of TRIP than even Deb and I'm not sure, throughout all of our discussions, that [sic] when that was decided. Of course we want to gel with PDI and the Transportation area has great potential, however, we are an accomplished team in our own right and saw ourselves lending our experience to better both our companies. I know that PDI has to think "big Picture" as far as bodies and staffing, but I didn't really see us as being what has been described. I don't want to sound ungrateful, but how do your other BSN's work? Are they considered part of PDI to the extent of that which you have described us?

I know we spoke of owning my book and having a retirement plan so to speak, without the risk or expenses, however, I don't envision myself as simply a producer who owns their book. I was, in a certain sense, an owner for six years, albeit without a written contract, and this seems to be going backwards for me. I mean no disrespect to anyone, and appreciate all the support and guidance PDI has shown already.

My plan has always been to remain a business owner and to partner with a company exactly like PDI and hope we can come to an agreement that stays true to both our plans.

Excerpt from email from George:

- 2) I am suggesting that we incorporate a new company to make this a clean and separate entity. How do you see the:

- a. Ownership structure
- b. Relationship with PDI (I am attaching a copy of our Broker Support Network agreement which we currently use)
- c. Revenue and expense estimates
- d. Use of employment and partnership agreements (I know that this is important to you)
- e. A name for the new company. I have Transportation Risk and Incident Management Inc. and Transportation Risk and Insurance Protection Inc. available for consideration. Kim likes the TRIP acronym.
- f. I have great relationships with our legal and accounting firms. Do you have any problems with us using them?

Thank you for your time and I look forward to discussing this further. ...

Best regards,
Lis

[31] Shortly thereafter, on July 20, 2009 at 6:44 PM, McCarter responded to Arseneau's email, copying J. Fairburn ("Fairburn"), then Chief Operating Officer of PDI. His response reads (with emphasis added):

Hi Lisa,

I appreciate your comments and will gladly continue our discussions. Let me just make a few points to consider:

- The addition of Lynn was explained to Debbie as we are considering her and/or book to be a part of TRIP. She is in no way above Debbie and I thought that I was clear that this is just a first draft and we will finalize when you get back.
- The registered name and trade marking for TRIP is the property of PDI and has been for some time. I have had this name since before Mike and Dave.
- The difference between the BSN and this structure is minimal. I will be happy to explain both more fully. The most significant issue is to stay within the RIBO guidelines and this means no matter what (BSN's included) everyone is an employee of PDI.
- I have always tried to keep your original wish list in place to provide a sound brokerage to support your clients, to provide employment for Debbie and [Bartlett], to ensure your compensation structure, and to allow you some sort of value for your portfolio down the road. There are many ways to approach this, but from experience, if we keep it simple and document it properly, we all get what we want.
- Your role in TRIP and within PDI will be significant. You will be recognized by the insurance industry as such.

Lisa, I respect your comments and have promised you that we will be fair and we will not ever allow what has happened to you in the past to occur again. I do

however, need to get something to Ray by Wednesday. The final structure of TRIP can still be altered.

Everything has moved quickly and these matters are better discussed in person. If you would like, I can call tomorrow.

George

[32] Some more time passed without any agreement on TRIP's business structure. On November 17, 2009 at 7:15 AM, Arseneau sent an email to McCarter and Fairburn regarding a meeting held the day prior. It reads:

Good Morning Jenny, George,

I have gone over my notes from yesterday's meeting and would firstly like to make sure I have taken with me the information as it was presented. Below is what I understand from your presentation:

TRIP

REVENUE

- LA [Lisa Arseneau] Book
- PDI Book
- New Business LA
- New Business Referral PDI Producers – 85% for simple hand off, 65% for relationship
- Centre Of Influence Referrals – not sure what commissionable value, if any

EXPENSES (to be paid solely by TRIP)

- Staff Salaries, benefits (car allowance, cell and health benefits)
- Overhead costs – rent, utilities, telephone, etc.
- Head Office Expense charge back (3%?)
- Marketing
- Co-Commissions to PDI 15% and 35%
- Another 25% to PDI for Pre-Tax calculations

After all expenses paid as above, a bonus pool or profit would then be split 50/50 between TRIP and PDI. Out of their 50%, only TRIP further distributes to staff a "bonus".

Before I go any further, could you both please let me know if I have captured the facts as presented yesterday? That would be great ...

[33] Nothing was finalized between the parties as a result of the November 2009 meeting. Further time passed.

[34] Subsequently, in preparation for a meeting with Arseneau to be held on June 14, 2010, McCarter prepared a discussion paper regarding a review of TRIP and the transportation division. It read:

TRIP PROFIT CENTRE

June 14, 2010 – Meeting with Lisa Arseneau

For discussion purposes only:

1. Lisa Arseneau – Employment Contract

- * Determination of base salary
- * Benefits offered by PDI
 - * auto allowance
 - * cell phone
 - * internet access
 - * group benefits plan
- * Calculation and payment of commissions

2. Determination of PDI Direct Expenses & Revenue

PDI Expenses	PDI Revenue
<ul style="list-style-type: none"> • employment cost • travel & entertainment • office occupancy • E&O Insurance • administration • postage • courier • IT • key man life insurance • all others specifically identified to TRIP profit centre 	<ul style="list-style-type: none"> • all revenue excess of 25% EBITDA to be split 50/50 with TRIP • percentage allocated to Lisa and staff • allocation of clients referred by PDI <ul style="list-style-type: none"> • 65% to TRIP • 35% to PDI • allocation of clients referred by TRIP to PDI (CMP, personal lines, VIP, group home & auto) <ul style="list-style-type: none"> • 65% to PDI • 35% to Trip • recovery of PDI capital contributions and costs to TRIP profit centre

3. Lisa Arseneau – Long Term Retirement Plan

- * Vesting period to ensure recovery of PDI capital contributions and costs
- * Amount payable upon retirement
- * Valuation of TRIP book of business

- * First rights in event of offer to purchase or sale of TRIP
- * Obligations on termination of agreement

[35] McCarter testified that, in preparing this discussion paper, he was trying to show existing expenses and revenues in order to have a discussion with Arseneau around how they could structure TRIP. This was a projection of how the entity would work in the future.

[36] At the June 14, 2010 meeting, McCarter and Arseneau discussed the key points raised in the discussion paper, including an amount payable to Arseneau upon her retirement, valuation of the TRIP book of business, and first rights of refusal in the event of a sale of TRIP. McCarter testified that his view was that, if they were to build something new, PDI had already invested quite a bit of capital to this date so anything going forward would have to be recovered. Even after this meeting, however, no firm agreement was reached on the structure of TRIP or on an employment contract, bonus plan or retirement plan for Arseneau.

[37] Significant time passed until another meeting was held on September 20, 2011 to discuss Arseneau's contract. McCarter's evidence was that this was intended to be an employment contract and PDI had retained a lawyer, M. Wallace ("Ms. Wallace"), to draft the employment contract. Notes from this meeting, as taken by Arseneau, indicate:

1. Nest Egg – Dec. 31/2010 [with] multiple of 2X's – min walk-a-way
2. If I leave I go [with] what I brought
3. Greater #1 or 25% of present day value. Paid over 3 year period – First + 25 + 25

[38] McCarter testified that he understands the reference to "Nest Egg" to reflect a retirement allowance based on commission incomes that followed Arseneau from Kimberley & Associates to PDI as of the year-end December 31, 2010, calculated at a multiple of 2, which would be her minimum walk-away; it would be paid over a 3-year period. McCarter testified that, as at this time, he believed they were going to continue their discussions about the proposed "TRIP Profit Centre", that had been raised at the June 14, 2010 meeting, tied to an employment contract for Arseneau.

[39] PDI and Arseneau did not come to any agreement at the meeting of September 20, 2011.

[40] On December 23, 2011, Sutton signed an offer of continued employment received from PDI. It contained many of the same terms, duties and obligations as set out in the first agreement she had signed, and increased her annual salary to \$62,000.00, amended a commission term respecting former Kimberley & Associates accounts, and added a term that she would receive 25% of the brokerage's commission for new business that was referred to her.

[41] For the period October 2011 to January 2014, there do not appear to have been any significant efforts made to finalize a written agreement between Arseneau and PDI.

[42] By an internal email sent out on September 5, 2012 by A. McFarland, now the Chief Operating Officer of PDI ("McFarland"), PDI announced a number of promotions including that Arseneau had been promoted to Vice President Transportation. The evidence was that nothing changed in relation to Arseneau's role and responsibilities at TRIP or PDI with this title change.

[43] On October 29, 2012, Arseneau signed a PDI Employee Acknowledgement Form. The stated purpose of the form was to confirm receipt and review of PDI's employment manual, restrictive covenant agreement, computer technology usage policies, and AODA policy and customer service standards. Employees were expected to read and familiarize themselves with those documents and comply with them. The form stated that failure or refusal to sign it could be grounds for dismissal. As of that date, Arseneau still did not have a producer/employment contract, and she had not signed any restrictive covenant agreement.

[44] On October 30, 2012, Sutton signed her copy of the PDI Employee Acknowledgement Form which signified her agreement to comply with PDI's employment manual, standards and policies, including the Restrictive Covenant Agreement she had previously signed. Sutton testified that she understood that the form was needed in order to make her personnel file complete. The employee manual, AODA, and computer technology policies were available on the PDI system to read.

[45] As of January 2014, there was still no written agreement between PDI and Arseneau and, as McCarter testified, there were "still things being discussed".

[46] By email sent to McFarland and McCarter on January 9, 2014 at 9:05 PM, under the subject line: Contract and Other Sundries, Arseneau wrote, among other things (with emphasis added):

Hi Guys,

First, I'd like to thank you both for, what I know is, your very valuable time. I can't tell you how hard this is. You both have been so solid with me and I just hate causing this kind of noise. I wonder if we could table this for a bit. George, as we talked about today, I'd be grateful for an across the table conversation. Theo, I hope you understand. We have gotten so far from where we started that it's almost hard for me to remember why I came to you George.

Theo, I promised you some form of engagement and I keep my word. I am not being stubborn, I am truly trying to navigate this in a way that shows you the respect that I have for both you and George and for PDI.

...

[47] McCarter responded to Arseneau by an email sent on January 10, 2014 at 6:48 AM, writing (with emphasis added):

Good morning Lisa,

No problem, we understand that right now may not be the right time. Let's take a break from these discussions for now. However, it is imperative that we finalize. Together, we have accomplished a lot in spite of many challenges. We faced each challenge with support, openness, and encouragement. This has gone both ways and I always appreciated your support and encouragement for me as I faced other challenges with this company.

TRIP is a player in the transportation industry and will continue to grow. I look forward to our doing this as a team and celebrating our successes.

We will have our sit down in the very near future. ...

[48] McCarter could not recall the discussions that he had with Arseneau in January 2014, but he agreed that there were continued discussions with her. On cross-examination, he further agreed that Arseneau wanted ownership of the Kimberley & Associates book she brought to PDI and that “she always referred to ownership”.

[49] McCarter testified that at one of PDI’s annual planning meetings, he spoke with Arseneau and told her that he continued to have concerns about there being no signed agreement between her and PDI. As well, they talked about retirement, and what would happen upon death or disability. The triggering events of death and disability concerned him because PDI would be in a predicament if either of those events happened and there was no signed agreement. As a result, McCarter wanted to add death and disability to Arseneau’s agreement, and he expressed that to her. Arseneau agreed it was important. He stated that the expectation was that they would continue discussions to finalize retirement, death and disability. However, despite this, no agreement was ever concluded before Arseneau left PDI in December 2015.

[50] From 2009-2015, the premiums of TRIP’s transportation clients were paid into PDI’s accounting department. Those premiums were not treated any differently than any other clients of PDI.

[51] PDI had a broker management system (“BMS”) which is a software operating system that tracks client information, policy information, insurance company, premiums paid, and commission retained. Everyone in the company had access to use the BMS using a password and sign-in privileges, as it was integral to PDI’s daily operations in accordance with their job responsibilities. Arseneau only had access to the TRIP division information contained within the system. McCarter testified that the BMS information was considered confidential to PDI and was for no use other than activities for PDI.

[52] As part of the tracking in the BMS, there was a code for each producer. Arseneau’s code was “LAC” and the system tracked all clients for which she was directly responsible for managing.

[53] McCarter began pursuing the sale of PDI to Jones Brown in the second quarter of 2014. His evidence was that it took 6-8 months to negotiate the Jones Brown deal and that he never told Arseneau about a potential sale of the business which included TRIP.

