See para. 60

Case Name:

Corrigan v. Di Domenico

Between
Les Corrigan, Plaintiff, and
Philip Di Domenico and H. Michael Bachert, Defendants
And between
Target Internet Development Corporation, Plaintiff, and
Checksite Canada Inc. and Leslie Robert Corrigan,
Defendants

[2007] O.J. No. 4868

162 A.C.W.S. (3d) 682

Court File Nos. SR1476/04 and 46858/05

Ontario Superior Court of Justice

B.H. Matheson J.

Heard: November 19-23, 2007.
Judgment: December 12, 2007.

(65 paras.)

Bills of exchange -- Bills, cheques and notes -- Consideration -- What constitutes valid consideration -- Liability of parties -- Action on promissory note allowed -- Note holder provided consideration for note by surrendering shares of company, resigning as officer and director and entering into employment agreement -- Debtor acknowledged validity of note by making some payments, by seeking forgiveness of note, and by assuming another debtors' responsibility under note -- Bills of Exchange Act, ss. 176, 179.

Computer law -- Internet -- Web sites -- Similarities in websites of company and former employee's new business were attributable to fact former employee authored both -- Former employee did not take confidential information from company.

Employment law -- Implied duties of employee -- Confidential information -- Loyalty and non-competition -- Former employee of web design company did not breach fiduciary duty to

company by continuing to work for clients of company after leaving, where some were personal clients during time of employment, and some solicited his services after leaving company -- Similarities in websites of company and former employee's new business were attributable to fact former employee authored both -- Former employee did not take confidential information from company.

Action by Corrigan on promissory note -- Action by Target against Corrigan and CheckSite for damages -- Corrigan joined Di Domenico in 1994 to form Target -- Bachert joined between 1996 and 1998 -- Di Domenico was salesperson, Bachert was officer manager and Corrigan was programmer -- Corrigan designed websites and programs for clients -- Websites had public and private components -- In 1999, when Target needed of capital, Corrigan agreed to sell his shares, one-third of Target's shares, to Bachert and Di Domenico in exchange for promissory note valued at $41,667 -- Corrigan also agreed to resign as officer and director of Target -- Signed employment agreement, dealing with remuneration, trade secrets and confidential information, non-competition and non-disclosure -- Target had legal advice but Corrigan did not -- In 2000, Di Domenico and Bachert entered agreement under which Bachert purchased Di Domenico's shares of Target and assumed his liability to Corrigan under note -- Bachert claimed Corrigan stated he did not want money, but nothing was reduced to writing -- Corrigan denied this -- Bachert claimed he made payments to Corrigan anyway, out of feeling of obligation -- Bachert made five monthly payment of $2,000 in 2002 -- Bachert claimed payments ceased because EEC was investing in Target and stopped making payments -- Corrigan began having problems at Target in 2001 -- Ultimately signed letter of resignation on April 2, 2002 -- Corrigan worked for four clients before and after his time with Target, claiming they sought out his services after he left Target -- Two of these clients were personal clients of Corrigan during his time at Target, with Bachert's knowledge -- Corrigan started another company, CheckSite -- Former employee of CheckSite met Bachert, provided information to allow Bachert access to private portion of CheckSite's website -- Target's expert testified to similarities between CheckSite and Target websites, discovered by using former employee's access to private portion of CheckSite -- Bachert contacted Corrigan to inform him he wanted note forgiven in exchange for not taking legal action against Corrigan for breaching employment agreement -- HELD: Action by Corrigan allowed -- Action by Target dismissed -- Bachert liable to Corrigan for remaining $31,667 on note plus interest -- If Corrigan could not collect from Bachert, he could proceed against Di Domenico -- Corrigan's evidence accepted that he did not forgive note -- Prudent businessman like Bachert would have had this reduced to writing -- Note was valid on its face -- Consideration given by Corrigan was relinquishing of shares, resignation as director and officer of Target, and agreement to enter employment agreement -- Bachert's assumption of liability for note from Di Domenico, payment of monthly installments, communications with Corrigan seeking forgiveness of note showed he felt consideration given for note -- Corrigan's evidence accepted that he did not forgive note -- Prudent businessman like Bachert would have had this reduced to writing -- Corrigan had common law duty not to take physical and intellectual property of Target when he left company -- Corrigan did not violate fiduciary duty to Target in taking clients, where they solicited his services -- No evidence Corrigan took confidential information

from Target -- Corrigan authored websites in similar ways -- No evidence Target suffered damages by virtue of similarities between websites -- Target did not have clean hands in seeking equitable remedy, where it should not have been accessing private CheckSite website.

