See paras. 19, 33

Case Name:

ThyssenKrupp Elevator (Canada) Ltd. v. Amos

RE: ThyssenKrupp Elevator (Canada) Limited, Plaintiff/Respondent, and Scott Amos, Skyline Elevator Inc. and Schindler Elevator Corporation, Defendants/Moving Parties

[2014] O.J. No. 3155

2014 ONSC 3910

16 C.C.E.L. (4th) 313

242 A.C.W.S. (3d) 332

2014 CarswellOnt 9013

Court File No. CV-13-491661

Ontario Superior Court of Justice

F.L. Myers J.

Heard: June 16, 2014.
Judgment: June 26, 2014.

(46 paras.)

Contracts -- Validity -- Public policy -- Restrictive covenants -- Non-solicitation agreements -- Non-competition agreements -- Motion by the defendants for summary judgment allowed -- The plaintiff ThyssenKrupp Elevator alleged that the defendant Amos was induced to leave its employ to take up a position with the corporate defendants -- ThyssenKrupp Elevator further alleged that Amos violated non-competition and non-solicitation clauses of his employment contract and his fiduciary duties -- Amos denied any wrongdoing and was not successfully challenged on cross-examination -- Amos held an entry-level management post and was not a fiduciary to ThyssenKrupp Elevator -- Furthermore, the restrictive covenants were invalid as they were overbroad or ambiguous.

Contracts -- Proceedings in contract -- Practice and procedure -- Motion by the defendants for summary judgment allowed -- The plaintiff ThyssenKrupp Elevator alleged that the defendant Amos was induced to leave its employ to take up a position with the corporate defendants -- ThyssenKrupp Elevator further alleged that Amos violated non-competition and non-solicitation clauses of his employment contract and his fiduciary duties -- Amos denied any wrongdoing and was not successfully challenged on cross-examination -- Amos held an entry-level management post and was not a fiduciary to ThyssenKrupp Elevator -- Furthermore, the restrictive covenants were invalid as they were overbroad or ambiguous.

Employment law -- Contract of employment -- Express terms -- Restrictive covenants -- Motion by the defendants for summary judgment allowed -- The plaintiff ThyssenKrupp Elevator alleged that the defendant Amos was induced to leave its employ to take up a position with the corporate defendants -- ThyssenKrupp Elevator further alleged that Amos violated non-competition and non-solicitation clauses of his employment contract and his fiduciary duties -- Amos denied any wrongdoing and was not successfully challenged on cross-examination -- Amos held an entry-level management post and was not a fiduciary to ThyssenKrupp Elevator -- Furthermore, the restrictive covenants were invalid as they were overbroad or ambiguous.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 20.02(2.1), Rule 20.02(2.2), Rule 29.1

Counsel:

Gordon B. Woods, for the Plaintiff/Respondent.

Porter Heffernan, for the Defendants/Moving Parties.

ENDORSEMENT

1 **F.L. MYERS J.**:-- This motion for summary judgment presents a "trial model" dilemma. The plaintiff alleges that the defendant, Scott Amos, was induced to leave its employ to take up a position with the corporate defendants. In doing so, the plaintiff alleges, Mr. Amos violated the noncompetition, non-solicitation and confidentiality clauses of his employment contract, a separate confidentiality agreement, and his fiduciary duties. In essence, the plaintiff alleges that the defendants improperly solicited the plaintiff's customers.

2 The defendants seek summary judgment on the basis that Mr. Amos denies any wrongdoing and the plaintiff has no firsthand evidence of illicit solicitation of customers or misuse of confidential information by Mr. Amos or his new employers.

3 The plaintiff responds that the evidence of what the defendants did to solicit customers of the plaintiff is uniquely within the knowledge of the defendants. On that basis, the plaintiff says that it is entitled to documentary discovery and examinations for discovery in order to compel the defendants to provide the necessary evidence. The plaintiff says that the court can infer that there are material issues of fact requiring a trial by extrapolating or "following the dots" from the limited evidence that the plaintiffs have obtained to date.