[54] The closing date for the Jones Brown purchase of all of the shares of PDI was June 19, 2015. In the purchase agreement, PDI had disclosed that Arseneau, as a producer, “does not have any written agreement but she is entitled to the payment in the future of a retirement bonus for certain accounts.”

[55] Once the Jones Brown closing happened, there was an announcement of the sale made to PDI staff, and Arseneau found out about the sale at the same time. Later, on October 6, 2015,

McCarter sent a letter to Arseneau. In it, he made an offer “in consideration for the Original Book” that Arseneau had transferred from Kimberley & Associates in the form of \$150,000 worth of shares in Jones Brown. (McCarter testified that, by this offer, PDI/Jones Brown was attempting to make sure they had consistency with all employment contracts and any types of special considerations that might exist with producers.) McCarter further wrote in the letter:

[Jones Brown] is in the final stages of a new compensation model that will be offered to you. The compensation structure is on a variable basis, and will likely have commission of 40% on new business and 20% on renewal business. We can discuss additional compensation components such as marketing expenses and mobile phone. We'll provide you with a new employment contract as soon as we finalize the new compensation plan. ...

[56] On December 2, 2015, Arseneau responded to the October 6, 2015 offer by an email she sent to McCarter, McFarland, and two executives of Jones Brown. She attached a letter she had written, dated December 1, 2015, which reads (with emphasis added):

Dear George McCarter

To follow up our meeting of October 6th, 2015, I wish to counter with the following:

In 2009 it was agreed that I would bring my book of business from Kimberley & Associates to Pearson Dunn under the company to be known as TRIP Insurance Brokers. The attached list is the actual Original Book and is markedly different than the list supplied by you on October 6th, 2015. [M.H.] has since “re-run” the numbers and, but for approx. \$25K, we are pretty much in agreement.

...

In regards to your paragraph regarding Original Book today being \$112,435. I do not understand the valuation of original book six years later. If we want to look at six years later then let's look at book today. We received our numbers last Monday, and it is \$450,182 commission revenue up to October 2014. That number increases by another \$65,300 up to and including November new Biz and renewal.

To address your next paragraph, I have no idea what type of shares these are or what their value is. Nor do I agree with the dollar amount that is being offered. Also, to tie our agreement into a go forward agreement is not what I wish to do.

We have discussed this and I want a clear and concise rendering of past and future. I feel strongly that our Pearson Dunn life needs to be concluded before I consider a Jones Brown life. Pardon the simplistic view, however, it is simple to me and my future. I am now expecting to be paid for what we agreed back in '09. 2 x's the value of it then (\$330 X's 2 = \$660K). As you will note from the attachments (number 003), I am conceding the \$25K that I mention above. I do not wish this to have anything to do with Jones Brown or their Shares.

Furthermore, I am unclear as to what my compensation package looks like. As you know I have historically preferred a set salary plus expenses. I am getting the feeling that this will not be possible with Jones Brown. If so, is the 40/20 split to be supplemented with expenses being paid?

...

[57] McCarter testified that, by this response, he understood Arseneau to be saying that she was expecting to be paid 2X the value of the original Kimberley & Associates book at \$330,000, for a total of \$660,000. His testimony was that Arseneau was “alluding that the book of business in 2009, that we said was \$112,435, is actually \$330,000” and that she was looking for something similar in the share offer being put forward. McCarter’s evidence was that the 2X multiple was used in the context of their retirement plan discussions with respect to the commission earned from Kimberley clients, however, PDI and Arseneau never had “a written agreement” that PDI would pay her 2X what she says the commission was.

[58] There is no evidence that either PDI or Jones Brown responded to Arseneau’s December 2, 2015 communication. McCarter testified that he never met with Arseneau to discuss it.

[59] On December 14, 2015, Arseneau submitted her letter of resignation to PDI, giving two weeks’ notice. Arseneau did not work out her two weeks’ notice, however, because PDI accepted the resignation and then escorted Arseneau off the premises and told her she was not required to work out her notice period. McCarter’s evidence was that this was the normal procedure when an employee resigned since there was no benefit to either party to have the resigning employee in the office.

The Move to Staebler

[60] Arseneau and Philpott had known each other professionally for many years before Arseneau moved to Staebler, because of their work in the insurance industry; they would also see each other at industry conventions. At a convention in Toronto in October 2015, they bumped into each other and, when Philpott asked Arseneau how things were, Arseneau replied “not good”. She stated that she was upset about the Jones Brown situation at PDI. Philpott said they should make a plan to have lunch.

[61] Philpott testified that she believed Arseneau was employed directly by “a PDI subsidiary company called TRIP” and that she was “a principal of sorts in TRIP” and its transportation expert.

[62] On November 3, 2015, Philpott and Arseneau met up for an approximately 2-hour lunch. Arseneau talked about her time at PDI and her role and responsibilities there. She talked about being quite concerned regarding the Jones Brown acquisition of PDI. Her concern was that she felt her book of business had been sold out from under her without her participating in any discussion. They spoke about what Staebler could offer and what Arseneau was looking for. Arseneau indicated that she still had a preference to own her own book, but Philpott told her that could not happen at Staebler. They also spoke about a remuneration package for Arseneau.

[63] Philpott's evidence was that, at the lunch meeting, Arseneau talked about "the BSN with PDI" being a "protracted sort of negotiation" that was never actually documented. Arseneau had become frustrated and skeptical about it. Philpott asked Arseneau if she still owned her own book of business and if she had signed a restrictive covenant with PDI. Arseneau confirmed that she had not signed anything in the form of a restrictive covenant and there had been no change to the ownership of her book. The lunch ended with Arseneau being interested to see Staebler's offer. Philpott said she would put together and send to Arseneau an overview of things, including an employment contract, standard retirement terms, and benefits, plus terms for the potential purchase of Arseneau's book. Philpott testified that all of Staebler's producers work for the company and do not own their books; all producers sign restrictive covenants.

[64] Philpott subsequently sent to Arseneau an overview of the Staebler proposition which involved the purchase of Arseneau's book of business, valued at roughly \$500,000 in gross annual commissions, for 1.5 X the annual commissions amount. The proposed employment contract included a backstop salary of \$150,000 annually for 2 years. Staebler also offered Arseneau a producer retirement buy-out at 2X gross annual commissions.

[65] On December 3, 2015, Philpott emailed to Arseneau a letter of intent with Staebler. The letter of intent showed an estimated book value based on gross written premiums of \$5,380,000, gross commissions of \$538,000, for a purchase price at \$807,000 using the 1.5 X multiple that had been discussed. The letter also included a non-competition, non-disclosure and non-solicitation paragraph which Arseneau was expected to agree to. She was also expected to sign a producer contract of employment. At the point when the letter of intent was signed, Philpott had not seen any list of clients or renewal list from Arseneau.

[66] Philpott testified that Staebler would not have bought the client list from Arseneau without Arseneau agreeing to come work at Staebler because the list would have had minimal value without her. The value of the book of business was its goodwill, being the relationship between the clients and Arseneau as the producer. The client has free will and can choose whether they want to stay with their current broker or go to another brokerage; without the producer, the goodwill does not exist.

[67] Philpott testified that she introduced Arseneau to MNP, the accountants who would be involved in assisting with the book's sale transaction. In her email of December 3, 2015, Philpott reminded Arseneau that MNP would need "a list of accounts with GWP [gross written premiums] and Gross Commissions asap to register as assets in your new company." Philpott's evidence was that she left it to Arseneau how she would generate the information to be provided to MNP; Philpott had no input into same. Philpott did not ask Arseneau to provide her with a TRIP client list.

[68] Arseneau signed the Staebler letter of intent on December 4, 2015 and returned it by email. By emails exchanged on December 4, 2015 between Arseneau and Philpott, it was confirmed that they had a deal.

[69] Sutton testified that she thought Arseneau and McCarter were partners in TRIP. She became aware of the Jones Brown involvement with PDI at a work event in the Summer of 2015.

At first, Sutton was excited about it when she heard because her very first boss was a part of Jones Brown. She initially was not concerned how the merger would impact her role at PDI because they were told it was just two companies coming together to make a better company. However, once further information was released, Sutton got concerned because it became clear that it was not a merger but that Jones Brown was purchasing PDI and, in a past job, Sutton had gone through a merger and it was untrue that nothing changed. Sutton knew that Arseneau was also concerned.

[70] Sometime after the Jones Brown purchase, Sutton became aware that Arseneau was looking to take her book of business and go somewhere else. On December 4, 2015, Arseneau mentioned to Sutton that one place she was talking to was Staebler and it had a CSR position open. She asked if Sutton would be interested. Sutton said yes, she would be interested in meeting with Staebler. Sutton then met up with Philpott and Arseneau for lunch on December 7, 2015. They discussed Sutton's experience and background and about how things were set up at Staebler. The opportunity for Sutton at Staebler was a service team position. Sutton saw this as an opportunity to increase her marketability.

[71] After the December 7th lunch with Philpott, Sutton reached out to McFarland and McCarter and asked for a meeting with them to see if she could get any assurances about her employment if she stayed at PDI/Jones Brown. She met with them two days later. At the meeting with McCarter and McFarland, Sutton asked what it would mean for her if Arseneau was no longer working at PDI, would she still have a job. They responded that they could not guarantee or confirm who was going to be where and doing what, but they firmly believed there was going to be a place for her. Their response did not give Sutton the assurance she was looking for.

[72] After the lunch meeting on December 7, 2015, Arseneau advised Staebler that she wished to include Sutton as a shareholder in the new company that she was working with MNP on incorporating. Philpott testified that she became aware that Arseneau and Sutton were discussing and negotiating together a fair and equitable split between themselves, because Arseneau had previously promised Sutton that she would allow her some benefit in the future. Once Philpott became aware that Sutton was to be a shareholder, she got her in touch with MNP. The rest was worked out between Arseneau and Sutton.

[73] By way of an email, dated December 9, 2015, Philpott sent to Arseneau a copy of her signed retirement agreement and producer contract that indicated her employment would commence on January 4, 2016, as signed/accepted by Staebler. That same day, Arseneau signed a retainer with the law firm who would be preparing the documentation for the sale of her book of business to Staebler.

[74] Sutton subsequently exchanged emails with Philpott on December 10, 2015 about a formal job offer to be sent to Sutton shortly. Staebler emailed Sutton a draft employment contract to review.

[75] On December 14, 2015, Arseneau submitted her letter of resignation to PDI/Jones Brown. After Arseneau was subsequently escorted out of PDI on December 14th, she called Philpott at Staebler. Philpott told her to come to work at Staebler the next day. Arseneau did so and her employment commencement date was then changed to December 15, 2015. Staebler sent an email

to RIBO advising that Arseneau was starting as a new employee effective December 15th. This meant that the RIBO licence for Arseneau would be transferred to Staebler so she could start working with its clients, as of that date.

[76] On December 15, 2015, Sutton sent an email to C. Coulson at Staebler advising that she would be coming to join the company and that she would return a signed employment contract to them after resigning from PDI later that week.

[77] Sutton testified that, by December 15th, she was aware that she would be receiving funds from Arseneau's sale of the client list to Staebler but she did not know yet how it was going to be determined. Sutton understood these funds to represent Arseneau's acknowledgement of Sutton's role in building the book of business. Sutton testified that she did not tell McCarter or PDI about Arseneau selling the client list to Staebler because, at that point in time, it was a personal thing between her and Arseneau and she did not know until later on the details of Arseneau's deal with Staebler. Sutton was not part of negotiations between Philpott and Arseneau.

[78] Sutton submitted her written resignation to PDI on December 18, 2015, giving two weeks' notice. She had previously booked some vacation over the 2015 holiday season.

[79] Sutton signed a retainer letter with the law firm handling the book's sale transaction on December 29, 2015.

[80] Sutton signed an employment contract with Staebler on December 31, 2015, with a start date of January 4, 2016. Her duties were to provide commercial lines support in obtaining, maintaining, expanding and servicing accounts. Sutton did commence work on January 4, 2016.

[81] Arseneau and Sutton incorporated 2498173 Ontario Inc. to hold the book of business they were selling as an asset. Pursuant to two Transfer Agreements, dated January 3, 2016, Arseneau and Sutton transferred their legal interest in the asset to the numbered company. Then, by way of a Share Purchase Agreement, dated January 4, 2016, Staebler purchased the outstanding shares of 2498173 Ontario Inc. from each of Arseneau and Sutton. The deal was structured such that Arseneau and Sutton could take advantage of the capital gains tax lifetime exemption. The initial purchase price was \$807,010 with Arseneau receiving \$669,689 and Sutton receiving \$137,321. A condition of the purchase of the TRIP client list was that Arseneau should effect the transfer of 90% of those clients to Staebler. If that target was not met in the first year, Arseneau and Sutton would be required to pay back a portion of the purchase price.