Statutes, Regulations and Rules Cited:

Bills of Exchange Act, R.S.C. 1985, c. B-4, s. 176, s. 179

Court Summary:

Issues dealt with as identified by the Judge releasing the decision:

* Dealing with issue of promissory note and whether consideration.
* Did plaintiff take confidential information and clients when he left a computer company?
* May defendant have an accounting if there is an equitable breach?

Counsel:

Andrew J. Larmand, for the Plaintiff Les Corrigan.

Bradley J. Troup, for the Defendant H. Michael Bachert.

Bradley J. Troup, for the Plaintiff Target Internet Development Corporation.

Andrew J. Larmand, for the Defendants Checksite Canada Inc.
and Leslie Robert Corrigan.

JUDGMENT

1 **B.H. MATHESON J.**:-- These matters were heard together pursuant to an order of Justice Tucker.

2 The main issues are:

(1) Are there monies owing under a Promissory Note dated June 23, 1999, (Exhibit 1) by H. Michael Bachert ("Bachert") to Leslie Robert Corrigan ("Corrigan")?
(2) When Corrigan left the employment at Target Internet Development Corporation did Corrigan take with him confidential information,

> confidential computer files, and induce clients of Target to become clients of his company?

3 The Defendant Philip Di Domenico ("Di Domenico") has resolved the dispute between himself and Corrigan.

4 Corrigan is 43 years of age and has two years at Sheridan College where he took a Business Administration course. He did not graduate. He indicated that he is a self-taught computer programmer. He did take a two to three day course in Toronto after he began working for Target.

5 He joined up with Di Domenico in about 1994. They had a company called Target Canada. This later became known as Target Internet Development Corporation ("Target"). When I refer to Target it will be Target Internet Development Corporation. I will refer to the other Target company as "Target Canada".

6 When Target Canada was rolled into Target, Bachert joined the corporation. Bachert joined Target between late 1996 and early 1998.

7 The roles of the three were as follows: Di Domenico was the salesperson and was looking for new clients. Bachert was the office manager. Corrigan was the webmaster or programmer. They worked together. Sometimes Di Domenico and Bachert would work on a computer program with Corrigan; but Corrigan was the main programmer.

8 Corrigan would develop new websites and programs for clients.

9 It was explained that a website has two components. The first was what the public could see. This was not protected and could be accessed without the use of a user name or password. The second component was confidential and could be accessed only by use of a user name and password.

10 Target was owned by Di Domenico, Bachert and Corrigan. Corrigan owned one third of the shares of Target. There was need for an infusion of capital, and Di Domenico and Bachert were looking for new investors. Corrigan had no available capital.

11 Corrigan agreed to sell his shares to Bachert and Di Domenico in exchange for a Promissory Note dated the 23rd of June 1999. This is Exhibit 1. The value of the note was $41,666.67. Neither Bachert nor Corrigan were able to explain how the value of the Promissory Note was arrived at, but all parties agreed as to the amount. In addition to giving up his shares, Corrigan also agreed to resign as an officer and director of Target. He also agreed to an Employment Agreement made the 23rd day of June 1999 setting out conditions of his employment.

12 Corrigan complied with all the terms of the Agreement as set out in Exhibit 2. He signed an Employment Contract, which was prepared by the solicitors for Target. This is Exhibit 7. This

contract was signed by Corrigan on June 20, 2001. Attached to it was a remuneration package. The reason for the delay was not adequately explained.

13 Exhibit 2 deals very specifically with trade secrets, customer information, non-competition and non-disclosure. Corrigan had the opportunity to have a lawyer look at this. In all the documents that Corrigan signed he did not have a lawyer advise him.

14 Corrigan's evidence was that he was having problems at Target. He was having a difficult time with Di Domenico. On August 11, 2000, Di Domenico and Bachert entered into an agreement. This is Exhibit 19. In that agreement Bachert purchased the shares that Di Domenico or his company had. In addition, Bachert agreed to assume the liability for the Promissory Note that Corrigan had. Di Domenico had no further interest in Target and Bachert was the sole owner.

15 Bachert stated that Corrigan was relieved that Di Domenico had left the company and that Bachert did not have to pay on the note to him. Bachert stated that he felt an obligation to Corrigan and "wanted to pay back his money".

16 According to Bachert, Corrigan told him on several occasions that he did not want the money on the note after Di Domenico had left. Bachert never reduced this to writing as "a prudent careful businessman" would do. Those are the words that he described himself with. I accept Corrigan's statement on this matter.