4 This is the classic "trial model" response to a motion for summary judgment. Over the years, under prevailing case law, counsel frequently responded to summary judgment motions by pointing to just enough facts to suggest that she can put material facts in dispute or that credibility may be in issue and then proceed to discovery, pretrial, and trial in the ordinary course.

5 The law has supported this approach as long as the responding party is able to lead sufficient evidence to show the need for discovery. It remains the obligation of parties responding to a motion for summary judgment to "put their best foot forward" or to "lead trump or risk losing". *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* 1996 CanLII 7979 (ON SC). A question arises as to how this approach is affected by the "culture shift" mandated by the Supreme Court of Canada in *Hryniak v. Mauldin,* 2014 SCC 7.

The Facts

The Plaintiff's Allegations

6 Prior to 2011, the defendant, Scott Amos, had for a number of years been employed as a salesman for the defendant, Skyline Elevator Inc. ("Skyline"). In late 2011, the plaintiff posted a job opening for a Maintenance and Service Supervisor at its London, Ontario branch. Mr. Amos's position at Skyline was non-managerial and he was attracted to the opportunity to enter management of the plaintiff who was the dominant competitor in the marketplace at the time.

7 The plaintiff alleges that as the Maintenance & Service Supervisor, Amos was responsible for overseeing the fulfillment of the plaintiff's maintenance and service contracts in South-Western Ontario. When a customer had a service or maintenance issue, the customer would contact Mr. Amos and he would dispatch the appropriate technician(s) to ensure that the customer's needs were met. Mr. Amos supervised twenty-three (23) service technicians.

8 Mr. Amos had regular contact with the plaintiff's customers in and around London. He would take some direct calls from customers when there were service or maintenance issues. He would also conduct "site visits", whereby Mr. Amos would attend customers' locations to ensure that satisfactory work was being performed.

9 The plaintiff alleges that Mr. Amos had a special relationship with its customers. Part of his job was to establish and maintain relationships with customers. The plaintiff alleges that Mr. Amos was also "highly involved" in the acquisition of new business. When the plaintiff was competing for

maintenance and service contracts, Mr. Amos was responsible for determining if the plaintiff could provide the services the customer required and provided information about fulfilment requirements to people internally who would price the bid. In acquiring new business for the plaintiff, Mr. Amos would attend "site surveys", whereby Amos would meet with the customer to determine the customer's needs and requirements.

10 As a result of the seniority of Mr. Amos's position and his special relationship with customers, the plaintiff asserts that he falls within the band of employees who are subject to fiduciary duties not to compete unfairly with their employer in addition to whatever contractual duties he may have had.

11 In addition, in recognition of the vulnerability of the plaintiff to the risk of Mr. Amos leaving to work for a competitor, the following terms were included in his contract employment:

> 7. l Amos shall not, during the term of his employment hereunder and for a period of one (1) year from its termination, either directly, or indirectly, individually or in partnership, carry on or be engaged in, or concerned with, or interested in, in any capacity whatsoever (including that of principal, agent, shareholder, employee, lender or surety) any person, firm, association, syndicate, or company engaged in or concerned with or interested in, the conception, designing, development, fabrication, construction, modernisation, maintenance, marketing, distribution, advertising, franchising or sale of products or services similar to those conceived, designed, developed, fabricated, constructed, modernized, maintained, marketed, distributed, advertised, franchised or sold by the Corporation in the course of his employment with the Corporation, within the Province of Ontario.
>
> ...
>
> 7.3 During the period contemplated by Section 7.1, Amos shall not, directly or indirectly, solicit or attempt to solicit, interfere with or endeavour to entice away any business, client, prospective client or contract of the Corporation then existing or contemplated by the Corporation within 12 months prior to the termination of Amos. Amos shall perform his services for the Corporation from its offices located in London, Ontario.