[82] The earliest broker of record form transferring a TRIP client to Staebler was dated December 15, 2015. As of the end of November 2016, the total commissions were \$425,000 which was 79.1% of TRIP's original book size since not all of the clients chose to come. Staebler extended the agreement a further 12 months to allow Arseneau to bring over the remainder of the business to be transferred. At the end of Arseneau's second anniversary at Staebler, there was a shortfall of \$8,087 from the original 90% target. That was multiplied by the 1.5X and resulted in a clawback of \$12,130.37 which was split between Arseneau and Sutton at an 83% and 17% ratio. In the end, they ultimately received the sum of \$794,869.00 from Staebler.

[83] Following Arseneau and Sutton's departure from PDI in December 2015, the TRIP work was assigned to a junior producer who worked out of PDI's Hamilton office. He was asked to contact as many clients as he could. When PDI received a broker of record transfer document, showing that a client was transitioning to Staebler, he would call the client to confirm if they wanted to do that or stay with PDI.

[84] Philpott testified that, after Arseneau resigned from PDI/Jones Brown, McCarter called her on the phone and they had a brief conversation. He knew that Arseneau had joined Staebler; he also talked a bit about Sutton. Philpott subsequently received an invitation for a meeting at PDI on December 30, 2015. She attended the meeting along with R. Philpott (Staebler's placement manager), J. Hawkrigg (CEO, Jones Brown), and McFarland. Philpott testified that they discussed how PDI/Jones Brown felt they had an ownership claim to Arseneau's book of business and that, in their opinion, Arseneau was a fiduciary.

[85] On January 8, 2016, McFarland sent Philpott an email setting out PDI/Jones Brown's point of view of the matter and a settlement proposal suggesting the compensation they would like Staebler to pay them and that, in exchange, they would give a full release to Staebler and Arseneau. A deadline of Monday, January 25th was given for a response. Since she was about to leave for Florida, Philpott emailed McFarland on January 14, 2016 and asked for an extension of time to respond. She also asked for some further documentation relating to the issues raised. By email dated January 15, 2016, PDI/Jones Brown responded by forwarding some of the requested documents. While Philpott was sent a copy of the Restrictive Covenant Agreement between PDI and Sutton, dated June 1, 2009, she was never sent any restrictive covenant or employment agreement signed by Arseneau.

[86] When Philpott returned from Florida, she responded to the Jones Brown offer by email dated February 17, 2016. In that email, Philpott primarily addressed the restrictions on Sutton only since Sutton had a restrictive covenant.

[87] Sutton testified that, since she had a 12-month non-compete clause with PDI, when she went to work at Staebler, it was set up so that she had nothing to do with any transportation clients from PDI. She joined as a commercial service broker. She did not work with or report to Arseneau while at Staebler for the first year. Instead, she worked with other producers and learned other areas of insurance.

ISSUES

[88] The issues to be determined are as follows:

- (a) Should a permanent injunction restraining the defendants from using, disclosing or disseminating the TRIP book of business be granted?
- (b) Did Arseneau own the Kimberley & Associates book of business?
- (c) Who owned the TRIP book of business?

- (d) Was Arseneau constructively dismissed from her employment with PDI?
- (e) Did Arseneau breach any fiduciary duty owed to PDI?
- (f) Did Arseneau breach any duty of confidentiality, loyalty or fidelity owed to PDI?
- (g) Did Sutton breach any employee duty owed to PDI?
- (h) Was there knowing assistance by Staebler?
- (i) Did Staebler induce Arseneau and Sutton to breach their contracts with PDI?
- (j) Was there conversion?
- (k) Was there conspiracy?
- (l) Are there any damages owing to PDI?

POSITION OF THE PLAINTIFF

[89] It is the plaintiff's position that Arseneau sold the PDI transportation division book of business to Staebler, a competitor, while still employed with PDI. In doing so, Arseneau wilfully and deliberately removed confidential client information from her employer which she had access to due to the position of trust she held as an employee. This conduct was a fundamental breach of her employment duties that required her to manage and safeguard the goodwill, assets, clients and staff of PDI for the benefit of PDI. Arseneau breached her common law duty of loyalty and fidelity and her duty of confidence to her employer. The plaintiff also argues that Arseneau breached a fiduciary duty that she owed to PDI given her position of trust as Vice President of TRIP.

[90] The plaintiff asserts that Arseneau did not own her transportation insurance book of business. Rather, she had a right to receive a retirement payment based on the commissions generated from the Kimberley & Associates clients when she retired from PDI.

[91] The plaintiff contends that Sutton acted improperly in assisting Arseneau and breached the provisions of her own contract of employment with PDI by providing Arseneau with a list of then current TRIP clients printed from PDI's broker management system.

[92] The plaintiff further alleges that Sutton and Staebler knowingly assisted Arseneau in breaching her fiduciary duties to PDI; and that Staebler induced Arseneau and Sutton to breach their contracts with PDI.

[93] By engaging in the sale of the PDI transportation division book of business to Staebler, the defendants deprived PDI of its proprietary interest in the book and are liable for the tort of conversion in respect of the book.

[94] It is the plaintiff's position that Arseneau, Staebler and Sutton coordinated and participated in an unlawful conspiracy to facilitate the sale of the TRIP book of business to Staebler, acting in concert with the common purpose and intention of causing harm to PDI by depleting it of its transportation division clients.

[95] The plaintiff denies that Arseneau was constructively dismissed from her employment with PDI. It also submits that such an allegation is statute-barred as it was raised for the first time well beyond the applicable two-year limitation period.

[96] The plaintiff claims as against all defendants:

- (a) an interim, interlocutory and permanent injunction restraining the defendants from using, disclosing or disseminating PDI's confidential and proprietary information;
- (b) an interim order requiring the return by Arseneau, Sutton and/or Staebler of PDI's confidential and proprietary information;
- (c) disgorgement and/or an accounting of the profits gained by the defendants through their unlawful acts, specifically breach of confidence, conversion, and breach of, inducing breach of, and knowingly assisting in breach of fiduciary duty;
- (d) in addition or in the alternative to (c), damages in the amount of \$10,000,000.00, jointly and severally, for breach of confidence, conversion, breach of, inducing breach of, and knowingly assisting in breach of fiduciary duty, and breach of and inducing breach of contract; and,
- (e) prejudgment and postjudgment interest.

POSITION OF THE DEFENDANTS

[97] It is defendants' position that Arseneau owned the TRIP book of business pursuant to the BSN-like model developed for her to join PDI. In the alternative, Arseneau owned the TRIP client information pursuant to an agreement entered into by Arseneau and PDI on or before May 1, 2009 by which McCarter agreed that Arseneau's book of business would be recognized as hers from an ownership perspective. Arseneau always owned her book of business and was entitled to deal with her book of business as she saw fit, both before and after her departure from PDI. There were no restrictions on her ability to solicit or compete with PDI after she left her employment.

[98] Arseneau joined PDI on June 1, 2009. At that time, her book of business generated annual commissions in the range of \$320,000. She never signed any formal agreement with PDI, either with respect to her book of business or a restrictive covenant agreement. The terms of her relationship with PDI were never finalized.

[99] The business arrangement between McCarter/PDI and Arseneau resulting in Arseneau joining TRIP was that her Kimberley & Associates book of business belonged to her and that she would have an ownership interest in the transportation and trucking business of TRIP. TRIP was

being created for the specific purpose of housing Arseneau's current and future book of business in the trucking and transportation sector.

[100] Arseneau was not a fiduciary of PDI. She was an insurance salesperson at a branch location of PDI. The office consisted primarily of herself and two assistants, being Sutton and Bartlett.

[101] Arseneau started looking for other employment options in 2015 only after finding out that Jones Brown had bought PDI, that her employment would be changed to a commission-only structure from a salary-based one, and that she would be provided minimal compensation for her book of business. It was PDI that breached its agreement with Arseneau by fundamentally changing the terms of her employment, including how she was to be paid.

[102] Arseneau did not use the TRIP client renewal list to solicit or recruit clients. She only used it in her negotiations with Staebler to show the value of what she was transferring into her newly incorporated numbered company which was then sold to Staebler. That sale to Staebler was completed on January 4, 2016. Arseneau already had her clients' contact information in her cellphone.

[103] The renewal list was not confidential information belonging to PDI as it did not have exclusive ownership of the TRIP client list. Since Arseneau owned her book of business, it logically flows that she owned the information about her book of business. Even if the renewal list was confidential, after PDI unilaterally changed Arseneau's employment terms on October 5, 2015, she was entitled to use the renewal list without limitation.

[104] Arseneau was shocked to learn that the TRIP book of business had been included in the sale of PDI to Jones Brown. The offer from McCarter to give her \$150,000 in Jones Brown shares and to change her compensation model and employment agreement were material negative changes to the terms of her employment and her business agreement with PDI. These changes to Arseneau's contract also amounted to a constructive dismissal of her employment with PDI, such that any post-employment restrictive covenants or fiduciary duties in favour of PDI were vitiated as a result. Arseneau refused to accept the unilateral and material changes PDI purported to make to her employment. PDI's unilateral change of Arseneau's form of compensation, from a guaranteed salary to pure commission, constituted a fundamental breach to her employment terms. As a result, she was entitled to treat their agreement as terminated.

[105] Arseneau did not contact any of her clients about her move to Staebler until after December 14, 2015, the date her employment with PDI had ended. It was ultimately the clients' choice whether they wanted to remain with PDI or move with Arseneau to Staebler. Some clients did not move to Staebler and some remained with PDI.

[106] The defendants submit that there was no conversion of the TRIP client list because, after Arseneau's departure, PDI still had access to the same information and could use it for PDI's own purposes.

[107] There was no conspiracy on the part of the defendants. Arseneau owned her book of business and was entitled to leave PDI with it. Staebler was entitled to deal with Arseneau on this

basis. There is no evidence that any of the defendants were motivated by an intent to harm the plaintiff. Their sole motivation was to pursue their respective business and career interests.

[108] PDI's transportation division did not collapse after Arseneau's departure. PDI simply lost a transportation producer who took her book of business with her to another brokerage. In any event, the value of a book of business is predominantly the value of the relationship between the producer and their clients, which is largely intangible. Here, that relationship was between Arseneau and her clients whom she had serviced for many years, first through Kimberley & Associates and then through TRIP.

[109] PDI is attempting to appropriate Arseneau's book of business, without ever having paid for it and without any legal agreement.

Sutton

[110] Sutton accepted PDI's written offer of employment on May 25, 2009. That offer did not contain any restrictive covenants. On June 1, 2009, only after she had commenced her employment with PDI, Sutton signed the two-page employment contract and she was presented with a restrictive covenant agreement which she was required to sign. That agreement is wholly unenforceable at law as being without consideration. It is also overly broad in scope and vague.

[111] Once PDI was sold to Jones Brown, Sutton met with McCarter and McFarland about her future at PDI. They advised her that they did not make the decisions anymore but believed there was always a place for her. Sutton did not find this reassuring. After considering things, she applied for a position at Staebler. She provided her notice to PDI on December 18, 2015, and she physically worked in the office until December 24, 2015. She then had vacation days until January 1, 2016. She commenced working at Staebler on January 4, 2016.

[112] Sutton denies that she copied or misappropriated any information belonging to PDI. She did not contact any TRIP client in an effort to have them transfer their business to Staebler. During her first twelve months working at Staebler, Sutton did not contact, deal with or deliver any services to any former PDI clients.

Staebler

[113] For its part, Staebler denies any wrongdoing. The information provided to Staebler belonged to Arseneau and the TRIP book of business that she owned. Staebler did not conspire with Arseneau or Sutton, nor did it misappropriate PDI's confidential business information. It did not induce either Arseneau or Sutton to breach their agreements with PDI.

ANALYSIS

- (a) *Should a permanent injunction restraining the defendants from using, disclosing or disseminating the TRIP book of business be granted?*

[114] The plaintiff seeks a permanent injunction restraining the defendants from using, disclosing or disseminating the TRIP book of business.

[115] In *Labourers' International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71, at paras. 24-25, the Ontario Court of Appeal confirmed that the general legal test applicable to permanent injunctions is as follows:

24. We reiterate that permanent injunctions constitute extraordinary relief that must be granted sparingly. A different test applies for a permanent injunction than for an interlocutory injunction. A different test is required because, in considering an application for a permanent injunction, the court has the ability to finally determine the merits of the case and fully evaluate the legal rights of the parties. See *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643, at paras. 76-80; *Cambie Surgeries Corp.*, at paras. 27-28.