17 Corrigan also denies that he told Bachert that he did not want the payment on the note.

18 In Exhibit 16 there is a list of payments. The exhibit is unfortunately cropped at the bottom left. The month of payment is not clear. The court was told that Bachert made monthly payments, therefore it will be assumed that the payments of $2,000 were made in the first five months of 2002. Bachert said that they stopped because a company, EEC, was investing in Target and stopped making payments. Bachert said that this was why the payments to Corrigan were stopped.

19 Corrigan indicated that he was having a difficult time at Target. This would have been towards the end of 2001. He had a meeting with Bachert and after that he took a two-week holiday.

20 Matters did not improve on his return. On March 28, 2002, he had an argument with a fellow employee, Volker Loetframe. Bachert later told him to apologize to Loetframe. He did not and quit the company.

21 Bachert and he had a meeting at Perkins Restaurant on April 2. At that meeting he signed a Letter of Resignation and a Final Release. This is Exhibit 8. He was given until April 12th to sign. After reading the documents, he felt that he understood and signed them. It contained the usual clauses about not taking anything of Target with him, not to induce clients to leave Target for him and, in particular, not to take any confidential information of Target, including computer programs of Target. There was no mention of the Promissory Note in these documents.

22 Corrigan was paid a salary until the 19th of April.

23 Corrigan did do work for Hernder Estate Winery and John Campisano, as well as work done for two radio disc jockeys, both at Target and after he left the firm. Corrigan knew Angel Fusarelli for many years and this was the cause of Hernder being a client of Target. When she learned that Corrigan was no longer at Target she contacted Corrigan. John Campisano was Corrigan's godfather. These were the only clients that Bachert was able to identify that were former clients of Target. From the evidence before me, I find that these two left Target and went to Corrigan or his company on their own and were not enticed or induced to switch by Corrigan.

24 Bachert was aware that while Corrigan was working at Target he was doing work for the two disc jockeys. They were not clients of Target.

25 Bachert met Rob McConnell ("McConnell") about June 5, 2002. McConnell had been a freelancer with Corrigan and his company CheckSite. As a result, he had the password and user name that allowed him to enter the confidential sites on CheckSite's web page. This would allow him to see who the clients of CheckSite were and other confidential information. Also Bachert used the password that Corrigan had at Target to enter the confidential portion of CheckSite's web page.

26 As a result of this use of McConnell's password and the password that was Corrigan's at Target, they were able to retrieve a number of confidential pages of CheckSite and its predecessor Chexite.ca. These are found at Exhibits 20, 21, 22, 23, 24, 25, and 26.

27 Target engaged the services of Jeffrey Hardy ("Hardy"). He was found by the court to be an expert and was allowed to give opinion evidence in two areas. Those areas were the similarities between the web pages of Target and those of CheckSite and Chexite, and what the difference is between a proprietary interest and open source.

28 Hardy gave evidence that he attended at Bachert's office and Bachert explained what he wanted Hardy to do. Hardy was provided with two discs; one disc, according to Bachert, contained downloads from CheckSite and the other contained downloads from Target.

29 In his testimony he referred to about 30 web pages. He stated that the discs contained hundreds more. An inference may be drawn that Bachert and his employees spent much time on the website of CheckSite.

30 There were a number of e-mails between Bachert and Corrigan. This ended when Corrigan started his action against Di Domenico and Bachert on September 15, 2004. This was followed by the Target action against Corrigan and his company CheckSite Canada Inc. on April 7, 2005.

31 The preceding is a brief outline of the factual situation of the relationship between Corrigan and his company and Bachert and his company.

32 I will now deal with the two issues before the court. They are, as previously stated: Is Bachert liable on the Promissory Note and did Corrigan and his company breach the fiduciary relationship that existed between Corrigan and Target? I take it that the fiduciary relationship would be his common law obligations and what Corrigan agreed to in his employment contract and his termination letter.

PROMISSORY NOTE

33 The Promissory Note is dated June 23, 1999 and was signed by Di Domenico and Bachert. (See Exhibit 1)

34 The *Bills of Exchange Act* (R.S.C. 1985, c. B-4) s. 176 defines a promissory note as follows:

> (1) A promissory note is an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.

Section 179 goes on to state:

> (1) Joint and several liability - A note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to the tenor.
> (2) Individual promise - Where a note bears the words "promise to pay" and is signed by two or more persons, it is deemed to be their joint and several note".