12 Mr. Amos's employment agreement also contained, at article. 6.1, a provision requiring Amos to hold in confidence any confidential information of the plaintiff which he acquired in the course of his employment. The definition of confidential information included memorized "know-how" as to the plaintiff's business. (A similar covenant is contained in a separate confidentiality agreement also executed by Mr. Amos with the plaintiff.)

13 The plaintiff also places much reliance upon the acknowledgment of reasonableness of the restrictive covenants contained in article 8.1 of the employment agreement as follows:

> 8.1 Amos agrees that all the conditions and restrictions established in this agreement are reasonable taking into account the circumstances surrounding this agreement.

14 The plaintiff's counsel noted that before he was hired, Mr. Amos negotiated to increase the salary that he was offered, but he did not seek to negotiate the terms of the restrictive covenants. Mr. Amos admits that he was aware of the restrictive covenants but he says that he was told that there would be no changes to the employer's form of agreement. He also said that he did not want to delay by negotiating further. As Mr. Amos chose to negotiate other clauses but not the restrictive covenants, the plaintiff's counsel argues that the court should treat the restrictive covenants as a commercial agreement between sophisticated parties of equal bargaining strength each with independent legal advice especially given the acknowledgement by Mr. Adams that the covenants are reasonable. (See: *Yellowhead Petroleum Products Ltd.* v. *United Farmers of Alberta Co-Operative Ltd.*, [2004] A.J. No. 1001 at para. 63). Here there was no evidence of either party having independent legal advice. They were not two sophisticated commercial parties of equal bargaining strength. Rather than enhancing the strength of the acknowledgement of reasonableness, in my view, the circumstances of a prospective employee applying for a job call for a greater level of independent analysis of the reasonableness of the restrictive covenants for the reasons discussed by Hoy J.A. (as she then was) in *Martin* v. *ConCreate USL Limited Partnership*, 2013 ONCA 72 at para 62. In *Shafron* v. *KRG Insurance Brokers*, [2009] 1 S.C.R. 157, at para. 19, the Supreme Court of Canada quoted from the seminal case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535 (H.L.) in which the Lord Macnaghten expressly noted at page 566 the inequality of bargaining power between "an employer and a person seeking employment". The power imbalance between employers and employees (and potential employees) is not a novel proposition in 2014. It is not changed by the fact that Mr. Amos got the employer to pay him an extra $5,000 and to pay for a training course before signing on.

15 In the fall of 2013, Schindler Elevator Corporation ("Schindler") bought Mr. Amos's former employer Skyline. Shortly thereafter, Schindler induced Mr. Amos to return to its employ as a supervisor of maintenance. Schindler agreed to indemnify Mr. Amos in case he was sued by the plaintiff.

16 In paragraph 18 of its Statement of Claim, the plaintiff alleges that:

> a. ...prior to his resignation, [Mr. Amos] advised clients that he was leaving [the plaintiff] and solicited their business for his new employment with Skyline and Schindler ...
> b. . . .solicited, contracted with, advised or otherwise performed services for the clients of [the plaintiff] subsequent to his resignation in breach of the

Employment Agreement...; and

c. . . .induced clients of [the plaintiff] to cancel their contracts with [it]

The Plaintiff's Evidence

17 Gary Medeiros is Vice President for Central Canada of the plaintiff. In paragraph 15 of his affidavit, Mr. Medeiros swore his oath to the following:

> 15. Mr. Amos has, in breach of the employment agreement, and in breach of his duty of confidence, fiduciary obligations and duty of good faith:
>
> a) Joined the company in direct competition with ThyssenKrupp;
> b) Removed and/or retained confidential and proprietary information of ThyssenKrupp;
> c) Used and continues to use ThyssenKrupp's confidential client list to solicit its clients which is resulted in ThyssenKrupp losing customers, including but not limited to Caleb Village Chatham-Kent Retirement Community;
> d) utilized his knowledge of ThyssenKrupp's bidding process, strategy and costing structure to undercut ThyssenKrupp, which has resulted in ThyssenKrupp losing customers, including but not limited to Boardwalk Properties; and
> e) allowed his own self-interest to conflict with and to prevail over his fiduciary duty and duty of good faith owed to ThyssenKrupp.