25. As referenced in Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2019), at para. 1.45, in *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46, 358 Nfld. & P.I.E.R. 123, at para. 72, the Court of Appeal of Newfoundland and Labrador summarized the approach to be applied in deciding whether to grant a permanent injunction:

- (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
- (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
- (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
- (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
- (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
- (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons

are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[116] For the reasons set out below, I find that no cause of action has been proven by PDI on a balance of probabilities. Accordingly, there is no justification for the granting of a permanent injunction as against the defendants.

[117] The plaintiff alleges that the defendants have acted unlawfully, jointly and severally, by breaching duties of confidence; conversion; by breach of fiduciary duty, inducing breach of fiduciary duty, and knowingly assisting in breach of fiduciary duty; and by breach of contract and inducing breach of contract. I address each of these grounds below.

(b) *Did Arseneau own the Kimberley & Associates book of business?*

[118] The plaintiff argues that what it had offered to Arseneau in respect of the Kimberley & Associates clients who followed her to PDI in her first year was an “internal proprietary right” in the form of a retirement plan. That is, Arseneau did not have a proprietary interest in the customer information or files or the goodwill associated with the Kimberley or TRIP books of business other than through PDI’s retirement plan for her. See *King v. Merrill Lynch Canada Inc.*, 2005 CarswellOnt 6765, 144 A.C.W.S. (3d) 268 (Ont. S.C.J.), at paras. 67-68; and *Rutherford v. RBC Dominion Securities Inc.*, 2011 ONSC 6002, at paras. 37-38.

[119] I reject this argument for the following reasons. First, Arseneau did not come to PDI merely as an employee. She arrived at TRIP in a partner/co-owner type arrangement, already owning the proprietary interest in the information and goodwill associated with the Kimberley & Associates book of business. While Arseneau was technically an employee of PDI, the evidence establishes that this was because it was a requirement of RIBO. Arseneau was not a typical employee of PDI. She was clear from the outset that she owned her book of business, that she considered herself a quasi-partner in Kimberley & Associates, and that she wanted to work with another entity as a partner. Arseneau was attracted by the BSN model that had been created by McCarter and was in use at PDI. The discussions between McCarter and Arseneau leading up to her joining PDI focused on a BSN-like arrangement. Arseneau could not be a full BSN because she did not run her own brokerage and did not have the appropriate designation from RIBO. Given the requirements of RIBO, Arseneau had to be an “employee” of PDI. The written communications from McCarter to Arseneau, prior to June 1, 2009, establish that McCarter was agreeing to offer Arseneau a contractual arrangement as close to a BSN as could be formulated, within the confines of the regulations. To the extent Arseneau then developed the TRIP portfolio, I find that she anticipated owning a proprietary interest in the TRIP client list independent of her employment agreement with PDI. I find that the April 7, 2009 and May 31, 2009 communications sent by McCarter to Arseneau, including the “Draft Business Plan for the first 30 days” (collectively, “the Draft Discussion Terms”), show an intention on the part of McCarter/PDI that Arseneau’s ownership of the Kimberley & Associates book of business would be recognized and that PDI and Arseneau would share the remaining TRIP clients.

[120] Second, I find that the concept of a retirement plan was never part of the original plan established by the Draft Discussion Terms. In my view, the retirement plan concept only came

about after McCarter determined that he did not want to formally partner with Arseneau in TRIP any longer. The retirement plan's terms were never agreed upon. Since a retirement plan was never finalized, it cannot be said that Arseneau's ownership interest in the Kimberley & Associates book of business was ever transferred to PDI in exchange for a retirement allowance.

[121] I find that Arseneau consistently staked her claim to the Kimberley book and that this was acknowledged on a number of occasions by McCarter/PDI. McCarter admitted on cross-examination that he knew it was important to Arseneau to have ownership in the Kimberley book because she had expressed to him that she felt she had not been treated fairly by Elliott at Kimberley & Associates. He stated that Arseneau made him aware of her relationship with Elliott at her prior employment.

[122] I conclude that Arseneau was the owner of the Kimberley & Associates book of business when she joined PDI and that she never lost that ownership interest throughout the course of her dealings with PDI.

(c) Who owned the TRIP book of business?

[123] The main issue in this action comes down to who owned the TRIP book of business. It is undisputed that Arseneau joined PDI pursuant to an oral agreement with McCarter, the principal of PDI at the time. What is disputed by the parties is the nature and contents of that oral agreement.

[124] The plaintiff's position is that Arseneau entered into an employment agreement with PDI in the ordinary course, with compensation of a salary, benefits and paid expenses, as well as consideration for the Kimberley & Associates clients that followed Arseneau to PDI in her first year in the form of an internal recognition by way of a retirement plan. The plaintiff argues that any proprietary interest that Arseneau may have gained in the TRIP book of business was strictly within the confines of the employer-employee relationship. At its highest, it was an "internal ownership" in the TRIP client list.

The Law

[125] The protection of reasonable expectations is the main purpose of the common law of contracts: see *Harris Brothers Ltd. v. Mud Creek Capital Corp.*, 2023 ONSC 644, at paras. 64-67.

[126] The test for finding that a contract exists at common law is objective, and the offer, acceptance, consideration and terms may be inferred from the parties' conduct and from the surrounding circumstances: see *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, at para. 37.

[127] An enforceable contract can arise as a result of the language or conduct of the parties showing an intention to form a legal relationship. As the court in *Access Container Inc. v. The Container Guy Ltd.*, 2020 SKQB 314, at paras. 10-11, explained:

10 The law is clear. For a legally enforceable contract to come into existence there must be agreement on the essential terms of the contract. Except where required

by statute law (including the common law’s incorporation of the *Statute of Frauds, 1677*, 29 Cha II, c 3 (UK)) writing is not required for a contract to come into existence. Contracts can be created by oral agreement of the parties and essential terms thereof can be inferred from the conduct of the parties.

11 G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., (Toronto: Carswell, 2011), an acknowledged authoritative text on the law of contract, states the following:

a. On the intention to contract at page 27:

A contract can only arise if there is the *animus contrahendi* between the parties. “The creation of a contract requires an intention on both parties to do so”. The intent to create contractual relations is a fundamental criterion of contract formation. Without the expressed or implicit intention that a contract should emerge as a result of the language or conduct of the alleged parties, no contractual obligations can be said to exist and be capable of enforcement. Hence the offer that is made must be an offer to *contract* involving the creation of legal relations. As it was put by Sheppard J.A. in *Arding v. Buckton* [(1956), 6 DLR (2d) 586 (BC CA)],

a contract may be implied only when the conduct of the parties indicates that they are proceeding on the basis of some legal relation so that the function of the Court is merely to find as a fact that relation with its attendant obligations and rights which the parties have so indicated by implication but have failed to express.

While this is essentially an issue of fact, there are indications that certain parties may be less prone to entering into legal contractual relations than others.

b. On the test for agreement and the concept of consensus *ad idem* at pages 14 and 15:

An alleged agreement, however reached, orally, in a document purporting to be a contract or in a letter of intent, must be clearly manifested, expressly or by implication. An inward intent will not suffice. “The law judges of the intention of a person”, said Sirois J. of Saskatchewan in *Gutheil v. Caledonia No. 99 R.M.* [(1964) 48 DLR (2d) 628], “by his outward expression only and it judges of an agreement between two persons exclusively from those expressions of their intentions, which are communicated between them”. Hence the requisite agreement may be established by the conduct of the parties subsequent to the alleged contract.

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* [(2003), 17 Alta LR (4th) 243]:

the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.

...

[128] Courts will find a binding contract if the parties acted as if they thought they had one, and subsequent conduct reinforcing a conclusion that there was a binding contract can be relied upon: see *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (S.C.C.); and *Canada Square Corp. et al. v. VS Services Ltd. et al.*, 1981 CanLII 1893 (ON CA), 34 O.R. (2d) 250 (Ont. C.A.).

[129] A contract is to be interpreted in accordance with the intention of the parties at the time they entered into the agreement having regard to the words the parties used and the provisions of the contract as a whole: see *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888; and *Eli Lilly & Co. v. Novopharm Ltd.*, 1998 CanLII 791 (SCC), [1998] 2 S.C.R. 129.

[130] Regardless of whether the words under consideration are clear and unambiguous on their face or contain some ambiguity, it is permissible, as part of the interpretive exercise, to consider evidence of the circumstances surrounding the making of the agreement. Such extrinsic evidence has been referred to as the "factual matrix" and involves the origins of the agreement, its purpose and the commercial context in which it was made: see *Dumbrell v. Regional Group of Companies Inc.* (2007), 2007 ONCA 59 (CanLII), 85 O.R. (3d) 616 (C.A.), at paras. 53-55.

Discussion

[131] The two questions to be answered then are: (i) did PDI and Arseneau, on an objective standard, intend to contract? and (ii) can the terms of that contract be determined with a reasonable degree of certainty?

[132] With respect to the first of these questions – was there an intention to contract? – I am satisfied that PDI and Arseneau, on an objective standard, did intend to contract with each other in some form.

[133] The test of intention in the formation of contracts is objective. That is, intention is to be ascertained from what the parties said or did. The main consideration is whether the parties, by their words and actions, conducted themselves in a way which showed that it was more probable than not that, from a certain date forward, they regarded their relationship as being of a binding nature rather than one of two parties still engaged in negotiation: *Canada Square Corp.*, at page 261.

[134] I find that the Draft Discussion Terms, being the April 7, 2009 and May 31, 2009 communications sent by McCarter to Arseneau, including the “Draft Business Plan for the first 30 days”, are clear indicators of an intention to contract.

[135] The parties’ subjective intent is not evidence upon which the court can rely to determine the meaning of their oral agreement. In terms of the extrinsic evidence, including the purpose and the facts surrounding the parties’ dealings with each other and the representations made by the parties at the time of starting the TRIP business, I am satisfied that it all supports a finding that the parties committed to an interim relationship, during which time they would begin working together and continue discussing the terms of their agreement as to the ultimate structure and ownership of TRIP and then finalize same in a formal written agreement.

[136] The Draft Discussion Terms set out the starting point for discussion and negotiation of the parties’ mutual business venture. These documents identified their respective contributions to the development of TRIP and its subsequent operation and provided them with the direction and a framework to work within, in anticipation of ultimately agreeing upon the essential elements of their contract.

[137] With respect to the second question – can the contract terms be determined with a reasonable degree of certainty? – I find that the terms of the parties’ purported contract cannot be determined with a reasonable degree of certainty.

[138] The parties do not disagree that there was an oral agreement reached about some items, including the salaries and benefits to be paid to Arseneau, Sutton and Bartlett, and that a Mississauga office would be set up for Arseneau and her team to work out of to service the TRIP clients. But, crucially, I find that there was no agreement at all on the fundamental terms regarding the ownership and structure of the TRIP entity or its book of business.

[139] In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 1991 CanLII 2734 (ON CA), 1991 CarswellOnt 836, at paras. 20-21, the Ontario Court of Appeal explained the nature of a complete and binding contract in the following way:

20 As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They

frequently agree upon all of the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by way of memorandum, by exchange of correspondence, or other informal writings. The parties may “contract to make a contract,” that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all of the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.

21 However, when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the “contract to make a contract” is not a contract at all. The execution of the contemplated formal document is not intended only as a solemn record or memorial of an already complete and binding contract but is essential to the formation of the contract itself . . .

[140] This case is a situation where the acceptance by PDI and Arseneau, the parties to the agreement, was conditional upon the negotiation and approval of further essential terms and a written contract. Some of those essential terms were ownership interests, revenues and profit sharing, expense items, commission rates, a valuation formula, and cessation/termination rights. While an interim arrangement was reached and performed, a final agreement or contract was never agreed upon. There was never a meeting of the minds.

[141] I find that the parties’ conduct establishes that they both knew they did not have a binding contract as they could never agree on final terms.

[142] The evidence establishes a record of meetings, written communications, and negotiations between Arseneau and McCarter/PDI, beginning in April 2009 and following Arseneau’s first day of work on June 1, 2009 through to December 2, 2015, as they continued to try and reach agreement on their business arrangement.

[143] McCarter/PDI was more proactive in trying to finalize a formal agreement. However, McCarter’s proposals morphed with each iteration of a proposed agreement he put before Arseneau. In response to each of those iterations, Arseneau expressed her concern to McCarter/PDI that the proposals did not reflect the parties’ initially agreed-upon terms that had enticed her to move to PDI with her book of business and work at TRIP. She repeatedly asked for the agreement to revert back to the original terms discussed back in April/May 2009. When no consensus could be reached, the parties would simply agree to put off their discussions until another day.

