See paras. 47-49, 52-54

Indexed as:

Edac Inc. v. Tullo

Between
Edac Inc., plaintiff, and
Joseph Tullo, defendant

[1999] O.J. No. 4837

107 O.T.C. 81

47 C.C.E.L. (2d) 264

93 A.C.W.S. (3d) 657

1999 CanLII 14868

Court File No. 98-CV-147273CM

Ontario Superior Court of Justice

Nordheimer J.

Heard: November 22-26 and 29, 1999.
Judgment: December 15, 1999.

(75 paras.)

Master and servant -- Fiduciary duty -- When owed -- Duties of servant -- On termination -- Competition in business, solicitation of clients of former employer -- Liabilities of servant -- To master -- Lost profits.

Action by Edac Inc. against Tullo for breach of fiduciary duty and misuse of confidential information. Counterclaim by Tullo for salary and bonus. Edac hired Tullo to research competition in the area of electronic components and to survey available representatives and distributors. Tullo was later given the position of Director, Sales and Marketing - Resale Products, and an employee contract was drawn up which included a confidentiality clause. Edac's business relationship with Tekcon became strained and Edac asked Tullo to prepare a strategic plan as to how to replace

Tekcon as principal supplier. Shortly afterwards, Tullo resigned. Although Tullo was not sure what work he would engage in after he left Edac, he had told Edac that there might be a conflict with his new business venture if he continued on at Edac until the end of a 30-day notice period. As it turned out, Tullo accepted a position at Tekcon. Tullo admitted that while he was employed by Tekcon, he contacted Edac's customers. However, Tullo claimed that he explained to these customers that he did not want to take business away from Edac. Edac claimed that Tullo's new job resulted in a significant loss of business for it.

HELD: Action and counterclaim dismissed. Tullo's entitlement to remuneration ended with his resignation. He owed a fiduciary duty to Edac. However, this did not preclude him from a general solicitation of potential customers, or from using his general body of knowledge and expertise to compete for their business. If Edac had intended to preclude Tullo from employment in its area of business, then it had to specifically provide this in a non-competition provision in the employment contract. Thus, Tullo did not breach his fiduciary duties either before or after his resignation. Tullo also did not misuse any confidential information. The competitive nature of the industry meant that prices that Edac charged its customers would have been revealed by the customers to other suppliers in order to get the best deal. The names of Edac's customers were not confidential, as this information was routinely used in marketing presentations and in efforts to entice the business of new customers. There was no evidence that Tullo used the pricing, profit margins or product development of business plans of Edac to advance the position of Tekcon. Edac was not entitled to repayment of the bonus paid to Tullo before his resignation. According to the terms of the bonus plan agreement, Edac had no right to reclaim the bonus after it had been paid.

Counsel:

Mary Jane Stitt, for the plaintiff.
Howard L. Shankman, for the defendant.

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1 **NORDHEIMER J.**:-- In this action the plaintiff contends that its former employee, the defendant, after resigning from the plaintiff, solicited and obtained business from customers of the plaintiff through his misuse of confidential information and in breach of his fiduciary duties. The action raises the difficult issue of the degree to which a former employee may compete, if at all, with his former employer in the marketplace.

Background

2 The plaintiff has been in business for the past 34 years. It has a manufacturing facility in the former City of Scarborough in which, for many years, it manufactured electronic components known as edge connectors or rack and panel connectors. The customers of the plaintiff are

principally original equipment manufacturers ("OEMs") and contract equipment manufacturers ("CEMs"). Over those many years, the plaintiff's product line had not changed and its business had, therefore, become stagnant. As a consequence, the plaintiff had, by 1990, begun to lose money. The plaintiff's parent company realized that it needed to find a new line of business for the plaintiff to increase its sales and its profitability. That task fell to Adrian Robinson who had, at approximately this time, become the President of the plaintiff.

3 In or around 1992, Mr. Robinson began to investigate new products that the plaintiff might add to its business. Mr. Robinson focussed on the prospect of instituting a re-sale programme whereby the plaintiff would purchase items from foreign manufacturers and then resell them to customers. In particular, Mr. Robinson focussed on the prospect of buying and reselling D subminiature connectors ("D-subs") which are widely used in the electronics industry.

4 Mr. Robinson spent the first half of 1993 pursuing the possibility of starting to purchase and re-sell D-subs as part of the plaintiff's business. He travelled to Taiwan to find a manufacturer of D-subs that the plaintiff could use which would manufacture the D-subs with the plaintiff's name on them. The plaintiff would then re-sell the D-subs to OEMs and CEMs. Mr. Robinson found such a manufacturer in a company called Tekcon.

5 Around the end of June, 1993, Mr. Robinson concluded that the re-sale of D-subs was a viable business for the plaintiff to get into. At about this same time, the plaintiff had hired the defendant as a consultant. The defendant was known to the plaintiff because he had earlier applied for the position of Director, Sales and Marketing when the plaintiff was looking for someone to fill this position. While the plaintiff decided to hire another person for the position, the defendant sufficiently impressed Mr. Robinson and Bruce Hynds, the plaintiff's Chief Financial Officer, that in mid-1993, the plaintiff hired the defendant as a consultant to research the plaintiff's competition as well as to survey the available representatives and distributors in the United States. The defendant's work on this project was well received by Mr. Robinson with the result that Mr. Robinson decided to involve the defendant in the proposed D-sub project.

6 The defendant was first asked to review the proposed business venture to re-sell D-subs and determine if he thought it was viable. In August and September, 1993, the defendant performed that review and concluded that the project was, in fact, viable. Having that confirmed, Mr. Robinson decided to ask the defendant to head up this new venture and, consequently, offered him the role of Director, Sales and Marketing - Resale Products. In this new position, the defendant would essentially be on the same level as the existing Director, Sales and Marketing (who looked after the existing and traditional products of the plaintiff). The defendant was to report directly to the President, Mr. Robinson.