18 Mr. Amos's evidence is quite to the contrary. His job was to supervise 23 unionized elevator repairman and women. He was not a salesman. Account managers dealt with sales to customers. Mr. Amos would deal with customers as part of his supervision of their elevator repairs. He would also be involved tangentially in sales efforts by considering the clients' elevator service needs and the abilities of the company to fulfill those needs. He was not uniquely responsible for meeting customers to prepare "site surveys" but was among a number of people involved. He did not prepare the bids or the pricing of bids. He did not deal with customers on their bids except to the extent of helping the account managers determine what the plaintiff could do for the customers. He says that upon resigning, he took care to return all property and confidential information in his possession to the plaintiff under the supervision of the plaintiff's district manager Dave Conners. He says that he has not solicited any clients of the plaintiff nor used or disclosed any of its confidential information. He admits that he was involved in an effort by the defendant Schindler to bid for a tender for modernization work on behalf of the Boardwalk Properties. Modernization contracts are a particular type of business for elevator servicing companies. Mr. Amos was not involved with modernizations while with the plaintiff. There was another entry-level manager who oversaw that work. Mr. Amos swears that he did not use any confidential information of the plaintiff in this process and was not

involved in preparing the bid itself. Boardwalk Properties is a large property management company that is a shared client of both plaintiff and the defendants.

19 On its face, there is a glaring discrepancy between the evidence of the competing parties as summarized in the prior two paragraphs. However, Mr. Medeiros and Mr. Amos were each cross-examined. In his cross-examination, Mr. Medeiros admitted that he had no basis in evidence to support the vast bulk of the facts that he swore to be true in paragraph 15 of his affidavit. He admitted that had no evidence that Mr. Amos notified clients of the plaintiff of his resignation. Mr. Medeiros admitted that he had no evidence that Mr. Amos solicited the business of any client on behalf of Schindler. He admitted he had no evidence that Mr. Amos had solicited, contracted with, advised or otherwise performed services for any clients of the plaintiff. The defendants say that the plaintiff's evidence is nothing more than supposition and speculation and certainly not enough to require a trial.

20 The plaintiff's counsel was left to rely upon the following facts:

a. Three customers of the plaintiff have moved to the defendant Schindler since Mr. Amos moved. At least two of the customers had sites that were serviced by teams supervised by Mr. Amos for the plaintiff. Moreover, two of the customers left prior to the expiry of their current contract with the plaintiff;
b. Mr. Amos admits to having some involvement in helping Schindler prepare for its bid for a Boardwalk Properties modernization project;
c. It was part of Mr. Amos's his role with Schindler and with the plaintiff to advise the employer if it could meet prospective customers' needs; and
d. In his evidence, Mr. Amos had some variations in his assessment of the generalized quantity of his contact with customers. (I found this sub-issue trivial and propose to speak of it no further.)

21 The plaintiff's counsel says that the court should infer from these facts that there is an issue of material facts requiring a trial. Because clients with sites serviced by Mr. Amos moved, Mr. Amos must have been involved in soliciting them and using confidential information improperly despite his sworn evidence to the contrary that was not shaken in cross-examination.

22 Among its principal grounds for asking the court to infer wrongdoing against the defendants is the plaintiff's submission that when the plaintiff was attempting to secure a customer previously serviced by Mr. Amos' former employer, Skyline, Mr. Amos provided the plaintiff input and assistance based on his experience at Skyline, to help the plaintiff put in a competitive proposal. That is, the plaintiff seems to be suggesting that Mr. Amos must have disclosed its confidential information to the defendants because when he was with the plaintiff he did just that in the plaintiff's favour. Leaving aside the interesting nature of that argument, it is based upon a single answer given by Mr. Medeiros during his cross-examination. At question 104 the following

exchange took place:

Q. 104 When you hired Mr. Amos, did you tell him to pursue Skyline clients?

A. No, no. We didn't tell him to pursue it, but he did at times offer information in regards to those customers.

23 Mr. Medeiros's answer does not carry the suggestion that counsel tried to load on to it. If Mr. Amos at times provided some information about his former employer's customers, that does not mean or even suggest that the information was confidential information that was being illicitly provided to the plaintiff to help it compete against the former employer.