Ultimately, there was never any agreement reached between the parties regarding essential contractual terms, including ownership of the TRIP book of business.

[144] The documentary evidence establishes that the parties' business arrangement began with the potential for being a partnership between PDI and Arseneau, with each having an ownership interest in the new entity. Initially, the thought was that the new entity could be a BSN. Arseneau would be an employee, because that was a RIBO requirement, and she would sign a producer/employment agreement. McCarter agreed at the outset that Arseneau's "book of business" would be recognized as hers from an ownership perspective. He testified that this "book of business" was never actually defined by the parties. It is not clear from the parties' evidence whether this meant just the Kimberley & Associates book of business or whether it was to also capture the business that Arseneau developed at TRIP.

[145] I find that the Draft Discussion Terms were the basis for Arseneau's decision to join PDI and bring over her book of business from Kimberley & Associates. I also find that, leading up to Arseneau commencing work on June 1, 2009 at PDI, there was no discussion between the parties about the possibility of a sale of the Kimberley book of business to PDI. The Draft Discussion Terms spoke to an ownership and partnership interest for Arseneau in the new business entity, and the entering into of a BSN-type agreement between her with PDI. McCarter's evidence was that, in their initial discussions, he asked Arseneau for her thoughts on a partnership agreement and what type of ownership or equity interest in the business that would entail.

[146] PDI initially paid TRIP's overhead expenses but various of the communications and agendas of meetings held shows that the intention was ultimately for TRIP to cover its own costs and expenses and pay percentages back to PDI, in a similar vein to a BSN, and for PDI and Arseneau to share profits between them. That is, the initial plan for the structure and operation of TRIP was to have been for the mutual benefit of both PDI and Arseneau with the intention of the sharing of commission profits earned as policies were issued and/or renewed.

[147] By July 2009, it was becoming clear to Arseneau that things were changing from the original deal. She stressed to McCarter/PDI that an employment agreement was not what she had in mind when she moved her book to PDI. She saw herself as an owner and a partner with PDI in TRIP. I find that the Draft Discussion Terms support her understanding in this regard. The arrangement was now morphing into something she did not agree with and she informed PDI of that. Arseneau advised PDI that she wanted to get back to the original plan.

[148] McCarter testified that, with respect to the original plan, he had contemplated a brokerage arrangement, with a company he incorporated and operated under his own ownership. His evidence in chief was that he told Arseneau only that he would set up a BSN for a company that he owned, not that he would set up a BSN for her. However, on cross-examination, McCarter agreed that, in April 2009, he was contemplating the possibility of having a new brokerage that he would incorporate using his legal and accounting firms and further agreed that, as of the April 7, 2009 email, he had spoken with Arseneau about ownership and that there had been discussions about the possibility of her having ownership in the new company that would be incorporated. McCarter's evidence was that it was contemplated in the original plan that Arseneau could have

shares in the new business that was going to be incorporated; and that, as of April 29, 2009, he was still discussing with Arseneau the possibility of a BSN arrangement with her.

[149] Things moved along very fast, with Arseneau and Sutton being hired to start work on June 1, 2009. As McCarter continued to do the analysis of the business model, he determined that a BSN-type of arrangement would not be feasible because he would have to fund the new brokerage. He would be taking on all of the risk. There was no guarantee of clients following Arseneau to PDI; there was only a suggestion that they would. So, any new BSN arrangement would have a shortfall and not be profitable. It also would not have complied with the RIBO requirements. As a result, McCarter decided not to go forward with the BSN. While McCarter's change from the original plan is understandable based on his determining that a BSN would not work, the problem is that he never clearly communicated to Arseneau about his change in position away from a BSN-type arrangement for TRIP nor did he ever obtain her agreement or consent to such a change.

[150] In her email of July 20, 2009, Arseneau made it clear that she did not see herself as simply a producer who owned her book. She expressed her concern that things seemed "to be going backwards" for her. In responding to Arseneau's concerns in his email of July 20, 2009, McCarter did not disabuse her of the notion that they were still working towards a BSN-type arrangement. Instead, he reassured her that the difference between what he was now proposing and the BSN "is minimal" and that, even in the BSN's, everyone is an employee of PDI. He also informed her that "the final structure of TRIP can still be altered" so that her concerns would be addressed. Of greater consequence is the fact that McCarter also stated that he has always tried to keep Arseneau's "original wish list in place". That original wish list included Arseneau being an owner/partner of some sort in the new venture. McCarter knew this.

[151] McCarter testified on cross-examination that the standard PDI producer contract had not been provided to Arseneau before she started work on June 1, 2009. However, she had been given a blank copy of a BSN agreement to review. McCarter agreed that BSN employees were employees of PDI and that employment status was not determinative of ownership of a broker's book of business.

[152] I find that the summary of the November 16, 2009 meeting, set out in Arseneau's email of November 17, 2009, also has a number of features similar to a BSN-type structure, with expenses paid by TRIP, charge-backs and co-commissions paid to PDI, and the sharing of a bonus pool or profit between PDI and TRIP. Even the "TRIP Profit Centre" proposal set out in McCarter's discussion paper for a June 14, 2010 meeting with Arseneau still reflects a quasi-BSN-type arrangement, with PDI recovering its expenses and the TRIP revenue being shared between PDI and Arseneau.

[153] Prior to the June 14, 2010 meeting, McCarter had meetings with the lawyer, Ms. Wallace, wherein he discussed with her that Arseneau wanted ownership but PDI did not want to transfer ownership to her. He testified that, instead, he was considering with Ms. Wallace a "profit centre" business model where there would be some kind of profit and loss division and it could be shared with Arseneau. McCarter's testimony was that he and/or Fairburn discussed with Ms. Wallace that Arseneau's book would be recognized as hers. However, McCarter denied that he ever intended that Arseneau could take her clients with her if she left TRIP, even though this notation is found

in Ms. Wallace's notes of a meeting she had with McCarter on May 26, 2010. McCarter's evidence was that he does not recall discussing that Arseneau could take her book if the relationship was terminated.

[154] McCarter also had a meeting with Ms. Wallace on June 2, 2010, for which there are handwritten notes. In those notes, under the heading "Lisa's Portfolio" is the notation, "Recognition of ownership of Lisa's clients that were developed prior to PDI. Buy-out terms". McCarter admitted that he used the term "ownership" in relation to Arseneau's clients, and not "retirement". He agreed that the purpose of giving notes to Ms. Wallace was "to build some kind of draft document" as they worked on the profit centre concept. It was to involve a combination of employment contract and a profit centre model that would recognize compensation, performance bonus, etc. Ms. Wallace was to prepare the draft document for McCarter to consider. This was in preparation of the June 14, 2010 meeting that was held with Arseneau.

[155] When asked if he recalled Arseneau discussing at the June 14, 2010 meeting that she wanted to sell her work at a multiple, McCarter testified that, yes, Arseneau did comment about selling her work at a multiple. He agreed with the cross-examiner that this was something different than a retirement agreement.

[156] There is no evidence that any agreement, draft or otherwise, was ever prepared and sent out from Ms. Wallace's office following the meeting of June 14, 2010.

[157] It is really only with the meeting held on September 20, 2011 that the business plan being proposed to Arseneau seems to have clearly swung away from a BSN-type arrangement. McCarter agreed on cross-examination that he never stated to Arseneau that she would not own the Kimberley & Associates book of business or that all she would get at the end of their relationship was a retirement plan.

[158] PDI funded all of the costs associated with operating the TRIP division. However, the original plan and subsequent business plans up to September 2011 proposed by McCarter and discussed with Arseneau envisioned TRIP paying commission percentages and expenses back to PDI. The problem was that time continued to pass without a finalized agreement, and PDI continued to fund TRIP and pay the salaries and expenses of Arseneau, Sutton and Bartlett. It appears that there came a point where McCarter decided that PDI had funded enough of the TRIP entity such that he considered the project to now be PDI's, without any input or consent from Arseneau. When cross-examined about whether PDI ever informed Arseneau that PDI claimed ownership of the TRIP book of business, including the Kimberley book of business, McCarter testified that it did not.

[159] I find that the actions of McCarter in sending Arseneau the October 6, 2015 offer of \$150,000 in shares of Jones Brown demonstrates that he considered the arrangement between them still to be unfinalized and that Arseneau was, in fact, owed something to represent the value of her Kimberley book of business. In my view, this conduct by McCarter is inconsistent with PDI's allegation that it owned the Kimberley book of business or the TRIP book of business in its entirety (since the Kimberley book had been subsumed within the TRIP book). McCarter agreed with the cross-examiner's suggestion that, in writing the October 6th offer, he was trying to resolve the 4 or

5 years of discussions he had had with Arseneau regarding the Kimberley book of business with Jones Brown shares.

[160] I find that a reasonable person observing the parties would not conclude that there was a meeting of the minds between PDI and Arseneau in terms of their respective interests in TRIP or what would happen upon termination of their relationship. I find that, based on all the evidence at trial, an objective bystander certainly would not conclude that PDI and Arseneau had reached a final agreement whereby PDI solely owned the TRIP book of business, to the exclusion of Arseneau. The relationship between the parties and the manner in which they conducted themselves did not create rights and obligations of the sort contended by the plaintiff in this action.

[161] The parties' behaviour does not reflect any objective understanding or meeting of the minds that Arseneau had ceded ownership of the Kimberley book or the TRIP book to PDI: see *M.S. v. I.S.*, 2021 ONSC 3715 (Ont. S.C.J.), at paras. 85-88 and 100; and *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (Ont. S.C.J.), at paras. 89-90. Arseneau was clear and unequivocal in her evidence that she did not transfer any ownership interest to PDI. The plaintiff has not led any evidence establishing otherwise.

[162] Where the evidence of McCarter and Arseneau differs on the point about ownership of the Kimberley and the TRIP books of business, I accept the evidence of Arseneau. Not only does the documentary evidence support her account, but it makes no sense in the commercial context between these parties, and given Arseneau's past experience with Kimberley & Associates and her initial overture to McCarter, that Arseneau would agree to hand over her entire book of business, that she was intending to continue to grow and develop at TRIP, for a \$100,000 salary and some undetermined retirement allowance.

[163] The plaintiff argues that customer lists are generally treated as goodwill and that goodwill, although intangible in character, is part of the property of a business that belongs to the employer. While I accept that that principle may apply in typical employer-employee relationships, I find that it does not apply in this case. Here, TRIP was a new venture that came to be only because of Arseneau agreeing to move her Kimberley book of business to PDI and to come work at the new venture. Arseneau arrived with her own goodwill constituted in the Kimberley book of business. As a new entity, TRIP did not itself have a pre-existing customer list or goodwill. Rather, TRIP's customer list and goodwill was that which was developed and nurtured by Arseneau and her team during the six years she worked there.

[164] I accept and prefer Arseneau's evidence that she believed she was joining PDI as a quasi-partner on terms akin to the BSN structure, which arrangement was supposed to provide for her to co-own the TRIP book of business while receiving the benefits of a traditional employment relationship in the form of a salary and benefits. In my view, PDI's claim that it solely owned the TRIP book of business is an attempt to reconstruct what actually transpired between PDI and Arseneau. The situation that developed was an unfortunate one, for both parties. However, the court is not in a position to now draft a contract for the parties. It was at their own peril that PDI and Arseneau continued their business venture together without the terms of their contractual arrangement ever being finalized or set down in written form.

[165] Since the essential terms of a contract between PDI and Arseneau as it relates to the ownership, structure and operation of TRIP lack certainty, because they are incomplete and unsettled, the result is there is no binding agreement. In the absence of such an agreement, there is no certainty about what bundle of ownership rights and obligations each would receive or be subject to.

[166] I conclude that there was no binding and enforceable agreement reached between PDI and Arseneau as to who owned the TRIP book of business. Accordingly, the plaintiff has not established that it owned the TRIP book of business to the exclusion of Arseneau.

(d) Was Arseneau constructively dismissed from her employment with PDI?

[167] Arseneau has pleaded, as an affirmative defence, that she was constructively dismissed by PDI as a result of McCarter's email to her, dated October 6, 2015, wherein the terms of their business arrangement and her employment were changed.

[168] The leading case on constructive dismissal is *Farber c. Royal Trust Co.*, [1997] 1 S.C.R. 846 (S.C.C.), wherein the principle was described as follows, at para. 24:

Where an employer decides unilaterally to make substantial changes to the essential terms of the employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as "constructive dismissal". By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.

[169] As the Supreme Court in *Farber* went on to say, at para. 36:

It has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions it has been held that a unilateral change to the method of calculating an employee's remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee's income by an employer amounts to a constructive dismissal.