7 The defendant was initially hired in this role as a consultant for a three month period. There was a written consulting agreement dated October 4, 1993. It was agreed that after the three month period, the defendant would either (i) be hired as an employee or (ii) continued as a consultant for

another nine months or (iii) the relationship would be terminated. The written consulting agreement also contained the following provision in paragraph 13:

> "In the course of your providing services to the Company, you will become aware of confidential information about the Company that is not available in the public domain. By accepting this offer, you will be bound to keep this information confidential and you will not reveal this information to third parties without the consent of the Company, either during or after your provision of services to the Company."

Mr. Hynds had prepared this consulting agreement based on some precedents that the plaintiff had used before and on some human resources periodicals he had read. There was no discussion about this clause between the defendant and anyone at the plaintiff before the consulting agreement was signed.

8 While the defendant had experience in the computing industry, he did not have any experience in the connector business. I take it from the evidence that the defendant was brought in because of his skill in dealing with sales representatives and distributors through whom the plaintiff would be selling its new product line. There does not appear to be any dispute that the plaintiff had to educate the defendant in terms of the various facets of the connector business. However, Mr. Robinson said that the defendant had done excellent work in the process of reviewing the proposed new business and that he showed an aptitude for learning so Mr. Robinson made the decision to use the defendant to concentrate on the start-up of this new business venture.

9 In his new position, the defendant was to deal with the sales representatives, distributors and ultimate customers for the D-subs. In this regard, his position and responsibilities involved finding the customers for the plaintiff's D-subs and negotiating prices and other terms for the sale of the product, to such customers, subject to certain parameters set by Mr. Robinson. It was Mr. Robinson's responsibility to deal with the manufacturers. In this latter regard, Mr. Robinson made regular trips to Taiwan to deal directly with the manufacturers. I say manufacturers because, while the plaintiff started out with Tekcon as its manufacturer, the plaintiff subsequently also obtained products from another manufacturer in Taiwan by the name of Tact.

10 Although the consulting contract referred to a provisional three month period, it does not appear that anything further transpired regarding the defendant's position until late 1994 when the plaintiff determined that it wanted the defendant to become an employee as opposed to a consultant. Consequently, an employment contract was drawn up and signed by the plaintiff and the defendant. The employment contract is dated January 2, 1995. It also contains a confidentiality clause, again in paragraph 13, which is in virtually the same wording as the clause contained in the consulting agreement. The specific clause from the employment contract states:

> "In the course of your employment, you will become aware of confidential information about the Company that is not available in the public domain. By

> accepting this offer of employment, you will be bound to keep this information confidential and you will not reveal this information to third parties without the consent of the Company, either during or after your employment with the Company."

11 There is no dispute that the defendant performed his role as Director, Sales and Marketing - Resale Products in a very successful manner. Sales by the plaintiff of D-subs, which amounted to $181,162 in the period January to September, 1994, rose to $816,495 in the fiscal year ended September 30, 1995, rose again to $2,416,453 in the fiscal year ended September 30, 1996 and again to $4,810,318 in the fiscal year ended September 30, 1997[1]. The defendant exceeded his sales targets in each of those years and consequently received the maximum amount he could under his bonus plan for each of the 1995 and 1996 fiscal years and was well on his way to repeating that feat in the 1997 fiscal year.

12 The defendant resigned from the plaintiff on June 6, 1997. While I will return to the events of that day and the succeeding days, it is important to first turn to certain other events that occurred prior to that day.

13 The relationship between the plaintiff and Tekcon was not altogether a happy one. On the one hand, the plaintiff came to realize that having Tekcon as its only source of D-subs placed the plaintiff in a vulnerable position. Consequently, the plaintiff began to look for another source of D-subs and starting in 1997 it began to make purchases from another Taiwanese manufacturer by the name of Tact. At the same time, that is the early part of 1997, Tekcon was becoming more difficult about the terms upon which it would supply D-subs to the plaintiff. The original terms were that the plaintiff would pay one-half of the invoice amount at the time of shipment and then the balance within 30 days after the shipment arrived. The plaintiff wished to move to an open account whereby it would only have to pay for the product some period after it was received. Tekcon, however, started to move in the opposite direction. It decided, apparently unilaterally, to change the volume discount as well as, more importantly, the lead time it required between the time that orders were placed and the time by which it would deliver the products.

14 It was asserted by the plaintiff that the difficulties with Tekcon arose mainly because of an error made by the defendant with respect to a particular order. The defendant had a responsibility to ensure that any sale that he agreed to had at least a 20% margin for the plaintiff unless Mr. Robinson authorized a lower margin. Apparently, the defendant agreed to a sale to a customer that had less than a 20% margin and then ordered the necessary product to complete the sale from Tekcon. When Mr. Robinson became aware of this particular sale, he instructed the defendant to cancel it. This in turn lead to the cancellation of the product purchase from Tekcon. Tekcon was clearly annoyed by this cancellation because it said that it occurred after Tekcon had begun to manufacture the product. Tekcon says that it was left with an amount of partially completed product as a result. Mr. Robinson contended that the deterioration in the relationship with Tekcon was the direct result of this incident for which he blamed the defendant.

15 While there is evidence upon which it could be concluded that the defendant was the person responsible for this error (although the defendant contends that the purchase was actually cancelled by the plaintiff because it determined it could obtain the product from Tact at a cheaper price), it is clear to me that this event was not the real reason for the deterioration of the relationship between the plaintiff and Tekcon. Tekcon was clearly starting to push the plaintiff in terms of what it could extract from the plaintiff on the price and other terms for its products. Tekcon's reasons for so acting are not clear. Perhaps Tekcon had come to realize that the plaintiff was in the vulnerable position that the plaintiff had come to appreciate it was in. Perhaps Tekcon became aware that the plaintiff was starting to obtain product from one of its competitors, namely, Tact. Whatever the reason, Tekcon obviously started to change its terms to ones which were more onerous for the plaintiff and Mr. Robinson was not going to lie down and accept those changes. The issue of the cancellation of the particular order, while no doubt having added to the problems, was not, in my view, the genesis of them.