24 The plaintiff is left to argue that it needs documentary and oral discovery to look for evidence against Mr. Amos. The plaintiff's counsel says that requiring the plaintiff to undertake discovery and witness examinations for this motion would have had the effect of requiring the trial to be held now which defeats the purpose of the cost savings sought by *Hryniak.*

Analysis

No Fiduciary Duties

25 Mr. Amos can in no sense be seen to have been a fiduciary to the plaintiff. He supervised repairers in one geographic region. He held an entry-level management post. He had no executive authority or duties. He did not have exclusive contact with customers. In fact, he did not even have the lead role with dealing with customers whom his team serviced. He was a person who got the work done. While he may have had the authority to enter into standard form service contracts with customers, it was not part of his job duties and he did not do so. Mr. Medeiros said that Mr. Amos had a close and special relationship with customers. In cross examination, he agreed that the plaintiff encourages all of its employees to develop strong relationships with customers and that account managers would have a stronger relationship with clients than service level employees such as Amos.

26 A very helpful summary of the law in this area was set out by D.M. Brown J. in *Boehmer Box LP* v. *Ellis Packaging Limited et al.*, 2007 CarswellOnt 2726 (SCJ). Although that case involved a non-management employee, the cases and principles cited apply more broadly. Bearing in mind the public interests in mobility of employees and free and open competition as referred to by the Court of Appeal in *ConCreate, supra*, at para. 62, there is no triable issue nor any air of reality to the claim that Mr. Amos was a fiduciary. His employment lacked the *indicia* of a fiduciary relationship. There is no evidence that the plaintiff reposed a higher than normal (or even a high) level of trust and confidence in Mr. Amos. The plaintiff was not particularly susceptible of harm as a result of a

unilateral exercise of discretionary authority by Mr. Amos. The description by Brown J. at para. 58 of *Boehmer Box* applies as well here:

> What this case seemed to boil down to was that Mr. Harfst had a long history with the [customers], as a result of which he possessed a good feel for them and their decision-making structures. He knew who the real decision-makers were, and those who simply occupied titles. A salesperson who does his job properly should possess such information. No doubt the information is of value to his employer. But the accumulation of such information does not reflect, in and of itself, a higher than normal degree of trust or confidence reposed by the employer in the salesperson. In my view, it simply reflects a salesman doing a good job. I do not read the cases as going so far as to impose a fiduciary obligation on a good salesman, who knows well the decision-makers of his employer's customers, to refrain from soliciting those customers after his departure from the company. If the employer wants to protect the value of such information, it can negotiate the appropriate restrictive covenants.

27 Similarly, the case law does not apply a fiduciary duty to a regional repairers' supervisor who gets to know his clients to do a good job for them. If the plaintiff wanted to restrict Mr. Amos from competition, it had to do so by contract. Hence I turn to the restrictive covenants referred to above.

<u>The Restrictive Covenants are Invalid</u>

28 Restrictive covenants are *prima facie* void at common law. The plaintiff bears the burden of showing that it had a legitimate need for the protections that it obtained and that the protections are reasonable as between the parties. There is a further element of the test concerning the public interest that need not be reached in this case. (See: *Shafron, supra,* at paras. 15-17)

29 The restrictive covenant in article 7.1 of the employment agreement is overbroad. In addition to preventing Mr. Amos from competing against the plaintiff for elevator service work for a reasonable time and in a reasonable proximity to the customers whom he serviced, it purports to prevent him from a much broader set of activities. For example, he cannot buy shares in a company that is engaged in anything to do with any aspect of business that deals with elevators anywhere in Ontario. For example, if Bank of Montreal has internal elevator repair people that service any of its branches or real estate holdings, then Mr. Amos is prohibited from buying Bank of Montreal shares on the TSX for his RRSP.