35 On the face of the note and taking into account the above sections of the *Bills of Exchange Act*, I am satisfied that the requirements imposed by the Act have been complied with. The issue to determine is whether there has been consideration.

36 Bachert has taken the position that there is no consideration for the Promissory Note or that there is a partial failure. With respect, I disagree. I find that there was consideration given for the Promissory Note and that Bachert by his actions has acknowledged this.

37 In Exhibit 2, which was the Agreement between Corrigan, Bachert, Di Domenico, and Target dated the 23rd of June 1999, the following consideration was given by Corrigan:

1. Corrigan gave up 10,000 fully paid and non-assessable common shares in Target.
2. Corrigan was to resign as an officer and director of Target.
3. Corrigan shall enter into an Employment Agreement. (See Exhibit 7)

38 The value placed on the Promissory Note was arrived at by both Bachert and Di Domenico.

Corrigan apparently had no input in the setting of the value.

39 The conduct of Bachert after the signing of the Promissory Note confirms, in my mind, that he felt that there was consideration given by Bachert for the Note. I note the following:

1. He made five payments of $2,000 to Corrigan in the year 2002. (See Exhibit 16)
2. In an e-mail sent by Bachert to Corrigan dated May 15, 2002, he wrote the following: "Les, The shares were redeemed in exchange for the promissory note. No actual value was placed on the value of the shares. No effect on the balance sheet. Not sure on the tax implications. Payment is not due until June 2004 (my underlining) - consider this when figuring out your income i.e. monthly payments are not guaranteed."
3. In an e-mail dated January 7, 2004, Bachert wrote to Corrigan and stated that he had been monitoring CheckSite for over 10 months. Bachert stated that his lawyers thought that he should seek injunctive relief and general damages as well as aggravated and punitive damages in excess of $500,000. He stated, "If you are willing to supply a written undertaking and forgive the outstanding amount on the promissory note, I would be willing to drop the whole issue". Obviously, Bachert felt that there was some value in the Promissory Note.
4. In a reply to that e-mail Corrigan stated in an e-mail dated January 8, 2004: "I took nothing from Target and I resent your attempt to discredit me." (See Exhibit 12) Bachert replied, "Are you willing to sign off on a written undertaking and forgive the outstanding amount on the promissory note?" Again, it is indicative that Bachert believed that there was value in the Promissory Note.
5. In Exhibit 19 Bachert assumed the liability for the full Promissory Note of Corrigan. Di Domenico was transferring all his and his company's shares in Target. This is an indication that Bachert felt that there was value in the shares transferred by Di Domenico. Therefore, there must be some value in the shares transferred by Corrigan.
6. Bachert indicated in his testimony that he would not pay on the Note because it was his belief that Corrigan had breached the various fiduciary obligations.
7. Bachert stated that Corrigan did not want the money after Di Domenico had left. If that were the case one would have expected that Bachert would have reduced that statement to writing. There was nothing in the termination letter or the final release concerning the Promissory Note and Corrigan's alleged forgiveness.

40 Therefore, I find that the Promissory Note dated June 23, 1999, and due the 1st day of June

2004 was given for consideration and that the Defendant H. Michael Bachert is liable on it to Leslie R. Corrigan. Since Bachert has paid $10,000.00 on it, there is still owing the sum of $31,666.67 by him to Corrigan, plus prejudgment interest from June 1, 2004.

41 Bachert assumed the liability of Philip Di Domenico on the Note. If there is a problem in collecting from Bachert, Corrigan may still proceed as against Di Domenico.

WAS THERE A BREACH OF THE FIDUCIARY OBLIGATION OF LESLIE R. CORRIGAN AND HIS COMPANY TO TARGET INTERNET DEVELOPMENT CORPORATION?

42 Corrigan was a founding member of Target Canada and later Target Internet Development Corporation. As stated in Exhibit 2, he gave up his shares, directorship and office in the company. He also had to enter into an employment contract, which he did on June 20, 2001.

43 When he left Target he also signed a termination letter and a final release dated April 2, 2002. (See Exhibit 8)

44 Aside from those documents, he had a common law duty not to take property of his former employer, either physical or intellectual, without the consent of the employer.