16 The situation with Tekcon continued on a downhill slide. Tekcon not only insisted on changing its terms for payment but it also began to demand that the plaintiff pay it a cancellation fee respecting the above-mentioned order. The plaintiff resisted these demands while at the same time it intensified its search for a replacement source of products. Principal among these was Tact which was already supplying some products to the plaintiff. However, Tact could not supply all of the products which Tekcon had supplied nor were some of Tact's products approved for purchase by certain customers of the plaintiff. In this latter regard, it is important to know that while OEMs purchase goods from their CEMs which in turn purchase products from companies such as the plaintiff, the OEMs must approve any products which their CEMs purchase. To do this, a company such as the plaintiff has to get on the approved vendor list or "AVL". In order to get on the AVL, the plaintiff has to submit its product for review and approval by the OEM. Consequently, to change from the Tekcon supplied product to the Tact supplied product required obtaining approvals from some customers and this, in turn, usually takes some time.

17 The largest customer for D-subs supplied by the plaintiff was a company called Matrox, which had two CEMs known as SCI and IEC. To put some perspective to the importance of Matrox-related D-sub sales[2] for the plaintiff, in the fiscal year ending September 30, 1997 of the total sales of D-subs of $4,810,318, just over 70% or $3,403,254 were Matrox-related sales.

18 The problems with Tekcon began to have some impact on the plaintiff sometime after April, 1997. The change in delivery times as well as the change in the lead times for orders being demanded by Tekcon made matters very difficult for the plaintiff. The only short term solution was for the plaintiff to increase its inventory of D-subs so that it would have them on hand when its customers placed an order since the customers would not wait the length of time that Tekcon was now insisting on to produce the D-subs. By early June, 1997, Mr. Robinson asked the defendant to prepare a plan to replace Tekcon as the principal supplier of D-subs for the plaintiff. The defendant did provide a plan to Mr. Robinson which Mr. Robinson described as extremely weak. He asked for and obtained a more detailed plan from another employee a few days later. While I tend to agree

with Mr. Robinson's view of the plan which the defendant produced, I do not view that issue as being particularly germane to the matters which I have to determine.

19 On June 6, 1997, late in the afternoon, the defendant handed his resignation to Mr. Robinson. Mr. Robinson said that he was surprised by this event but that the defendant told him that he wanted a change of lifestyle. Mr. Robinson asked the defendant what he intended to do and says that the defendant was evasive in his response. Mr. Robinson says that the defendant mentioned that he had a number of things that he might do. The defendant specifically mentioned a vending machine business and also that he might go back to running a computer software business as he had in the past. There was a discussion about the defendant staying for 30 days to work on the various issues facing the plaintiff at that time. As Mr. Robinson said, this resignation could not have come at a worse time for the plaintiff given the problems it was having with Tekcon. However, during this discussion, Mr. Robinson says that the defendant mentioned that his continuing to work for the plaintiff might put the defendant in a conflict of interest. Mr. Robinson says that he pressed the defendant as to the nature of this conflict but that the defendant refused to discuss the matter. Consequently, Mr. Robinson says that he told the defendant that he would consider the matter on the weekend (June 6 was a Friday) and would call the defendant.

20 The defendant then left the plaintiff's offices. There is no dispute that after having left the offices, Mr. Robinson discovered that the defendant had cleaned out his office and left his cellular phone, keys, company credit cards and his completed expense reports to date on his desk. Mr. Robinson says that as soon as saw the defendant's office in this condition, he knew that he had a problem. By that, I take Mr. Robinson to mean that he knew that the defendant had no intention of returning.

21 The defendant's version of the events of June 6 are somewhat different. The defendant says that he had started thinking of leaving the plaintiff in May, 1997 because he was unhappy. It should be noted in this regard that Mr. Robinson was in the process of moving the defendant out of the D-sub business into a new business that Mr. Robinson wanted to start-up and the defendant was plainly not delighted at that prospect. The defendant says that he did not know what he was going to do when he left the plaintiff. He says that he had a friend who had a vending machine business that the defendant could become involved in if the business received a particular contract from one of the school boards. That decision, however, was not to be made until later in June, 1997. Another prospect he considered was becoming a manufacturer's representative. The defendant says that both Tekcon and Tact had offered him jobs during the time that he was with the plaintiff but that he was not interested in becoming an employee of either of those companies.

22 When the defendant handed his resignation to Mr. Robinson on June 6, the defendant says that he told Mr. Robinson about the vending machine business opportunity and also about the fact that he might stay in the industry. The defendant says that he was not clearer about what he was going to do because he did not know what he was going to do at that time. He says that there was no discussion about a conflict of interest in that meeting and that all Mr. Robinson said to him was for

him to leave the offices and not tell anyone of his resignation. The defendant says that Mr. Robinson said that he would consider the issue of whether he wanted the defendant to work out his notice period and would call him.

23 There is no dispute that there was a telephone call between Mr. Robinson and the defendant on the Sunday. Mr. Robinson says that he told the defendant that he wanted the defendant to work the 30 day notice but that he was concerned about the conflict of interest issue that the defendant had mentioned and again asked for an explanation. Mr. Robinson says that the defendant again refused to explain what he meant by a conflict of interest. Consequently, Mr. Robinson told the defendant that he was not prepared to have the defendant return to the plaintiff's offices with that matter unexplained.