30 The non-competition clause would prevent Mr. Amos from lending money, for example, to an elevator company in North Bay. The plaintiff's counsel argued that among the plaintiff's customers are large property managers who have buildings located around the province. The plaintiff says it needs protection from the risk that Mr. Amos might leverage his relationships with its customers in London to obtain business from those customers elsewhere. There was virtually no evidence of this however. There are some references to the plaintiff having some "national customers" in a general

sense. There was no evidence of any detail establishing that there is any practical concern that the repairers' supervisor in London, Ontario could pose a threat to any of the plaintiff's national customer's locations elsewhere. Moreover, the noncompetition clause is not limited to protecting the plaintiff from Mr. Amos soliciting national customers. It purports to prohibit all forms of competition as defined in the broadest way throughout the entire province. There is no triable issue on the validity of the non-competition clause. It is a naked restriction on competition with no apparent rationale for its breadth of scope and geography and hence unenforceable. *(Mason* v. *Chem-Trend Limited Partnership,* 2011 ONCA 344 at paras. 17 and 30).

31 The non-solicitation clause is somewhat narrower. Non-solicitation clauses are viewed as being inherently more reasonable in that they are tailored towards an obvious risk. It is readily understandable why an employer would feel the need to protect itself from the risk of its customers being solicited away by a former employee who developed relationships with the customers in the course of working for the employer. However the non-solicitation clauses still must be drafted reasonably. They must first and foremost be unambiguous. A restrictive covenant that is ambiguous will be held to be unenforceable because the party seeking to enforce it will not be able to establish reasonableness in the face of ambiguity. (See *Shafron, supra,* at para. 27)

32 A valid non-solicitation clause must clearly advise the former employee which customers are off-limits to her or him. (See *Mason, supra,* at para. 30) The non-solicitation clause in this case, article 7.3, purports to prohibit Mr. Amos from any soliciting any "business, client, prospective client or contract of the Corporation then existing or contemplated by the Corporation within 12 months prior to the termination of Amos". The plaintiff operates across Canada. There is no way for Mr. Amos to know what business the plaintiff was contemplating at any time in the past year anywhere in the country. Nor could he know what customers it might have considered to be a "prospective client" over the year prior to his termination anywhere in the country. Mr. Medeiros admitted as much in his cross-examination. He tried to limit the clause to clients known to Mr. Amos. That is not what the clause says however. The plaintiff presented no evidence that Mr. Amos could have any basis to know or determine the identities of those whom he was to be restricted from approaching. I do not need to get to the issue of breadth - to consider, for example, why the plaintiff needs protection across the country or why it needs protection against Mr. Amos for customers with whom he had no dealings or why it needs protection for prospective clients that the plaintiff itself might have rejected as being not worth chasing. It is sufficient to find that the provision is "not only ambiguous in its practical implementation, but effectively prohibits [Mr. Amos] from competing with the [plaintiff] for a year". (See *Mason, supra,* at para. 30.) There is no issue of material fact requiring a trial as to the validity of the non-solicitation clause.

Breach of Confidence

33 All that remains of the plaintiff's lawsuit therefore are the claims that Mr. Amos released confidential information to his new employer. He expressly denies doing so. His involvement in the bid for Broadway Properties modernization work does not lead to any natural inference that he

released confidential information in considering the labour that would be required to fulfil the new services sought by that customer. He did not work for another customer, Caleb, while at the plaintiff, so there is no indication that he had or released confidential information about that customer. Should the plaintiff get to go to discovery to find out?

34 The plaintiff had the opportunity to ask for any files in its cross-examination of Mr. Amos and the cross-examination of Laurie Verbruggen, the Defendants' HR director whose affidavit was also filed. The plaintiff's counsel sought almost no undertakings on either examination.