45 In the Employment Contract (Exhibit 7), which he signed, the issue of trade secrets, customer information, exclusivity, non-competition and non-disclosure are dealt with at paragraphs (viii) and (ix):

> (viii) **Trade secrets and Customer Information**
>
> During the term of this agreement the Employee will have access to and will be paid to create software code, manual and electronic processes and systems, all of which are considered company trade secrets and also considered the property of the company.
>
> (ix) **Exclusivity, Non Competition and Non Disclosure**
>
> 1. At no time shall the Employee solicit the companies' customers or use the companies' trade secrets for any product or services, which are determined by the company to be in competition with the companies' products or services.
> 2. The Employee shall, at all times, hold and protect any and all company information and systems of operation as proprietary information crucial to the companies competitiveness in the marketplace. The Employee also agrees not to disclose such proprietary information in any way to anyone except as is required in the normal course of business. The Employee also agrees to do all things to

prevent this proprietary information from being used or copied in any manner by any person other than the way in which it was intended by the company.

46 In the termination letter dated April 2, 2002, (See Exhibit 8), Corrigan is obliged to do the following:

"Target's offer set out above is conditional on the following:

Within three (3) days from today's date, you are required to return to Target:

(a) building and internal door keys;
(b) all company hardware (including software drivers) and manuals;
(c) laptop and all relevant software, accessories, manuals, etc.
(d) all company software including copies/archives/remove installations and manuals;
(e) all Corporate Files (Electronic, Printed) - (project files, documents, documentation, contracts, contact lists, etc.);
(f) all correspondence, documents, software;
(g) any off location copies CD, zip files, of Site Archives/Backups;
(h) all ftp .ini/setup/config files from personal machines;
(i) any contact/client/e-mail lists off personal machines;

Within three (3) days from today's date, you are required to:

(a) remove all archive/backup/site files off personal machines and other property belonging to Target which is currently in your possession;

(b) you agree that you will not reproduce or use any such property;

(c) you agree not to disclose the terms of this severance offer to anyone except your legal and financial advisors in their professional capacity or as may be required by law;

(d) you agree to retain in confidence all confidential information you acquired during your employment with Target and will not disclose same to any third party (save for such disclosure as may be required by law) or used for your own benefit or that of any third party any such information learned during the course of your employment;

(e) you agree not to denigrate, through adverse or disparaging communication, written or oral, whether true or not, the operations or business of Target or its current or former employees, officers or directors;

(f) you agree not to contact any current employees of Target to discuss any matters arising from your employment or your termination of employment by Target; and

(g) you agree to execute the attached Final Release."

47 In the Final Release, which is part of Exhibit 8, he further acknowledges the following:

> "**I hereby acknowledge and agree** that as a consequence of my position with the Release, I acquired, received, had access to or was entrusted with information which is strictly confidential or proprietary and I further acknowledge and agree that the use or disclosure of this information by me to anyone could be highly detrimental to the Release. Consequently, I agree and covenant not to disclose or use any information I have received or have become aware as a result of my employment with the Releasee including but not limited to products, improvements, customers, clients, suppliers, methods of distribution, sales, prices, profits, costs, contracts, business prospects, business methods, techniques, research, data bases, trade secrets or know-how or any other information not publicly known or relating to other affairs of the Releasee, all of which shall be treated in strict confidence."

48 It is set out quite clearly what the obligation was that Corrigan had to his former employer.

49 With respect to clients of Target that are now clients of CheckSite or Corrigan, there are four. They are Hernder Estate Winery, John Campisano, and two disc jockeys of local radio stations.

50 Corrigan indicated that he did not ask them to become clients of his company CheckSite. When good friend Angel Fusarelli heard that he had moved to CheckSite, she contacted him. Corrigan stated that he had known Fusarelli for many years. Because of that relationship she moved her company Hernder Wines to CheckSite. John Campisano moved when he heard that Corrigan had moved. He was Corrigan's godfather. The two disc jockeys were personal clients of Corrigan when he was at Target. Bachert took no exception to that.

51 Bachert provided no other evidence that Corrigan or his company had breached the terms of the final release or the termination letter. Bachert spent 10 months, according to him, reviewing the web pages of CheckSite and was not able to come up with any other clients of Target. Exhibit 26 is the front pages of the website of a number of companies and people. These were taken from the CheckSite confidential section of its website.

52 I find that Corrigan did not violate his fiduciary duty to Target with respect to the taking of

clients from Target.

53 Target engaged the services of Caters Hardy Design Studio to provide an expert analysis in order to consider the likeness between two sets of digital website files. Those websites were, according to Bachert, from CheckSite and Target. Jeff Hardy ("Hardy") of Caters Hardy Design Studio was also asked to advise of the difference between proprietary and open face.