24 The defendant says that in the telephone call on Sunday, Mr. Robinson again pressed him on what his plans were and that he again said that he had not decided. The defendant says that he told Mr. Robinson that he might stay in the industry as a sales representative. The defendant says that it was Mr. Robinson who asked if that would create a conflict. The defendant replied that there would be a conflict only in the sense that he would undoubtedly wind up dealing with some of the same customers as the plaintiff did. The defendant says that Mr. Robinson's response to that was to tell the defendant not to come in to work on Monday. The defendant says that he asked Mr. Robinson whether he was sure and that Mr. Robinson said yes.

25 Finally, the defendant says that the reason that he cleaned out his desk and left his company material behind is that he was afraid that he might get locked out of the plaintiff's offices once he resigned and that he did not want to be put in a position where he might be accused of having taken material that did not belong to him or where he might not be able to reclaim his own personal property.

26 On balance, I accept the defendant's version of the events surrounding the resignation over that of Mr. Robinson. I accept that the defendant was, at the time, uncertain as to what he was intending to do and that is why he may have appeared to Mr. Robinson to have been evasive in responding to the questions. Further, on the issue of the possibility of a conflict, I note that Mr. Robinson's contention that the defendant would not explain the basis for the conflict is contradicted by Mr. Robinson's letter written on Monday, June 9, 1997. In that letter, Mr. Robinson said:

> "When questioned by me as to whether Edac would be negatively affected as a result of your working or providing service to a competitor, you provided no assurance that this would not be the case. When we discussed the possibility of your working on the sales desk during your notice period, you said that you may be placed in the position of receiving information which you could later use for your subsequent employment or interests. You also confirmed to me that should you so chose, you could commence consulting work effective this week." (emphasis added)

The explanation made by the defendant regarding the possible conflict as recorded in that letter by Mr. Robinson is similar to the explanation which the defendant says that he gave to Mr. Robinson and certainly does not evidence a refusal to discuss the subject as Mr. Robinson contended was the case in his evidence.

27 After his resignation, although it is not clear from the evidence how soon after, the defendant entered into an arrangement with Tekcon to act as their manufacturer's representative. The defendant's potential investment in the vending machine business did not materialize because the company did not get the contract it was hoping for from the school board. It is the activities of the defendant on behalf of Tekcon that form the substance of the claim herein.

28 The defendant did arrange a meeting between representatives of Tekcon and the person in charge of purchasing for Matrox. This meeting took place on July 29, 1997 and resulted in Tekcon becoming an approved vendor for Tekcon. Sales by Tekcon to Matrox and its CEMs followed thereafter. Indeed, in the period from August, 1997 to September, 1998, the defendant had Matrox-related sales for Tekcon of $1,201,250. The agreement which the defendant had with Tekcon was that he would receive a 5% commission on each of the sales.

29 The defendant does not deny that he contacted customers of the plaintiff after he resigned and became a manufacturer's representative. He does say, however, that he told these customers that he did not want the plaintiff's business. According to the defendant, there were a lot of other products that he could sell to these customers other than D-subs and that he did not need to fight with the plaintiff over that business. The defendant also says that he had legal advice at the time to be careful about what he said to such customers. The defendant does acknowledge however that such customers would know from this prior work with the plaintiff that he was familiar with D-subs and that, as a consequence, these customers naturally asked him to get them D-subs in addition to these other products.

30 The plaintiff says that the actions of the defendant, particularly with respect to the Matrox-related sales, caused them a significant loss of business. The plaintiff notes that in the fiscal year ended September 30, 1998 its sales of D-subs dropped from the previous year's total of $4,810,318 to $3,299,302 and that the Matrox-related sales dropped in the same period from $3,403,254 to $1,348,147. The defendant, while principally contending that any sales that he obtained for Tekcon were the result of fair competition, also observes that there were other factors that would have impacted on sales made by the plaintiff. First, he points to the supply problems which the plaintiff was having because of the falling out that the plaintiff had with Tekcon. Secondly, in this same time frame, Matrox changed from purchasing two connectors of a particular type for its video boards to buying two connectors of a different and cheaper type and then changed again from buying two connectors to buying only one connector. These events would necessarily have a negative effect both on sales and on sales revenue. Thirdly, the defendant says that customers for D-subs were all putting pressure on suppliers like the plaintiff to reduce their prices, that price reductions were consequently happening regularly and that this would in turn have

affected the level of sales revenue by everyone in the industry, including the plaintiff, in this time frame.

31 Before turning to the analysis of the plaintiff's claim, there are two other factual matters that should be mentioned. Sometime in April, 1997, the defendant purchased a laptop computer for his personal use. The defendant already had a laptop computer supplied by the plaintiff. At a point in time, the exact time is not clear from the evidence, Dave Nelson, an employee of the plaintiff, observed the defendant downloading information from his company laptop to his personal laptop. The plaintiff asserts that this activity was undertaken by the defendant to take confidential information from the company's premises. The defendant, however, says that he downloaded information from his company laptop to his personal laptop because the monitor on the company laptop was malfunctioning which in turn meant that the laptop was unusable unless it was in the docking station in his office with an external monitor. The defendant therefore used his personal laptop for purposes of work at home or when travelling. Mr. Nelson was responsible for technology matters within the plaintiff and he confirmed that the monitor on the defendant's company laptop was malfunctioning.

32 The other matter is the contact which the defendant had with Tact in May, 1997. During the course of the discovery process in this action, the plaintiff first learned that the defendant had sent a proposal to Tact in May, 1997 by which he suggested that he could act as their representative in North America. The proposal is fairly detailed and was, of course, delivered by the defendant to Tact at a time when the defendant was still an employee of the plaintiff and Tact was a supplier to the plaintiff. The defendant says that the proposal was made by him in response to a job offer which Tact had made to him. The defendant says that he was not interested in the job offer but sent this proposal to Tact by way of a "trial balloon" to see if Tact would be interested in such a concept. He says that he did this at a time when he was unhappy with his job with the plaintiff and was starting to contemplate other opportunities away from the plaintiff. There is no dispute that nothing ever came of this proposal, that is, the defendant never became a representative for Tact subsequent to his resignation from the plaintiff. I will return to these two matters later.