35 The plaintiff also did not move for directions as was suggested as a possibility by Karakatsanis J. in *Hryniak.* The plaintiff could have sought directions to compel the defendants to produce their affidavits of documents prior to the hearing of the motion. It did not seek the right to conduct examinations for discovery or take steps to schedule other examinations. Interestingly, it also did not produce its own affidavit of documents. The defendants' counsel notes that while the plaintiff swears that Schindler under-cut it on bids due to the defendants' wrongdoing, it has not produced any of its own bids that can be compared to the bids of Schindler.

36 The plaintiff complains that Ms Verbruggen had no personal knowledge concerning the alleged solicitation of the customers who have moved to Schindler. If Mr. Amos was involved then he would have had such information. Moreover the plaintiff could have issued summonses to witnesses or sought undertakings.

The Culture Shift

37 The defendants' counsel says that *Hryniak* has no impact on this motion. He argues that under the pre-existing law, the plaintiff has failed to put its "best foot forward" or to "lead trump". On that basis, he says that there is no material issue of fact requiring a trial and the motion should be granted. I think he may well be correct. It may well be that the evidence of movement of two customers is simply not enough to create an issue of material fact requiring a trial on the issue of breach of confidence. The question of how much evidence is needed to give an "air of reality" to counsel's effort to establish the existence of a triable issue of material fact is one that has never been readily susceptible of clear doctrinal expression. Therefore, I prefer to put my decision on a different basis reflecting more current sentiments.

38 Am I able to reach a fair and just determination on the merits of this issue by finding the necessary facts, applying the necessary law, in a proportionate, more expeditious and less expensive means than imposing the full trial model? *(Hryniak,* at para. 49) Do I have confidence that I can find the necessary facts? (*Hryniak*, at para. 50) Would better evidence necessarily be available at trial? (*Hryniak* at para. 58)

39 Mr. Amos's counsel says that there is no basis to find that Mr. Amos may have released confidential information to justify continuing the lawsuit. First and foremost, his client denied doing so and was not challenged successfully on cross-examination. I agree that there is no need for him

to be on a witness stand again absent new facts. Then, counsel says, the plaintiff had a burden to do something more. The plaintiff has provided no evidence of what Mr. Amos knew that he could have used against it. It provided no details of what information is contained in a modernization proposal and how Mr. Amos had that information in his former position. It provided no evidence about its own bid for Broadway Properties and from whom internally it sought information. It provided no evidence about Broadway Properties moving to Schindler or what it said or what efforts the plaintiff made to keep its business. During cross-examinations the plaintiff did not seek evidence of what Mr. Amos did or what he might have written to others internally at Schindler in relation to the customers who moved. It did not seek production of any correspondence among the defendants' employees who were involved in preparing and making bids or communicating with those customers. The defendants' counsel argues that there is no case for Mr. Amos to meet.

40 Under the roadmap provided starting at para. 66 of *Hryniak* the Court is to consider first whether the motion provides sufficient evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure. If not, the Court should consider if it can reach the required result (to fairly and justly adjudicate the dispute in a timely, affordable and proportionate procedure) by exercising the discretion to weigh evidence, evaluate credibility of witnesses and drawing reasonable inferences from the evidence now rather than at trial *(Hryniak,* at para. 67). If that does not provide the requisite degree of assurance, the Court should consider exercising the discretion to order presentation of some limited oral evidence *(Hryniak,* at para 68). If even a mini-trial will not provide a fair and just adjudication of the dispute in a timely, affordable and proportionate procedure, then the motion should be dismissed but the judge is required to craft a trial process to do so while remaining seized of the matter *(Hryniak,* at para 77). The last fallback is to simply dismiss the motion in exceptional cases where it is clearly inappropriate either to grant summary judgment *(Hryniak,* at para. 68) or to remain seized *(Hryniak,* at para. 78).