54 When he was dealing with the two website files he considered the following:

1. Comparison of interface and visual design.
2. Comparison of database & database tables.
3. Comparison of data in database.
4. Comparison of naming conventions in database.
5. Conclusion and Summary.

55 Hardy, using the above comparison techniques, came to the conclusion that the two sets of digital website files provided to him by Bachert were very similar.

56 His conclusion and summary in his report, found at Exhibit 29, stated the following:

> "In my opinion I believe that the files submitted to me are in fact copies with slight adjustments to the CheckSite files. There are many elements that point to the fact they are the same.
>
> It is obvious that everything outlined above, such as design & interface, database and tables as well as actual data, points the fact that they originated in the same place. This cannot be coincidental as they are too similar in all of these aspects. Programming convention is meant to standardize scripting and programming practice in order develop to a level of expertise. This would enable other programmers to easily take over a project or understand what has been completed in a programming project to date. It does not mean that unique names, identical structures and design and colours are always the same - which they are in this case.
>
> The other pointer that indicates that the files are the same is the scope of the project files. The time frame for development of an application of this type would take hundreds of hours of programming. Also, the number of files used to create this Control Panel/Project Management application is quite large. It is too much of a coincidence to be able to compare these sets of files with the high number of identical elements present - especially using the almost random sample choice of files used to compare.

Finally, since there is no question that Target Internet developed the proprietary code for this application, it seems that the files would have to have been copied by someone from within the Target Internet environment with access to computers and files on the Target network."

57 From that conclusion, it would appear that Corrigan had taken confidential information and procedures from Target and used it at his company. However, Hardy was not provided with the following information :

1. That Exhibits 17 and 20, the words and definitions as found on the websites of Target and CheckSite, were created by Corrigan. Corrigan gave uncontradicted evidence that he created this page before he came to Target Canada.
2. Exhibits 18 and 24, Client Section, were created by Corrigan about the same time as Exhibits 17 and 20, at his residence.
3. That the flags, as shown on the web pages that Bachert had taken from the CheckSite pages, were able to be accessed on the open source website of "Babblefish". Corrigan used the flags at Target in much the same way as at CheckSite, but it was open to all.
4. Hardy was not told that information and he stated the following in response to questions put to him by counsel:

"Q. Isn't another explanation of how these two sets of file look identical or similar to one another, wouldn't another explanation be that they were authored by the same person?

A. Yes.
Q. Thank you.
A. I'm sorry, did you say open source?
Q. I said authored by the same person. You indicated that there would be a gigantic impossibility ...
A. Yes.
Q. ... that two separate developers could come up with these two similar things.
A. Yes.
Q. And that is a conclusion you have reached.
A. Yes.
Q. Is another explanation of why these two documents or why these two sets

of data may look the same was because in fact they were authored by the same person?

A. Of course.

Q. Of course; and you don't know or have any information or knowledge over which one was authored first.

A. As I said, I was only asked to compare the two to show the similarities, which I've done.

MR. LARMAND: Thank you.

THE COURT: Sir.

MR. TROUP: I don't have any re-examination for the witness Your Honour."

The Court asked the following:

"THE COURT: Sir, I just have one question, it is a follow-up on the last question. The question, if Corrigan were the developer of both the Target and the CheckSite, would that account for the similarity?

A. Yes."

58 I find that there is no evidence that Corrigan took any confidential information from Target Internet Development Corporation.

59 There is no evidence as to the damages that Target suffered. There was a request for an accounting in the event that liability had been proven, which it has not.

60 An accounting is an equitable remedy and, therefore, the person or corporation asking for it must come to the court with clean hands.

61 I find that the conduct of Target in accessing the confidential portions of the website of CheckSite is question. What right did Bachert have to use the password of McConnell to access CheckSite's confidential page? What right did Bachert have to use the password of Corrigan he had at Target to access Corrigan's confidential webpage at CheckSite?

62 Bachert used his own self-help remedy, without the benefit of legal advice. He could have applied to the court for an *Anton Piller* order to preserve any information that he felt that Corrigan had taken from his company.

63 I would not order an accounting for those reasons.

RESULT

64 I find the following:

1. Corrigan shall have judgment on the Promissory Note dated June 23, 1999, in the amount of $31,666.67 with prejudgment interest from June 1, 2004 in accordance with the *Courts of Justice Act*.
2. The action as against CheckSite Canada Inc. and Leslie Robert Corrigan is dismissed.

65 The issue of costs may be addressed if counsel are not able to settle that issue.

B.H. MATHESON J.

cp/e/qlrxc/qlpxm/qlbrl