The plaintiff's claim

33 The plaintiff's principal claim falls under three different heads. They are:

(i) breach of fiduciary duty;
(ii) breach of the common law duty of confidentiality;
(iii) breach of the confidentiality clause of the employment contract.

There is also a claim by the plaintiff for the recovery of the bonus payment it made to the defendant shortly before his resignation. Finally, there is a counterclaim by the defendant for the salary and bonus payments he did not receive for the thirty day notice period that he offered to work for the plaintiff. I now turn to a consideration of each of these matters.

Fiduciary Duty

34 It is clear from the Supreme Court of Canada's decision in Canadian Aero Service Ltd. v. O'Malley et al. (1973), 40 D.L.R. (3d) 371 that an employee may owe a fiduciary duty to his or her employer. The question is whether the employee falls within the category of "top management" such that the fiduciary duty arises and then, if so, what activities will amount to a breach of that fiduciary duty.

35 In my view, the defendant would qualify as top management within the context of the plaintiff. His level within the plaintiff was below only that of the President and the Chief Financial Officer who also happened to be the two owners of the plaintiff[3]. The defendant reported directly to the President regarding his area of responsibility. Within that area, that is the resale products, the defendant was the person in charge. He was responsible for developing this new area of the plaintiff's business. Indeed, it is clear that he developed this new area quite successfully for the plaintiff. The defendant was the principal contact with the plaintiff's customers in this area, including Matrox and its CEMs. In fact, he was the person responsible for finding and developing the customers for the plaintiff. While the defendant may not have had corporate planning or corporate strategy responsibilities or signing authority in certain circumstances, in the case of the company the size of the plaintiff, where the two owners would largely if not exclusively determine such matters, I do not, consider that fact to preclude a finding that the defendant was within the reasonable definition of top management and I do so find.

36 What activities, then, is the defendant precluded from undertaking after his resignation in light of the finding that he was within the ranks of top management before he resigned? Laskin, J. (as he then was) put the restriction in Canadian Aero Service, supra, as follows at p. 381-382:

> "It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company."

37 However, later in that decision, Laskin, J. observed that he was not laying down any rule of rigid application and that the general standards of loyalty, good faith and avoidance of conflict had to be tested by a number of factors in each case. Laskin, J. said, at p. 391:

> "In holding that on the facts found by the trial Judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am

> not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge."

38 The situation here is somewhat akin to that which faced Mr. Justice Osler in White Oaks Welding Supplies v. Tapp (1983), 149 D.L.R. (3d) 159 (Ont. H.C.). In that case, Mr. Justice Osler found that Mr. Tapp fell within the definition of top management. Mr. Tapp held a position within White Oaks that was not dissimilar to the position that the defendant here held with the plaintiff. Mr. Justice Osler concluded that Mr. Tapp had a fiduciary duty not to solicit customers of White Oaks which duty he expressed in the following terms at p. 163:

> "Nevertheless, the defendant, with his encyclopedic knowledge of the plaintiffs customers, his unrestricted access to all customer lists and information concerning such customers, and his personal contact with and responsibility for a large proportion of the plaintiff's customers, was a senior employee with a fiduciary relationship to his employer of the same type and on the same plane as those discussed in those cases. His obligation was not simply that of every employee to refrain from taking with him material related to his former employer's business and making use of such material. The obligation of Tapp was of an altogether higher nature and was to refrain, not from competition, but from deliberately soliciting customers of the plaintiff, other than as part of the general customer public to whom general solicitation might be made." (emphasis added)

39 Unfortunately, it is not clear to me from the decision in White Oaks precisely what Mr. Tapp did in terms of soliciting customers of White Oaks, so I am unable to determine how those activities compare to the defendant's activities which are complained of here. I do note, however, that Osler, J. held that it was not impermissible in all respects for Mr. Tapp to compete with his former employer. I read the qualification or restriction imposed by Osler, J. to be that senior employees may not specifically target their former employer's customers. By specifically targeting customers, I take that to mean that senior employees are precluded from using information gained during their employment, as to the needs of those customers, to directly solicit those customers. My interpretation of the restriction or qualification on the nature of the solicitation in which a former

senior employee may engage also finds support in the decision in C.H.S. Air Conditioning Ltd. (c.o.b. Dial One Temp Air Control) v. Environmental Air Systems Inc., [1996] O.J. No. 1316 (Gen. Div.) in which Mr. Justice Adams said, at p. 13:

> "The evidence does not support the claim of an improper usurpation of corporate opportunity. The personal defendants were not part of the plaintiff's management team. However, even if they were, they did not resign to take advantage of a maturing business opportunity within the meaning of Canadian Aero Service Ltd. v. O'Malley, supra, or to exploit their knowledge of the intimate needs of the plaintiff's customers as in Alberts v. Mountjoy, 16 O.R. (2d) 682." (emphasis added)

40 I conclude, therefore, that the prohibition that is placed on a senior employee, who owes a fiduciary duty to his former employer, precludes the individual from using any special knowledge he or she obtained during the course of their employment to directly solicit the customers of their former employer. It does not, however, preclude the solicitation of those customers as part of a general solicitation of potential customers nor does it preclude the individual from using his or her general body of knowledge and expertise from competing, either for themselves or for someone who might employ them, for the business of such customers. To hold otherwise would, it seems to me, result in a situation where the individual could be effectively prevented from engaging in gainful employment in the industry or area with which they are familiar and for which they have an established background of experience. If such a prohibition is to be imposed on an employee, in my view it should be imposed only through an agreed upon non-competition provision in the individual's contract of employment. There is, of course, no such non-competition provision in the defendant's employment contract.