[170] I am satisfied that McCarter's October 6, 2015 email made unilateral changes that substantially altered the essential terms of Arseneau's employment with PDI. Interestingly, the terms her new employment with PDI/Jones Brown were unknown even to McCarter at the time he sent his email, which read in part:

[Jones Brown] is in the final stages of a new compensation model that will be offered to you. The compensation structure is on a variable basis, and will likely have

commission of 40% on new business and 20% on renewal business. We can discuss additional compensation components such as marketing expenses and mobile phone. We'll provide you with a new employment contract as soon as we finalize the new compensation plan.

[171] I find that the provision of a guaranteed salary was a fundamental term of Arseneau's employment agreement with PDI; as well, her expenses had also been paid as part of her employment with PDI. These were now set to change. There is no evidence to support that PDI had the authority or right to alter unilaterally the way in which Arseneau would be paid. She had commenced her employment pursuant to an oral agreement with PDI as a salaried employee. Having a guaranteed salary was important to her and was a negotiated term of her agreement with PDI to come and work in the transportation insurance division. Throughout various communications, McCarter acknowledged that this was an important term to Arseneau.

[172] I am satisfied that, at the time McCarter's October 6th offer was made, a reasonable person in the same situation as Arseneau would have felt that the essential terms of the employment contract were being substantially changed. The implication of McCarter's email, in the context of PDI's sale to Jones Brown with no prior notice being given to Arseneau, was clear. She was being given no alternative but to acquiesce in the new employment contract that would be offered, on the employer's terms. In my view, the effect of this communication was repudiation, even if the changes themselves are not considered substantial, which I find they are.

[173] Although Arseneau continued her employment with PDI for two more months, she did not consent to the changes set out in the October 6, 2015 email. Nor could she since the new terms had not yet been finalized. In any event, new finalized terms were never shared with Arseneau so she was never in a position to have accepted them. Arseneau responded to McCarter's October 6th email by her email dated December 2, 2015, which was left unanswered by both PDI and Jones Brown. I am satisfied that it would have been patently unreasonable for Arseneau to have continued in her employment in the circumstances presented by PDI, when she could not have been certain what the terms of that employment were or if her remuneration had been significantly reduced. I conclude that Arseneau was constructively dismissed by PDI.

[174] The fact that Arseneau ultimately responded to her constructive dismissal with a letter of resignation, dated December 14, 2015, does not change things. The legal effect of her "resignation" was simply an employee accepting the employer's repudiation of the employment contract as bringing the employment agreement to an end. An employee is entitled to a reasonable period of time to assess his or her circumstances and make an election whether to consent to or acquiesce in the unilateral change to an essential term or to accept the employer's repudiation.

[175] The issue of constructive dismissal is raised as an affirmative defence in the amended, amended statement of defence to the claim. It was Arseneau's issue to prove on a balance of probabilities. I am satisfied that she has discharged that burden.

[176] I dismiss the plaintiff's claim that Arseneau voluntarily resigned or that PDI had just cause for terminating Arseneau's employment post-termination. I find that Arseneau's conduct subsequent to October 6, 2015 was mere planning in order to establish a new job

opportunity/business for herself. The fact that that new opportunity/business involved competing with PDI for TRIP clients does not *ipso facto* violate any duty she owed to PDI because, as discussed and found below, she did not breach any fiduciary or confidentiality duty; and she did not begin to solicit any TRIP clients until December 15, 2015, after her departure from PDI.

(e) Did Arseneau breach any fiduciary duty owed to PDI?

[177] The plaintiff argues that Arseneau owed a fiduciary duty to PDI due to the position she held at TRIP.

[178] It is the nature of the relationship which gives rise to fiduciary duties. The characteristics of a fiduciary relationship were described by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) as follows, at para. 60:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[179] In the case of *Galambos v. Perez*, 2009 SCC 48, Cromwell J., on behalf of the Supreme Court of Canada, spoke about the requirement of vulnerability, at para. 68:

[F]iduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: “It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. ... In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement” (“The Fiduciary Obligation” (1975), 25 *U.T.L.J.* 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406. [Emphasis in original.]

[180] In my view, the three underlying characteristics of relationships in which fiduciary duties are imposed are not present in the relationship between Arseneau and PDI. Arseneau was not an officer or director of PDI nor was she in “top management”. While Arseneau was given the title “Vice President”, in actuality, she was not in a position of power and authority at PDI with the potential to prejudicially affect PDI’s legal or practical interests. When she began working at PDI

she had no specific title. In 2012, she was given the title of Vice President. However, her role did not change, and she did not receive any additional compensation in relation to the change of title. Her 2015 Record of Employment from PDI, issued after her departure, indicates that she was an “Account Executive”. The revenue generated by her office was approximately \$500,000 to \$507,000 annually, which was minimal compared to the overall revenue of PDI in 2015 which was in the range of \$24 million. The requisite vulnerability is not present.

[181] I also find that there is no evidence that Arseneau undertook, either expressly or impliedly, to act in the best interests of PDI and relinquish her self-interest. Such an undertaking is fundamental to the existence of a fiduciary relationship: *Galambos*, at para. 69-71.

[182] I accept and adopt the approach taken by the court in *HUB Financial Inc. v. Molinaro*, 2002 CarswellOnt 2405, [2002] O.J. No. 2846 (Ont. S.C.J.). In that case, the plaintiff was a registered insurance broker who sued two registered brokers for breach of fiduciary obligations and duty of confidentiality. The plaintiff had terminated the defendants’ contractual relationships by its unilateral decision to increase its share of the commissions to be divided between it and the two defendants. The defendants gave notice that they were terminating their association with the plaintiff and each went on to become associated with another principal broker and used information respecting their respective clients and their policies, including policy expiry dates, for the purpose of contacting them and obtaining letters authorizing them and the new principal broker to be their “broker of record”. The plaintiff wrote to the clients and informed them that no other broker had authority to service their policies. It commenced the action and moved for injunctions to restrain the defendants from soliciting business from the plaintiff’s clients or using confidential information obtained in the course of providing services through the plaintiff. In his decision, Cullity J. found certain rights were associated with the ownership of each defendant’s book of business, including the right to solicit renewals and other business from the clients, the right to use the clients’ information, and the right to share such lists and information with another broker, in order to solicit the clients’ business.

[183] In *HUB Financial*, the court held that the defendants had not breached any fiduciary duty or duty of confidentiality in soliciting the clients after their departure from the plaintiff. Cullity J. found that there was no common intention that the client information should belong to one party or the other and there was no basis to impute such an intention on the facts of the case. As a result, he found that there had been no breach of fiduciary duty and no breach of confidentiality. He concluded that the situation was effectively one of co-ownership in that the clients were the defendants’ clients as much as they were the plaintiff’s clients, and absent an agreement between the parties, either party was free to use the information in the files and to solicit the clients’ business.

[184] While in *HUB Financial*, the defendants were found to be independent contractors as opposed to employees, I am satisfied that the principles espoused therein still apply to the within case given that Arseneau was not a typical “employee”. She did not sign an employment contract with PDI nor did she sign a non-competition/non-solicitation agreement or a restrictive covenant. She was brought in to PDI to operate TRIP as a BSN-like entity with her ownership of her book being specifically recognized. In those circumstances, she was more like a co-owner/partner in the TRIP venture than an employee. As in *HUB Financial*, I find that there was no common intention

here that the TRIP client information should belong to PDI only, and it would be inappropriate to impose any restriction on Arseneau from using the TRIP client information after her association with PDI had ended.

[185] I also apply the principle established in *General Billpostings Co. Ltd. v. Atkinson*, 1909 AC 118 (HL). In that case, the plaintiff-company had terminated the defendant-employee, Atkinson, without notice despite the employment contract providing for 12 months' notice of termination. In an action to enforce a restrictive covenant, the court held that once a contract of service is rescinded, the covenant not to set up a competing business falls with it, stating: "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract" (pg. 122). The House of Lords held that, when an employee is dismissed without notice or cause, the employer cannot enforce a restrictive covenant, such as a non-solicitation or non-competition clause, against that employee. I find that this principle also applies in this case. Given PDI's repudiation of its contract with Arseneau, PDI cannot insist on her honouring any fiduciary or confidentiality obligation that may have existed during the course of employment. See also *Globex Foreign Exchange Corporation v. Kelcher*, 2011 ABCA 240, at paras. 48-58.

[186] The TRIP client list was not something that PDI handed to Arseneau. Rather, she developed it over her time there, and it began with a co-mingling of her Kimberley book with PDI's transportation book. I do not find that Arseneau stood in a fiduciary relationship to PDI in the sense that she owed a duty of loyalty and avoidance of self-interest.

[187] Accordingly, I conclude that Arseneau did not owe a fiduciary duty to PDI.

(f) Did Arseneau breach any duty of confidentiality, loyalty or fidelity owed to PDI?

[188] The plaintiff argues that, by selling the TRIP book of business to Staebler while still employed with PDI, Arseneau wilfully and deliberately removed confidential client information from her employer thus breaching her duty of confidentiality, loyalty and fidelity as an employee.

[189] I find that those clients on the TRIP client list who were former Kimberley & Associates clients were already known to Arseneau and Sutton, so none of that customer information was imported to Arseneau or Sutton in a confidential manner. I further find that the information regarding the remaining TRIP clients was shared with and acquired by Arseneau for the mutual benefit of both her and PDI, as co-venturers in TRIP.

[190] As set out above, I have found that Arseneau was constructively dismissed from her employment with PDI. Once Arseneau accepted PDI's repudiation of its agreement with her, any duties of confidence, loyalty and fidelity that she owed were terminated, and no such duties otherwise existed after the agreement was terminated: *HUB Financial*, at paras. 66, 68 and 71.

[191] The plaintiff effectively asserts that, even if it is found that Arseneau was constructively dismissed, she remained bound by all of the confidentiality and loyalty obligations arising from an employment contract. No caselaw was provided by the plaintiff in support of such an argument.

[192] I accept as a general statement that, during the period when a valid and binding contractual relationship exists between partners, it can be expected that client information must be treated as confidential for the benefit of that contractual relationship, however, once that relationship ends, that duty of confidentiality may also be lost: *Hub Financial*, at para. 68.

[193] The plaintiff contends that Arseneau's signing of the Employee Acknowledgement Form constitutes an enforceable agreement between herself and PDI, including a restrictive covenant and a non-competition and non-solicitation term. This argument is untenable given the parties' dealings with each other. Arseneau did not sign a restrictive covenant agreement. She testified that she would not have signed such an agreement because she considered herself an owner/partner. I accept her evidence in this regard. In any event, a restrictive covenant agreement is a serious agreement requiring clear notice and concise terms. It is not something to be inferred from a signature on an acknowledgement form that makes only passing reference to a restrictive covenant agreement by name, among other human resources documents.

[194] Unlike in *Kechnie v. Sun Life Assurance Co of Canada*, 2015 ONSC 3714; aff'd 2016 ONCA 434, here, there is no evidence of any agreement reached between PDI and Arseneau establishing that the parties intended to limit Arseneau's ability to use TRIP client information upon her departure from PDI.

[195] Further, nothing in the oral agreement between Arseneau and PDI relating to their working arrangement imposed a duty of confidence as purported by the plaintiff so as to prevent Arseneau from using the information after their association terminated. Surely something more significant than simply signing a one-page Employment Acknowledgement Form was required in order to bind Arseneau to a confidentiality term such as that claimed by the plaintiff, especially given that Arseneau was a quasi-partner/co-owner in TRIP who, at that time, still had not yet signed any producer/employee agreement or restrictive covenant.

[196] I find that there was no mutual understanding or agreement between Arseneau and PDI that the TRIP client information would belong exclusively to PDI. I further find that there is no rational basis for imputing such a term. I conclude that the TRIP client information was effectively "co-owned" such that there was no exclusive ownership by either PDI or Arseneau: *Hub Financial*, at para. 65. Either could solicit clients on the TRIP list once their business association came to an end.

[197] In any event, the evidence did not establish that Arseneau used the TRIP client renewal list to solicit TRIP clients. I accept Arseneau's evidence that she had client contact information in her cellphone and/or in her personal email directory. Given Arseneau's working knowledge of the Kimberley and TRIP clients, it is reasonable that Arseneau could have re-created the list of TRIP clients after she left PDI if she had wanted to do so. In my view, therefore, the renewal list falls within the type of information that is not reasonably characterized as confidential, as was considered in cases such as *Tomenson, Saunders, Whitehead Ltd. v. Baird* (1980), 7 C.C.E.L. 176, 1980 CarswellOnt 630 (Ont. H.C.).