41 Thus, counsel can no longer just point to a contested issue of fact to then consign the parties to the slowest and most expensive outcome under the "trial model". Nor is summary judgment limited to cases in which we are sure there is no chance of success. *(Hryniak,* at para. 38) Here, it is not hard to imagine the existence of some documents that could help the plaintiff's case. One can never dismiss peoples' propensity to write emails that contain information that is harmful to their own legal interests. It would not be hard to imagine someone emailing Mr. Amos to ask if he thinks a potential client would like this or that - with Mr. Amos then drawing upon his experience with the client to respond potentially in breach of his confidentiality obligations whether intentionally so or not.

42 Where does an issue of fishing for production come into play in the *Hryniak* roadmap? The question is not one for drawing inferences on the facts or assessing credibility. I do not need to hear from the plaintiff as it has no evidence. Mr. Amos has already been cross-examined and I have read the full transcript. I do not need him again. The question is whether to order production of documents, perhaps even limited production of documents, so as to give the plaintiff (and the Court) a better assurance that there is no smoking gun in circumstances where despite the lack of evidence,

a degree of suspicion is reasonable.

43 Overall, bearing in mind the "culture shift" it can no longer suffice to put parties to the cost and imposition of litigation based on the default position of the trial model being fairer and therefore the preferred outcome. History has proven that it is neither. The obligations associated with production of documents in civil litigation have expanded dramatically since the introduction of email. Counsel only needs to be involved in one large production case and face the need for computer programmers to design code to access email archives to understand why the costs of the production exercise hit the hundreds of thousands of dollars. That is before students, junior associates, or contract lawyers in the United States or Asia have to review each and every email (including each copy of all of the "reply all" responses) for relevancy and especially for privilege. This is not about Rule 29.1 and the *Sedona Principles*, but, rather, an effort to bring into focus the desirability of utilizing *Hryniak* to make litigation timely, affordable and more just.

44 I am not suggesting that summary judgment motions can be used to avoid a party's production obligations. But, it is not my role to second-guess counsel's tactical choices. Faced with several avenues to seek production from the defendants to respond to the motion for summary judgment, the plaintiff chose to limit its investigations and just ask for the motion to be dismissed so the parties can go to discovery. As noted above, counsel could have asked for documents on cross-examination, sought undertakings, or served summonses to witnesses. Counsel could have brought a motion for directions or while at Scheduling Court asked for documents or, in the defendants' case, sought to control the cost of disclosure.

45 In all, respecting counsels' choices, it seems to me that the motion should be allowed and the action dismissed. The plaintiff has not brought forward evidence to raise a material issue of fact require a trial. I can be confident that I can find the necessary facts on the basis of Mr. Amos's unchallenged testimony. The only issue is whether to allow some discovery of documents which is tantamount to a fishing expedition. As noted above, I probably could find that there is no material issue of fact requiring a trial because the plaintiff has failed to "lead trump". However, I prefer to find that I am able to fairly and justly adjudicate the dispute and that defaulting to the "trial model" by just ordering discovery in this circumstance is not a timely, affordable or proportionate procedure. I do not see how any of the other options under Rules 20.02(2.1) or (2.2) would assist. Absent production, which the plaintiff chose not to seek or make throughout the process, there is no genuine issue requiring a trial.

46 Costs on a partial indemnity basis should follow the event unless there are offers to settle for me to consider. If the parties cannot agree on costs, the defendants may deliver no more than five pages of submissions plus their costs outline by July 11, 2014. The plaintiff may deliver responding submissions of no more than five pages and its costs outline by July 18, 2014. The defendants may deliver reply submissions of no more than two pages by July 25, 2014. Materials are requested to be provided by email to my assistant in searchable pdf format with cases, if any, referenced by hyperlinks. In 2014, it should not be necessary to file hard copies. However, if necessary, counsel

may file hard copies by delivering the documents to Judges' Administration, Room 170, at 361 University Avenue with a very brief explanation of why he has incurred the extra cost of doing so.

F.L. MYERS J.