41 Against the backdrop of those principles, I am not satisfied, on the evidence, that the defendant acted in such a manner that would constitute a breach of the fiduciary duties that he owed to the plaintiff. The principal, if not sole, activity of which the plaintiff complains is that the defendant assisted Tekcon in selling D-subs to Matrox and its CEMs. The defendant's activities in that regard are essentially limited to having contacted the individual in charge of purchasing for Matrox and arranging a meeting between that individual and representatives of Tekcon. The problem with the plaintiff's complaint in this regard is that it is clear that Tekcon already knew that Matrox was the customer for the D-subs that they were manufacturing for the plaintiff. This was a fact that would not, in any event, have been hard for Tekcon to find out given that Matrox puts out advertising and marketing material regarding their video boards which clearly show the Edac connectors. It is a fact that Tekcon could easily have contacted Matrox directly and found out the individual in charge of buying by way of a simple telephone call. While I accept that the defendant's relationship with this individual made it considerably easier for Tekcon to get a meeting with him, that facilitation by the defendant was based on his personal relationship with the individual. There was no special knowledge used by the defendant to provide that entrée for Tekcon. There is nothing that I can find in the case law which would suggest that a former employee, even a senior employee,

cannot rely on relationships that he or she has developed with customers during the course of their employment for the purposes of competing for the business of such customers after they have left their former employer. Indeed, other cases have decided that an employee can do exactly that - see, for example, C.H.S. Air Conditioning Ltd., supra, 309925 Ontario Ltd. v. Tyrrell et al. (1981), 127 D.L.R. (3d) 99 (Ont. H.C.) and Wessex Dairies Ltd. v. Smith, [1935] 2 K.B. 80.

42 I am also not satisfied that the evidence establishes that the defendant specifically targeted Matrox or any of the other customers of the plaintiff. It was established that the market for D-subs is a very large market and a very competitive one. There are a number of suppliers from which companies such as Matrox can purchase D-subs. It is evident that customers such as Matrox play these various sources of D-subs off against each other as a way of getting the lowest possible price and that they move their business among these competitors accordingly. In my view, it is reasonable to conclude that Tekcon could have obtained business from Matrox without the intervention of the defendant. In any event, there is no evidence that the defendant used any knowledge of the "intimate needs" of Matrox learned from his time with the plaintiff to obtain orders for Tekcon.

43 I conclude therefore that the defendant did not breach the fiduciary duty which he owed to the plaintiff in the manner in which he conducted his activities after he left the employ of the plaintiff. I note that not a single customer of the plaintiff was called to give evidence that it was improperly solicited by the defendant. I have already noted that there was no non-competition covenant between the plaintiff and the defendant. Such a covenant would, of course, be the type of protection which the plaintiff could have had in place to prohibit any activities by the defendant regarding its customers if it really wanted such protection. Absent such a covenant, the plaintiff took a real risk that the defendant might leave and do for others what he had been successfully doing for the plaintiff. As Lord Justice Lindley said, more than one hundred years ago, in Louis v. Smellie (1895), 73 L.T.R. 226 at p. 228:

> "On the other hand, we must bear in mind that the defendant was entitled to set up in business in the absence of such a covenant in rivalry with his late employer. What he is not entitled to do is to make an unfair use in the carrying on of such a rival business of information acquired by him while he was acting as a clerk to the plaintiff. The difficulty lies in drawing the line."

In my view, the defendant did not cross over the line as I believe it should be drawn.

Confidential information

44 The plaintiff alleges that the defendant had confidential information arising from his employment. It asserts that such confidential information consisted of the names of its customers, the nature of the sales made, the volume of sales, the prices charged and discounts given, its profit margins, and its product development and business opportunities. While I accept that generally such information would be confidential to any employer, not all of these items were confidential in this particular industry or with respect to this particular employer.

45 First, it is clear that the prices which customers such as Matrox were charged for parts by companies such as the plaintiff were routinely revealed by those customers to other potential suppliers. Their reason for so doing was simple - it made those other suppliers match or better the price. In those instances where the actual price was not revealed by the customer, the customer would give sufficient hints' about the price that any potential supplier would easily be able to determine where they stood in terms of price compared to their competitors.

46 Secondly, the names of the plaintiff's customers were not treated by it as confidential. The evidence establishes that the names of the plaintiff's customers were routinely used in marketing presentations to new or potential customers to encourage or entice them into giving the plaintiff their business. This is not an uncommon marketing approach. The plaintiff's web site also mentions certain customer names such as SCI and Hewlett Packard. Further, the plaintiff acknowledged that some of the information that they claimed to be confidential would be known to competitors of theirs. The plaintiff says, however, that this information would not have been known to Taiwanese suppliers such as Tekcon and Tact.

47 It is not clear to me that a company can claim that information is confidential where it is known to one segment of the market and not to others. Once the information has gotten into the public domain in any respect, it seems to me by definition to no longer be capable of being labelled confidential. In any event, Tekcon had already established a sales office in the United States and was actively pursuing direct contacts with customers in North America. It was certainly in the process of becoming a competitor of the plaintiff at the time that the defendant left the plaintiff's employment. Therefore, it is reasonable to assume that, regardless of retaining the services of the defendant, Tekcon would have come to know this allegedly confidential information since the plaintiff's other competitors are admitted to have known it.

48 Regardless of that finding, I am not satisfied on the evidence that the defendant made use of any confidential information in terms of the activities he undertook on behalf of Tekcon after leaving the plaintiff. Such evidence as there is on this subject shows that it was the buyer at Matrox who gave Tekcon certain information regarding where their pricing should be on D-subs in order to be competitive with Matrox's other suppliers. I accept the defendant's evidence that he specifically did not tell Tekcon what the plaintiff's mark-up was on the D-subs that it sold to Matrox. He simply asked Tekcon for a price that he could forward to Matrox for its consideration. It turned out that the price which Tekcon gave the defendant was too high. However, it was Matrox's buyer, not the defendant, that told Tekcon that its price was too high by two cents per part. It was as a consequence of this information from Matrox that Tekcon revised its price to became competitive and thereby obtained orders from Matrox and its CEMs.