[198] Finally, I find that Arseneau did not sell the TRIP book of business while she was still employed. She negotiated for its sale while still working for PDI, but I have found that this was

mere planning after she had received PDI's unilateral changes to essential terms of her employment on October 6, 2015. The actual sale of Arseneau's interest in the TRIP book of business itself did not occur until January 4, 2016, pursuant to the executed Share Purchase Agreement.

Staebler

[199] The plaintiff argues that Staebler either knew or, alternatively, was reckless or wilfully blind to the fact of the confidential nature of the TRIP information Arseneau provided and that Philpott failed to make inquiries that an honest and reasonable person would make. As a result of its failure to inquire further about the nature of the TRIP client information that was being proffered, Staebler benefitted from the misuse of the confidential information and is therefore liable in equity for breach of confidence, equal to Arseneau.

[200] I do not accept the plaintiff's argument in this regard. While Arseneau did use the TRIP client renewal list in valuing and negotiating a purchase of the book of business from Staebler, there was no solicitation of clients at that point. Arseneau's uncontroverted evidence was also that she did not use the actual TRIP renewal list to solicit clients for Staebler. Regardless, in my view, since Arseneau effectively co-owned the TRIP client information, there was no breach of confidentiality in her use of the client list for any purpose. An owner of a book of business is entitled to use it in the course of their business endeavours. In her negotiations with Staebler in late November/early December 2015, Arseneau was not attempting to divert clients away from PDI. She was negotiating a move to Staebler for her own job prospects. There was no guarantee that any of the TRIP clients would follow her, and she made no overtures towards any of the clients prior to her employment relationship with PDI ending.

[201] Given my findings that Arseneau effectively co-owned the TRIP book of business, she was entitled to negotiate with Staebler for its sale. There is no evidence that Staebler had access to or used the information except for the purpose of the purpose of valuation, negotiation and execution of the Share Purchase Agreement. The TRIP client contact information was legitimately known to Arseneau as a co-owner of the TRIP book of business. Since the information was not confidential vis-à-vis Arseneau, Staebler was entitled to use the information in its business dealings with Arseneau and, subsequently, with Sutton.

(g) Did Sutton breach any employee duty owed to PDI?

[202] The plaintiff alleges that Sutton breached her employee duties owed to PDI.

[203] As it relates to Sutton, she did sign an employment agreement and a restrictive covenant agreement with PDI. However, I find that she did not breach either of those by her conduct. The evidence did not establish that Sutton printed off the TRIP client renewal list for the purpose of Arseneau using it in her negotiations with Staebler. Sutton's last day of employment with PDI was January 1, 2016. She did not join Staebler as an employee until January 4, 2016 and she did not sell her shares in the numbered company until after the termination of her employment with PDI. The Staebler purchase value was contingent on Arseneau's success in soliciting TRIP clients to move to Staebler. I accept that Sutton was not involved in that solicitation. There is no credible

evidence demonstrating that, either before or after her departure from PDI, Sutton used the TRIP client renewal list in a manner that breached her employee duties owed to PDI.

[204] The plaintiff did not prove that it was Sutton who provided the December 4, 2015 client renewal list printouts to Arseneau that were ultimately attached as a schedule to the Transfer Agreement and the Share Purchase Agreement. The evidence established that these were oft-printed reports, used by brokers to keep apprised of clients' policy expiry dates and insurance renewal needs. I accept Sutton's testimony that while it may have been her who printed the December 4 reports, she did not do so for any purpose outside her employment duties at PDI. Arseneau's evidence was that each month she received the client renewal list printed out between the 1st and 7th day of the month. Sutton's testimony was that she would print the renewal list for Arseneau on a regular basis, sometimes three to five times a month. Arseneau would use them to monitor renewals for clients.

[205] There is also no evidence to support a finding that Sutton and Arseneau worked in conjunction with each other to sell the TRIP client renewal list to Staebler. Arseneau had engaged with Staebler before Sutton found out that information. It was Arseneau who decided to share with Sutton a portion of the TRIP Book in recognition of her work over the years with certain identifiable clients. (Even when Sutton began working at PDI back in June 1, 2009, PDI recognized that Sutton had a producer-type relationship with at least 4 clients and initially paid her a commission portion.)

[206] Sutton testified that she and Arseneau used the TRIP client renewal list to arrive at a number they both felt was fair for Arseneau to share with her in terms of Sutton's contribution to the value of the book. Arseneau wanted it to be a fair and accurate determination of accounts that Sutton handled and wrote. Sutton believes this exercise was done around the date of her resignation from PDI. I find that use of the TRIP client renewal list in this way did not breach any employee duty owed to PDI by Sutton since it did not constitute an act to compete with PDI. Sutton did not provide the list to MNP or Staebler, Arseneau did. And Sutton did not use the client renewal list to contact TRIP clients to solicit them to transfer their business to Staebler.

[207] Upon commencing her employment at Staebler, for the first 12 months, Sutton was not involved with servicing the transportation insurance division. This was to ensure compliance with her non-competition/non-solicitation agreement with PDI. There is no evidence that she breached that agreement. She was assigned to a different division and did not work with Arseneau.

[208] I find that Sutton's conduct falls far short of any breach of her employment agreement or restrictive covenant duties and obligations owed to PDI.

(h) Was there knowing assistance by Staebler?

[209] The plaintiff claims that Sutton and Staebler knowingly assisted in specific breaches that Arseneau committed in breaching her fiduciary duties to PDI as her employer.

[210] In order to establish knowing assistance in breach of fiduciary duty, the evidence must bear out: (i) a fiduciary duty; (ii) a fraudulent or dishonest breach of the fiduciary duty; (iii) actual knowledge on the part of the stranger of both the fiduciary relationship and the fiduciary's fraudulent or dishonest conduct; and (iv) participation or assistance of the stranger in the

fiduciary's fraudulent or dishonest conduct: see *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, at para. 42, appeal allowed 2019 SCC 30; and *Air Canada v. M&L Travel Ltd.*, 1993 CanLII 33 (SCC).

[211] The plaintiff's claim of knowing assistance rests on a finding that Arseneau owed PDI fiduciary duties and that the TRIP book of business was improperly sold to Staebler. Since I have found that Arseneau did not owe any fiduciary duty to PDI and since I have found that Arseneau, as effectively a co-owner of the TRIP book of business, was entitled to sell her goodwill in the book, the claim of knowing assistance must fail as there was no fraudulent or dishonest breach of a fiduciary duty by Arseneau.

[212] Philpott made reasonable inquiries of Arseneau in terms of her ownership of the TRIP book of business. She also subsequently met with PDI/Jones Brown to discuss the matter and make follow-up inquiries of them. The responses provided by PDI satisfied Philpott that PDI/Jones Brown did not own the TRIP book of business and that Arseneau was not in breach of any duties towards PDI/Jones Brown in selling the book. Accordingly, there is no evidence to establish that Staebler had actual knowledge or was wilfully blind to any alleged breach of a fiduciary duty by Arseneau.

(i) *Did Staebler induce Arseneau and Sutton to breach their contracts with PDI?*

[213] The plaintiff argues that Staebler induced Arseneau to breach her contract of employment with PDI and that, in turn, Arseneau induced Sutton to breach her own contract of employment with PDI. The plaintiff contends that Philpott knew that in engaging in the sale transaction with Arseneau, she was encouraging her to release confidential information; and that Arseneau was aware of Sutton's employment duties owed to PDI, including the restrictive covenants.

[214] The tort of inducing breach of contract has four key elements: (i) a valid and enforceable contract between the plaintiff and a third party; (ii) awareness of the existence of this contract; (iii) an intention to and procurement of a breach of the contract; and (iv) damage as a result of the breach: *Chaba v. Khan*, 2020 ONCA 643, at para. 17.

[215] I find that Arseneau did not breach any term of her contract of employment with PDI by engaging in discussions or negotiations with Staebler for the sale of the TRIP book of business or to secure new employment at Staebler. Arseneau was not bound by any contractual term that precluded or prohibited her from using or disclosing the TRIP client renewal list in the ways that she did. Arseneau engaged with Staebler freely and of her own will. Since there was no breach of contract by Arseneau, it follows that Staebler did not knowingly assist in any breach of contract or induce any breach of contract by Arseneau.

[216] With respect to Sutton, the evidence established that it was Sutton's choice to resign from PDI after she had spoken with McCarter and McFarland about what her employment at PDI/Jones Brown might look like. There is no evidence that Arseneau pressured or induced Sutton to leave PDI. I find that it was completely Sutton's decision for her own career considerations. She gave two weeks' notice to PDI, as required by her employment contract, and she did not commence working at Staebler until after her last day of employment at PDI. I previously found that there was no evidence proving that Sutton provided the TRIP client renewal list to Arseneau for any

reason that was not related to their work at PDI. Sutton did not provide the client renewal list to anyone outside of PDI. Sutton also did not breach her 12-month restrictive covenant owed to PDI. Accordingly, I find that Sutton did not breach her contractual duties with PDI. So, Staebler cannot be held liable for knowing assistance in any breach by Sutton either.

[217] I conclude that Staebler did not induce Arseneau or Sutton to breach their contracts.

(j) Was there conversion?

[218] The plaintiff submits that the defendants are liable for conversion of the TRIP client renewal list.

[219] The tort of conversion is a strict liability tort that involves wrongful interference with another person's chattels such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods: *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 SCR 727, at para. 31.

[220] The tort of conversion has traditionally dealt with chattels which had been absconded with. However, the plaintiff relies on the Ontario Court of Appeal's decision in *Tucows.Com Co. v. Lojas Renner SA*, 2011 ONCA 548, to argue that a modern conception of property can include intangible goods like a book of business. The plaintiff submits that the tort of conversion can apply to goodwill, including in respect of the misappropriation of information and goodwill belonging to an employer: see *Brant Avenue Manor Limited Partnership v. Transamerica Life Insurance Co. of Canada*, 2000 CanLII 22368 (ONSC), at para. 13; and that conversion can also form the basis for unjust enrichment: see *1350369 Ontario Inc. v. O'Halloran*, 2015 ONSC 2770, at para. 321, wherein two employees who breached their employment contracts were found to be unjustly enriched by way of conversion of a book of business properly owned by the employer.

[221] The plaintiff argues that the test for conversion is satisfied in this case as it relates to the TRIP book of business in its entirety because the book was PDI's specific and identifiable property and was properly owned by PDI. Arseneau sold the book of business, including the client list and all of the related information, to Staebler. That sale was inconsistent with PDI's rights in respect of the book. By engaging in the sale of the TRIP book of business to Staebler, both Arseneau and Staebler deprived PDI of its proprietary interest in the book. Both Arseneau and Staebler are therefore liable for the tort of conversion regarding the book. TRIP was deprived of essentially all of its clients due to the actions of Arseneau, Sutton, and Philpott (on behalf of Staebler).

[222] I have found that there was no binding and enforceable agreement between Arseneau and PDI with respect to either of their ownership rights of the TRIP client information, which includes using that information to solicit said clients on the termination of their association. Accordingly, the plaintiff has not proven that it owned the TRIP book of business in its entirety.

[223] Other than a copy of the TRIP client renewal lists that were attached to the Transfer Agreement and the Share Purchase Agreement, there is no evidence that Arseneau took anything else from PDI to Staebler. At all material times, PDI continued to have the same TRIP client

renewal list information available to it on its computer system. The information was available to PDI to use for any purpose, including to service, contact, and solicit TRIP clients.

[224] I conclude that the defendants are not liable for conversion of any PDI property.

(k) Was there conspiracy?

[225] The plaintiff contends that the defendants acted in concert with a common purpose and intention of effecting the sale of the TRIP book of business and they either knew, or should have known, that their conduct would cause harm to PDI. The plaintiff argues that the coordinated unlawful conduct of the defendants in effecting the removal of PDI's confidential information and the sale of the book of business of PDI's transportation business without its knowledge or consent is sufficient to ground a finding in unlawful conduct conspiracy with respect to all of the defendants.

[226] In *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, at para. 26, the Ontario Court of Appeal affirmed the following requirements for the tort of unlawful conduct conspiracy: (i) two or more people, acting in concert, by agreement or with a common design or intention; (ii) engaged in conduct that is unlawful; (iii) the conduct was directed towards the plaintiff; (iv) in the circumstances, the defendants should have known that injury was likely to result; and (v) injury or harm did, in fact, result.

[227] Each defendant may be liable for their specific participation at different points in time, so long as each was aware of the relevant facts at that point and chose to participate: *HSBC Bank Canada v. 1100336 Alberta Ltd.*, 2013 ABCA 235, at paras. 33-35.

