COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Belron Canada Inc. v. TCG International Inc.,*
2009 BCCA 577

Date: 20091217
Docket: CA037131

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Between:

Belron Canada Incorporated/Belron Canada Incorporee

Appellant
(Plaintiff)

And

TCG International Inc., Allan Skidmore, Arthur Skidmore, Thomas E. Skidmore, Garry Skidmore, John Skidmore, Marilyn Skidmore, Ruth Moody, Apple Auto Glass Limited, Apple Auto Glass Systems Limited, Applewood Auto Glass & Upholstery Ltd., Windshield Doctor Canada Ltd., Hub City Glass Limited, Hub City Glass (Regina) Ltd. and Groupe Novus Inc./Novus Group Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low
The Honourable Mr. Justice Lowry

On appeal from: Supreme Court of British Columbia, May 1, 2009; (*Belron Canada Incorporated v. TCG International Inc.*, May, 2009 BCSC 596, S092231)

Counsel for the Appellant: D.E. Gruber & J.R. Goheen

Counsel for the Respondent: H.J. Harris & R.S. Padda

Place and Date of Hearing: Vancouver, British Columbia
November 27, 2009

Place and Date of Judgment: Vancouver, British Columbia
December 17, 2009

Written Reasons by:
The Honourable Mr. Justice Low

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Lowry

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Reasons for Judgment of the Honourable Mr. Justice Low:

[1] This is an appeal by the plaintiff, Belron Canada Incorporated, of an order dismissing Belron's application for an interim injunction restraining the defendant, TCG International Inc., from operating the website hosted at the URL www.windshields.com "in relation to the Canadian automobile glass repair or replacement business until" the earliest of 4 November 2012, the trial or other disposition of the action, or further order of the court.

[2] TCG set up the website to make referrals of consumers to automobile glass dealers in the United States, extended the referral service to dealers in Quebec and proposes to further extend it to the rest of Canada. TCG receives a fee from the dealer for each referral. Belron complains that use of the website for referrals in Canada breaches a 2005 agreement between the parties which included non-competition, non-solicitation and non-interference clauses binding on TCG for seven years.

[3] Madam Justice Ballance dismissed the application in chambers. Her reasons are indexed at 2009 BCSC 596. She concluded the reasons thus:

> [109] In weighing the relevant factors, which include the merits of Belron's claim, the sufficiency of damages, the absence of irreparable harm, as well as others, I conclude that the balance of convenience favours withholding the injunctive relief. Belron's application is therefore dismissed.
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> [110] In light of the fact that the restrictive covenants given by the defendants expire on November 4, 2012, the trial ought to be heard as well in advance of that date as is practicable. I intend to case manage this action to ensure this early timeline is achieved. Counsel can expect to receive a memorandum shortly setting the date of the first case management conference. At that time, I will hear the parties' submissions on costs.

[4] Belron argues in its factum that the chambers judge "erred in law or in principle in failing to properly consider and give effect to the principle that, absent special circumstances, a clear breach of an enforceable negative covenant ought to be enforced by interlocutory injunction". Belron says that, under the authorities, where there is a commercial agreement between two corporate entities, the agreement contains an unarguably negative covenant, and the plaintiff makes out a

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strong *prima facie* case that the defendant has breached or is about to breach the covenant, the court should normally restrain the breach without consideration of irreparable harm or the balance of convenience. The judge here found that the covenant was negative and that Belron had made out a strong *prima* facie case of a breach. Belron says that in the circumstances of this case there was no reason for the judge to consider irreparable harm or the balance of convenience; she should have simply granted the interim relief sought.

[5] In my opinion, the law in this area is not categorical as Belron's argument suggests and the chambers judge correctly stated the law she was bound to apply. I would not interfere with the discretion she exercised in refusing the interim injunction.

[6] The facts are thoroughly canvassed in the reasons of the chambers judge. I will summarize her findings.

[7] Until 1997, TCG owned automotive glass supply and installation outlets throughout Canada and the United States. It was a major shareholder in a public company in Quebec that operated installation outlets in that province and distributed automotive glass on a wholesale basis. In August 1997, TCG and the other majority shareholder sold their shares in that enterprise to Belron which later also acquired the remaining shares. TCG was then out of the business in Quebec but continued the business in the rest of Canada under three corporate names.

[8] In November 2005, under a lengthy and complex agreement, Belron bought all of TCG's assets in the auto glass business in the rest of Canada. The purchase price was about $53M. The chambers judge found that Belron became "a dominant player in the Canadian automotive glass industry" and that it is also "a significant presence in the American market".

[9] On the closing of the transaction, TCG, as it was bound by the terms of the contract to do, provided Belron with "Non- Competition, Non-Solicitation,

Confidentiality Agreements". These contain lengthy restrictive covenant clauses reproduced at paragraph ten of the reasons of the chambers judge.