49 There is no other evidence that the defendant used confidential information on behalf of Tekcon. There is no evidence that he used pricing or profit margins or product development or business plans of the plaintiff to advance the position of Tekcon. In my view, therefore, the claim for breach of confidential information regarding Tekcon is not made out.

50 That, however, does not end the consideration of the issues regarding the claim for breach of confidence. I earlier mentioned that the defendant had sent a proposal to Tact in May, 1997 regarding him possibly acting as its representative if he actually left the plaintiff. There is considerable information in that proposal regarding the plaintiff and its business, some of which is clearly confidential. For example, the sales volumes by the plaintiff to customers such as Matrox and Colorado Memory Systems would not be generally known nor would the rate of growth of those sales be known.

51 I have considerable concerns regarding this document. I find it troubling that it was produced and given to a supplier of the plaintiff at a time when the defendant was still in the plaintiff's employ. The defendant contends that the document is nothing more than a written job interview. In other words, he says that such a conversation could properly have occurred in the context of a job interview but that here, given the distance between the defendant in Toronto and Tact in Taiwan, the interview had to be in writing. Even accepting that characterization of the document, I do not agree that the defendant would have been at liberty in a job interview to reveal the confidential information which is contained in the document. Indeed, I would have considered it improper if he had done so.

52 However, it is evident from the case law that, in order to have a complete cause of action for breach of confidence, the plaintiff must not only establish a misuse of confidential information but must also establish a corresponding detriment to the plaintiff arising from that misuse. As Mr. Justice LaForest said in Lac Minerals v. International Corona Resources (1989), 61 D.L.R. (4th) 14 at p. 20:

> "I can deal quite briefly with the breach of confidence issue. I have already indicated that LAC breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence is not seriously disputed by the parties. It consists in establishing three elements: that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated. In Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.), Megarry J. (as he then was) put it as follows (p. 47):
>
>> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must "have the necessary quality, of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it.'

> This is the test applied by both the trial judge and the Court of Appeal. Neither party contends that it is the wrong test."

53 There is no evidence in this case that the plaintiff suffered any detriment' from the actions of the defendant in respect of the proposal he sent to Tact. Tact was a supplier to the plaintiff and it remained as such after the defendant resigned. The defendant never acted as a representative for Tact after his resignation nor did he obtain any sales for Tact at any point. Therefore, while I have found that his actions in regard to the proposal were inappropriate and a breach of his duty to maintain the confidence of his employer's information, I conclude that no detriment was suffered by the plaintiff from these actions and therefore the plaintiff has no sustainable claim arising therefrom.

54 Before leaving this issue, I should make reference to the activities of the defendant and his personal laptop computer. First, I accept the defendant's explanation for transferring information to his personal computer. The problem with the monitor on the company laptop would clearly have made using it in a portable context difficult, if not impossible. Secondly, the only information that the defendant transferred that was complained of in the course of the trial was the defendant's contacts list which included the names of contact persons, along with their addresses and telephone numbers, for various people that the defendant knew within the industry, including the plaintiff's customers. There no detailed information about the customers in the contacts list. The defendant says that he never used any of this information to contact Matrox or its CEMs. He says that he did not have to because he knew the names and phone numbers of the individuals by heart. I accept the defendant's evidence in this regard. It is clear that this information would have been readily available to the defendant without this list from the computer and that he could have re-created it easily if he had wished to do so after he resigned. In my view, therefore, the contacts list falls within the type of information that was considered in cases such as Tomenson Saunders Whitehead Ltd. v. Baird (1980), 7 C.C.E.L. 176 (Ont. H.C.) and is not reasonably characterized as confidential. I would also observe in passing that if the defendant had really been trying to abscond with confidential information from the plaintiff, I would have expected that he would have done it in a much less obvious and public way.

55 I do not find therefore that there was any misuse of confidential information arising from the incident involving the laptop and I should say, in fairness, that the plaintiff did not press this point in argument.

56 Finally, my analysis and conclusions above regarding the issues surrounding the alleged breach of common law duty of confidence apply with equal force and effect to the claim based on an alleged breach of the confidentiality clause in the employment contract. Therefore, for the same reasons, that claim must also fail.

Damages

57 I now turn to consider the assessment of damages that the plaintiff would have been entitled to if I had determined that there was liability on the defendant. The plaintiff submitted a report done by KPMG, LLP of the losses suffered by the plaintiff resulting from the alleged actions of the defendant. There was no counter report from the defendant. The plaintiff's report was presented through the expert evidence of Mr. James McAuley, a partner of KPMG, LLP. The damages as determined by Mr. McAuley are comprised of three parts:

(a) the lost contribution margin on the sales not made to Matrox and its CEMs because of the direct sales made by Tekcon;

plus:

(b) the lost contribution margin on the sales not made to other customers of the plaintiff because of the direct sales made by Tekcon;

less:

(c) the salary costs and bonus payments saved from the departure of the defendant after deducting costs which the plaintiff says it incurred in an effort to mitigate the damages it was suffering.

58 The calculation of the lost sales is derived from the commission statements produced by the defendant which show the sales that he made for Tekcon and on which he was paid his commission. In addition to those sales figures, there is added an additional amount for the assumed loss of sales revenue, for Matrox-related sales only, arising from the fact that the plaintiff had to reduce its prices for its products in order to try and redress the competition that was coming from Tekcon through the defendant. Mr. Hynds, the plaintiff's Chief Financial Officer, prepared information for Mr. McAuley regarding the history of the selling prices for the plaintiff's products and gave examples in his evidence as to the reductions that had occurred in the prices of some products arising from the Tekcon competition. Mr. McAuley then assumed a five per cent and a ten per cent loss in sales revenues arising from this competition and added that lost sales revenue into its calculation of the losses in two respects - (i) reduced prices on the lost sales to Matrox and its CEMs as well as (ii) reduced prices on the sales actually made by the plaintiff to Matrox and its CEMs. These calculations resulted in a range of losses in Mr. McAuley's opinion of $289,285 to $416,320 for the Matrox-related sales and a loss of $15,510 for all other sales.