[228] I have already found that Arseneau did not breach any fiduciary duty or duties of confidence, loyalty or fidelity owed to PDI in selling the TRIP book of business to Staebler. I have also already found that the evidence does not prove that Sutton assisted Arseneau by providing the December 4, 2015 renewal list reports to her for the purpose of the sale to Staebler.

[229] In my view, the plaintiff has not proven a case of unlawful conduct conspiracy. Arseneau owned her Kimberley & Associates book of business and effectively co-owned the TRIP book of business. She was constructively dismissed from her employment with PDI. In any event, she gave two weeks' notice of her intention to leave that employment but was told that she was not required to work out those two weeks. Arseneau was never subject to a restrictive covenant or non-competition clause at PDI. Due to being constructively dismissed, she was not bound by a fiduciary duty or a duty of confidentiality that survived the cessation of her employment relationship with PDI: *Zesta Engineering Ltd. v. Cloutier*, 2010 ONSC 5810, at para. 184. Arseneau was entitled to pursue the Staebler opportunity without regard to the interests of PDI. Staebler was free to negotiate with Arseneau as a producer who owned her book. There was nothing unlawful in this. (In my view, this state of affairs was also reflected in the fact that PDI sold the TRIP book of business to Jones Brown without Arseneau's knowledge or consent in June 2015.)

[230] I also find that Arseneau's reason for selling the TRIP book of business was not to cause harm to PDI. She did it in order to garner a new employment opportunity and salvage her business

in light of PDI's constructive dismissal of her and repudiation of their business arrangement. I accept her evidence that, after considering the October 6, 2015 email, she felt that she had no other choice but to leave PDI and find a position elsewhere.

[231] I find that Staebler acted in good faith and in a commercially reasonable manner in buying the book of business and goodwill from Arseneau. Philpott asked Arseneau whether she owned the book and was told that she did. She had no obvious reason to doubt this. Arseneau made the initial disclosure to Philpott in November 2015 about her unhappiness with her situation at PDI and they discussed possible options for a move to Staebler and what that would look like. It was up to Arseneau what she would decide to do. Arseneau testified that, even as of December 2, 2015, she was still undecided whether she would move to Staebler and waited to see PDI/Jones Brown's response to her "counter" email. It was only when no immediate reply was forthcoming that Arseneau decided, on December 3, 2015, to accept the offer of employment and purchase of her book of business as made by Staebler.

[232] Finally, parties are entitled to seek legal and financial advice and to organize their affairs so as to reduce tax liabilities. I draw no inference adverse to the defendants from any of those steps taken in the course of arranging the sale transaction to Staebler.

[233] I conclude that the defendants are not liable to PDI for the tort of unlawful conduct conspiracy.

(l) Are there any damages owing to PDI?

[234] Given my conclusion that the defendants are not liable to PDI for any of the claims made in the statement of claim, it follows that no damages are owing to PDI and so none are ordered.

[235] However, in the event that I am wrong on the question of liability, it is useful to make a finding on the question of the damages that the plaintiff suffered as a result of the TRIP book of business being sold to Staebler.

[236] The plaintiff claims damages based on the cause of action that was established. In this regard, it submits that for breach of contract, the amount is that which would place the plaintiff back in the same position it would have been in had the contract been performed; for tort and equity claims, the goal is to place the plaintiff back in the position it would have been in but for the breach; and for inducing breach of contract, damages are at large, do not require specific proof, and a claimant is entitled to be compensated for the actual harm sustained and to be put back in the position that it would have been in had the misconduct not occurred: see *Prim8 Group Inc. v. Tisi*, 2016 ONSC 5662, at para. 66. The plaintiff further submits that, for matters involving breach of fiduciary duty, damages typically serve to compensate an injured party for losses suffered and to act as a deterrence; deterrence is achieved primarily through disgorgement and is available for legal and equitable wrongs: *Canada National Railway Company v. Holmes et al.*, 2022 ONSC 1682, at paras. 446-447.

[237] Both parties called expert testimony from professional accountants who provided opinions with respect to the quantification of damages.

[238] The plaintiff called Mr. MacRae who provided three alternate bases of damages: (i) valuation of the lost goodwill of the business division in the amount of \$1.333 million; (ii) a lost profits analysis for five years and the sale of the book at the end of that period in the amount of \$1.927 million; or (iii) a disgorgement analysis of \$1.759 million.

[239] The defendants called Mr. Frye who opined that the appropriate basis for calculating damages was the valuation of the goodwill of the business and calculated those damages to be no more than \$223,000. Mr. Frye relied on a client list provided by Arseneau that she indicated to him reflected original Kimberley & Associate clients and removed those from the TRIP client list in order to calculate the value of the remaining book of business, applying a multiplier of 1.333.

[240] After considering the totality of the evidence, I accept that the proper approach for calculating damages in this case is that proposed by Mr. Frye for the following reasons:

- (a) Mr. MacRae conceded that transportation insurance was considered a niche market and that the issue of whether the specialist insurance producer would be willing to continue to stay on to service a book of business would be a relevant factor, and that it might be important for a hypothetical buyer of a transportation insurance book of business whether the transportation specialist was coming with the transaction.
- (b) Mr. MacRae agreed that non-competition and non-solicitation provisions would be important to a potential buyer of an insurance book of business because they would not want the seller to compete and solicit the very clients in respect of which the book purported to be sold.
- (c) Mr. Frye took into account that Arseneau had left PDI and so would not be attached to the TRIP book of business. Mr. MacRae did not take that factor into account.
- (d) Mr. Frye took into account that PDI's evidence was that there was no one senior enough to immediately take over the transportation insurance book of business once Arseneau left. Mr. MacRae did not take that factor into account.
- (e) Mr. Frye took into account that Arseneau did not have a non-solicitation or non-competition agreement with PDI prohibiting her from soliciting TRIP clients or competing with PDI for TRIP clients. Mr. MacRae did not take that factor into account.
- (f) Mr. MacRae did not take into account the value of the Kimberley & Associates book, which Mr. Frye valued to be \$258,600 at the time of Arseneau's departure from PDI.
- (g) Mr. MacRae did not take into account the value of any retirement allowance to be paid by PDI to Arseneau.

[241] Given that Arseneau had left PDI/Jones Brown, to the extent that the TRIP book of business remained with PDI, it was effectively "orphaned" for two reasons: (i) there was no one at PDI who had the same degree of goodwill with the TRIP clients as Arseneau did; and (ii) PDI did not have anyone on the same senior level as Arseneau who could immediately step into her shoes to service the transportation clients. This would have impacted on the value of the TRIP book to be paid by

a potential purchaser. I find that the most significant factor that would influence the TRIP book valuation to a prospective purchaser, however, was the fact that there was no restrictive covenant, non-competition/non-solicitation agreement to preclude Arseneau from trying to solicit the TRIP clients after leaving PDI.

[242] Arseneau's relationship with the former Kimberley & Associates clients and the TRIP clients was effectively all of the goodwill of TRIP, given that she was the main face and contact person for interacting and servicing the TRIP clients. I accept the defendants' submission that the best evidence of this is McCarter's own evidence regarding his refusal to pay anything to Elliott for the Kimberley book when Arseneau joined PDI back in 2009 because he knew that the value that existed in the book was directly tied to Arseneau herself and the relationships she had with her clients.

[243] All of this means that the upfront value of the TRIP book of business would not be as high as submitted by the plaintiff given the uncertainty that PDI or a potential buyer would be able to retain the TRIP clients and renew their insurance business. I accept the evidence of Mr. Frye that it is reasonable in these circumstances to apply a significant discount to the TRIP book value in order to account for these factors and accept his suggested discount of 67% as being fair and reasonable in the circumstances.

[244] In addition, with respect to Mr. MacRae's second scenario, I find that it is based on a notional five-year profit of the TRIP book of business with a notional sale in 2021, and is not an assessment as of the date of breach. So, it proposes an approach that is contrary to the general presumption that contract damages are to be assessed as of the date of the breach, which was affirmed by the Ontario Court of Appeal in *Rougement Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, at paras. 45, 50-51. I do not find that there are any special circumstances warranting a displacement of that presumption.

[245] With respect to Mr. MacRae's third scenario, I do not accept that disgorgement is an appropriate remedy in the circumstances. Courts have long recognized the need for disgorgement as the appropriate remedy for breach of fiduciary duty to deter others from similar breaches. In *Stoother v. 3464920 Canada Inc.*, 2007 SCC 24, at paras. 74-78, the Supreme Court of Canada explained that disgorgement of profits is an equitable remedy which may be ordered, in a court's discretion, either for a prophylactic purpose (to teach the fiduciary that conflicts of interest do not pay) or for a restitutionary purpose (to restore to the beneficiary the profit which was wrongly appropriated by the fiduciary in breach of its duty). Further, the Supreme Court of Canada in *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19, at paras. 23-24, and 61, held that disgorgement is a gain-based remedy and is "exceptional relief" for breach of contract. In this case, there is nothing exceptional about the breaches that PDI alleges. I have found that Arseneau was not a fiduciary to PDI. There is no certainty that the TRIP clients would have remained at PDI after Arseneau's departure since there was nothing prohibiting Arseneau from competing with PDI to solicit the TRIP clients. Finally, I take into account the fact that PDI sold the TRIP book to Jones Brown in June 2015 without notice to Arseneau. Taking these factors into consideration, I decline to order an equitable remedy such as disgorgement of profits.

[246] I do not accept the plaintiff's argument that the multiplier used in the Jones Brown purchase of PDI is an appropriate measure. The Jones Brown purchase was for all of the shares of PDI based

on its entire portfolio which was quite valuable, the deal was based on McCarter signing a non-competition/non-solicitation agreement, and one of the representations made by PDI in the purchase was that each employee/producer had executed a non-competition/non-solicitation agreement or other restrictive covenant in favour of PDI.

[247] The evidence at trial was that the goodwill attached to the TRIP book of business was largely personal to Arseneau. While PDI made financial investments in TRIP, Arseneau's involvement in the running of the business was fundamental to its success. PDI recognized this and it is supported by PDI's differentiation of how it treated Arseneau.

[248] The value in the TRIP client renewal list was not intellectual property, per se. Rather, it was Arseneau's relationship with the transportation insurance clients. To convert that goodwill to some sort of commercial value, a seller typically needs to be assured that the producer with the client relationships will remain, or will be leaving but has agreed to a transition plan for the clients, and has agreed not to compete. None of those elements are present here. What Arseneau sold to Staebler was really her relationships with her clients. The TRIP client renewal list remained available to PDI at all times after she left PDI. The clients were free to stay or go, as they wished. Both experts recognized that the main value in a book of business is the goodwill and that a purchaser would not want to pay a lot of money for a client list without a non-competition/non-solicitation agreement or restrictive covenant in place. There was no evidence led that another purchaser would pay anything for the goodwill in the TRIP book let alone the amount being sought by the plaintiff from the defendants.

[249] In quantifying the plaintiff's damages, I find that the plaintiff has failed to establish that there was a transferable commercial goodwill in the TRIP client renewal list that would translate to an amount of damages as opined by Mr. MacRae.

[250] In all of the circumstances, I would assess damages in the amount of \$223,000, in accordance with the defendants' expert opinion.

CONCLUSION AND DISPOSITION

[251] For all of the foregoing reasons, I conclude that the plaintiff's claims are not sustainable and the action is dismissed.

[252] On the whole of the evidence, I find that the parties had very disparate positions on crucial terms of their relationship for the purposes of the TRIP venture. To accept the plaintiff's interpretation would effectively write a new contract for the parties on terms that were never agreed to. This would completely ignore Arseneau's repeated objections that she came into the relationship intending to be treated as an owner and partner of PDI, and not simply as an employee. It would also result in the plaintiff being given ownership of an asset – the TRIP book which encompasses the Kimberley book – on terms and for a value that were never agreed upon by the parties. I conclude that no discernible agreement was reached between PDI and Arseneau and that no legal relationship existed between them that would entitle the plaintiff to the claims made in this action. Further, there was no conversion, misappropriation or conspiracy by the defendants.

COSTS

[253] I would urge the parties to agree on costs. If they are unable to do so, then costs submissions may be made as follows:

- (a) By January 31, 2025, the defendants shall serve and file their written costs submissions, not to exceed five pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and
- (b) The plaintiff shall serve and file its responding costs submissions of no more than five pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by February 14th, 2025; and
- (c) The defendants' reply submissions, if any, are to be served and filed by February 21st, 2025 and are not to exceed three pages.
- (d) If no submissions are received by February 21st, 2025, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

[254] If the parties are able to settle the question of costs or if a party does not intend to deliver submissions, counsel are requested to advise the court accordingly.

MacNEIL J.

Released: January 10, 2025