[10] An employee of TCG registered the domain name for the website in 1997 and transferred it to TCG in 2002. The site remained dormant until 2007 when TCG made it operative. The chambers judge described the operation of the website in some detail in paragraphs 13 to 28 of her reasons. The site operates in the United States and in Quebec. Potential consumers can use it to discover the available automotive glass shops in their area and to connect with the shop of their choice. The site does not make recommendations. TCG charges the retailer a fee if the consumer chooses that retailer's service.

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[11] As of the date of the hearing of Belron's injunction application (April 2009), thousands of Canadian Internet users had visited the website. TCG did not use those enquiries to connect consumers with retailers outside Quebec. We are told that the situation has not changed. As I understand it, TCG is using the website referral service in the province of Quebec but not in the rest of Canada.

[12] The leading authority on interim injunctions is *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In that decision, the court adopted a three-part test set out in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.). The test is:

> (1) Is there a serious question to be tried?
>
> (2) Has the applicant demonstrated that it will suffer irreparable harm if an interim injunction is not granted?
>
> (3) Where does the balance of convenience lie as between the parties?

[13] The final question involves "... an assessment ... as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits": *RJR-MacDonald* at p. 334.

[14] In the present case, the chambers judge discussed whether there was a need to closely examine the merits of the plaintiff's case:

> [34] In *RJR-MacDonald*, the Court stated that the low threshold of the initial inquiry meant that an extensive examination of the merits of the applicant's claim was "neither necessary nor desirable" in the early days of the litigation (338). At the same time, however, the Court recognized that a rigid application of the *American Cyanamid* formulation may not do justice in every instance. With that caution in mind, the Court was careful to acknowledge at 338-339 the existence of exceptions to the general rule that an in-depth review of the merits should not be conducted at the outset:
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>> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
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>>> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

[15] The chambers judge went on to determine that this case fell into the first exception described in *RJR-MacDonald*. At para. 49, she said that "the more rigorous test must apply in this case as a matter of justice". She then asked whether Belron had established a strong *prima facie* case. She noted that the litigation was in an early stage, the only pleading being an endorsement on the writ of summons that simply alleges that, by operating the website in Quebec, TCG is in breach of its covenants and that its intended expansion of the website for customer referral across Canada would also be in violation of its covenants.

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[16] After an extensive discussion of the arguments raised by TCG as to why its operation of the website in Canada would not amount to a breach of any of the covenants, including reference to several applicable authorities, the chambers judge determined that Belron had made out a strong *prima facie* case of a breach. On appeal, Belron does not challenge the judge's conclusion that such a case had to be made out and TCG does not challenge the finding that it had been made out.

[17] The chambers judge turned to the questions of irreparable harm and balance of convenience. She provided the following analysis:

> [97] Belron complains that it will suffer financial loss from business being diverted away from its various operations due to the Website. It also argues that there will be a depreciation of its goodwill if a customer is introduced to a local competitor through the Website. It claims that once that happens, barring poor service from that competitor, the customer will likely return to the competitor for any future automotive glass needs.
>
> [98] Belron's hypothesis that potential customers who avail themselves of the Website will ultimately be lost to Belron is highly speculative. To some extent its supposition also argues against the presence of irreparable harm in the sense that, barring poor service from Belron, all existing customers of Belron would continue to use Belron retailers with whom they had forged an existing relationship. On this analysis, there would be minimal risk of Belron losing its current customer base.
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> [99] Belron's evidence concerning the injury it might reasonably be expected to suffer if injunctive relief is not granted was relatively superficial. It did not lead adequate evidence to support its contention that it has lost, or will likely lose, customers in Quebec, or that there is a high degree of probability that it will suffer a depreciation of goodwill or lose business or a permanent share of the market into the future as the Website expands into other provinces.
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> [100] As stated previously, Belron is a significant force in the Canadian automotive glass industry. There is no suggestion that the Website would likely threaten its Canadian enterprise in any substantial way, much less put it out of business.
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> [101] Moreover, Belron has not demonstrated how such losses, were they to be incurred, would not be assessable as damages. There are a number of acceptable methods to calculate damages for the loss or diminution of goodwill and business revenue. In this case, one approach might be to examine Belron's sales before the launch of the Website within particular areas and compare them to any decline in business after the launch in those same locations, taking into account the proper contingencies such as the volume and financial value of the automotive glass business facilitated through the Website.

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> [102] Difficulties posed in the assessment of damages for breach of contract do not render the harm giving rise to such damages irreparable. The court regularly conducts complicated assessments of business losses in commercial cases, including losses that are based on uncertain future events, and unknown and fluctuating market conditions: *Music Waves Productions Ltd. v. WIC Television Ltd.*, [1997] B.C.J. No. 2240 (S.C.); *Kosub v. Cultus Lake Park Board*, 2006 BCSC 1410.
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> [103] Despite the forceful submissions of Belron's counsel, Belron has not shown that, should it prove its claim, the assessment of damages to which it would be entitled is any more formidable than it is in a spectrum of other cases where damages are routinely fixed by the court.
>
> [104] There is some evidence that granting the injunction could visit a degree of prejudice on TCG. At this time, the Website is the only one of its kind in Quebec and there is no Website like it operating in the rest of Canada. There are, however, several other companies that operate websites along the same lines as the Website in the United States. The defendants argue that any impediment to the Website's expansion across Canada at this vital early juncture would provide a great opportunity for competitors who wish to establish a market presence ahead of TCG. As the internet is not limited by geography, there is, in theory, nothing standing in the way of those American-based companies from entering the Canadian marketplace before the Expiration Date. TCG's timing of being the first such business to exploit the market in Quebec and potentially throughout the rest of Canada, is a reasonable business advantage: *Kanda Tsushin Kogyo Co. v. Coveley* (1997), 96 O.A.C. 324.
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> [105] I accept that an injunction at this crucial stage may pose a barrier to TCG gaining the market edge that it might otherwise enjoy from being the first one to launch this sort of business model in Canada. I also accept that TCG has heavily invested in the Website and that its investment may be lost or impaired if it is restrained from operating in the Canadian market until the matter is resolved at trial.
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> [106] Belron led no evidence, and made no suggestion that TCG would not be in a position to satisfy an award for damages in the event Belron succeeds at trial.

[18] I expect the chambers judge recognized that breach of the restrictive covenants had not yet been proven at trial and that operation of the website does not amount to direct competition, if it amounts to prohibited competition at all, and if the covenants prove to be reasonable. It has to be remembered that TCG has not purchased existing competing auto glass retail outlets or opened new ones in Canada. Had they done either of those things, I expect the path to interim injunctive relief would have been clearly lit.

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[19] I turn now to Belron's argument on appeal. It says that there was no basis for the chambers judge to consider irreparable harm or balance of convenience after determining that there was a strong *prima facie* case of breach of a negative covenant.

[20] Belron relies on *Gulf Islands Navigation Limited v. Seafarer International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216, 27 W.W.R. 652 (B.C.S.C.), aff'd 18 D.L.R. (2d) 625, 28 W.W.R. 517 (C.A.), a labour injunction case, and a handful of appellate decisions in this and in two other provinces: *Montreal Trust Co. v. Montreal Trust Co. of Canada* (1988), 48 D.L.R. (4th) 385, 24 B.C.L.R. (2d) 238 (C.A.); *Coast Hotels Ltd. v. Northwest Hotels Inc.,* 2001 BCCA 496, 11 C.P.C. (5th) 189; *Gelco Express Ltd. v. Roberts,* [1985] B.C.J. No. 2435 (C.A.)*; Canada (Attorney General) v. Saskatchewan Water Corp.*, 109 Sask. R. 241, [1992] 4 W.W.R. 712 (C.A.); and *Miller v. Toews,* 70 Man. R. (2d) 4, [1991] 2 W.W.R. 604 (C.A.).

[21] In my opinion, these cases cannot be read as enunciating the fairly rigid proposition argued by Belron. In addition, all of them except *Coast Hotels* pre-date *RJR-MacDonald*. There is emphasis in some of these cases that apparent breach of a negative covenant in a commercial agreement will usually attract an injunctive order. But these authorities do not preclude consideration of irreparable harm and balance of convenience as later clearly enunciated in *RJR MacDonald* to be part of the applicable test. Each of the cases cited by Belron was decided on the particular circumstances of the case and the most that can be said about them being in support of Belron's proposition is that irreparable harm on some sets of facts has been seen to be a lesser consideration.

[22] It is probably correct to say that in most commercial cases involving sophisticated and solvent litigants in which a strong *prima facie* case is made out that there has been or will be breach of a negative covenant, an interim injunction will be granted. But this area of law would not be well served by formulating a rule, as suggested by Belron, that the injunction should always be granted absent

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exceptional circumstances. The questions of irreparable harm and balance of convenience should be addressed. Each motion for an interim injunction should be determined on a discretionary basis under the three-part test. On the present state of the law, there is no basis for holding that the test is not of general application.

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[23] I am not persuaded that the chambers judge misstated or misapplied the law to the particular circumstances. Belron has not demonstrated any basis on which this court should interfere with the discretion exercised by the chambers judge in refusing to grant the interim injunction.

[24] I would dismiss the appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Lowry"