59 From the above numbers, Mr. McAuley deducted the salary costs saved and the bonus payments not made resulting from the defendant's departure. However, Mr. McAuley added back the alleged mitigation costs incurred by the plaintiff in responding to the activities of Tekcon and

the defendant. The evidence regarding the mitigation costs again came from Mr. Hynds who said that three employees had been required to take time from their normal duties to spend time on Matrox issues confronting the plaintiff. He estimated the number of days that these employees had devoted to the Matrox issues and then calculated amounts for the costs of those days based on the employees' respective salaries. Mr. McAuley then incorporated these figures into his calculations.

60 I have some difficulty with the approach to the mitigation costs for two reasons. One is that these calculations were based entirely on assumptions or estimates made by Mr. Hynds and which were made some considerable time after the events in question. None of the employees had kept any record of the time that they had spent on Matrox issues and there is therefore no way of testing the fairness of the estimates made by Mr. Hynds. While I am sure that Mr. Hynds did the best that he could in the circumstances, I do not accept that evidence as being good enough in the circumstances to provide a proper foundation for the assessment of a damage claim. The other difficulty I have is that there was no actual additional out-of-pocket expense incurred by the plaintiff arising from the efforts of these employees. In other words, the plaintiff did not have to go out and hire temporary people to fill in gaps created by these employees being diverted to the Matrox issues. If these employees had not been working on the Matrox issues then they would have been doing something else for the plaintiff and the plaintiff's salary costs would still be the same. There is no evidence that other tasks did not get done or that other costs were incurred as a consequence of the time spent by these employees in addressing the Matrox issues. It is evident to me that there were no additional costs incurred by the plaintiff in undertaking these efforts and I do not believe, therefore, that the mitigation costs as claimed are proper. I therefore disallow those amounts from the damages claimed. This has the effect of reducing the damages claimed from a range of $252,320 to $379,355 to a range of $241,643 to $368,678.

61 The other difficulty I have with the damages as calculated relates to the price reductions alleged to have been caused by the action's of Tekcon and the defendant. While I accept that the plaintiff was facing new and additional competition from the arrival of Tekcon on the scene, I also accept the evidence of the defendant that there was a constant downward pressure on prices from the customers. Indeed, Mr. McAuley gave evidence that the gross margin on the plaintiff's sales had been dropping over the years. He also observed that there was more price pressure coming from Matrox because of its significant size. There was, as a consequence, more going on than just the activities of Tekcon that was having an impact on the prices that the plaintiff could charge for its products. For these reasons, I considered whether there should be an allowance at all for the alleged reductions in prices in such circumstances. However, on balance, I am satisfied that Tekcon arrived on the scene-earlier and perhaps more aggressively than it would have without the assistance of the defendant. Had I found that assistance to be a breach by the defendant, then it should fairly be taken into account in the assessment of damages. In the end result, therefore, I would include that factor within the damages assessed but I would choose the lower of the two price increases used by KPMG in order to calculate the losses arising from this factor. In the end result, therefore, I assess the plaintiff's losses at $241,643.00.

62 There are two other issues that should be mentioned in connection with the assessment of damages. First, the defendant contends that the time period selected by the plaintiff is not the appropriate period. The plaintiff selected the period from the time of the defendant's departure until the end of September, 1998. The evidence of Mr. Hynds was that the plaintiff had, by that time, put people in place to take over the activities of the defendant. In other words, by that time the plaintiff was back in the position it would have been but for the departure of the defendant. Mr. Hynds also, quite frankly and fairly, said that there was a concern that if a longer period was chosen, the plaintiff would have to produce in this litigation current information on its operations to what was then, in essence, a competitor. For both of these reasons, therefore, the end of September, 1998 was chosen as a fair cut-off point.

63 The defendant asserts that the court must determine what is a reasonable period of time to which to hold the defendant liable in such a case and that a more reasonable period of time for the calculation of the damages, in this case, is six months. I take the defendant's position to be that the period of time in which to determine the damages is somewhat akin to the determination of reasonable notice for the termination of an employment contract. I do not agree with the defendant's position in this regard. First, it is not clear to me that there is ever a cut-off point after which a fiduciary is entitled to use information in breach of his fiduciary duties. The duty of a fiduciary is not a temporal one. A fiduciary is obliged to respect the obligations of a fiduciary for as long as the consequences of any breach of those duties remain. These considerations are different when one turns to the issue of confidential information since the confidentiality of the information may well be eliminated through the information becoming public or because the passage of time makes the claim of confidentiality of no practical significance. Having said that, the party harmed has the obligation to mitigate its damages and consequently it is likely that there will always be a finite limit to the period for which the injured party can claim damages. That period will, vary from case to case and circumstance to circumstance. In this case the plaintiff's evidence is that it took to the end of September, 1998 to redress the actions of the defendant and Tekcon. That is a period of some sixteen months from the actual departure of the defendant and some fourteen months from the time when Tekcon had contact with Matrox. In my view that is not an inordinate period of time in these circumstances. Further, the defendant did not place evidence before this court that seriously challenged either the reasonableness of the plaintiff's contention in this regard or of the steps which the plaintiff had taken to respond to this new challenge. I therefore accept the period used by the plaintiff for the calculation of damages as being an appropriate one.

64 The other issue is the defendant's contention that the damages should be measured by the defendant's gain from the improper activity and not by the plaintiff's loss. The defendant then says that he only earned commission income of approximately $50,000.00 from the sales that he made for Tekcon and that is therefore the appropriate measure of damages. Again, I do not agree with the defendant's position. While there are undoubtedly situations where the disgorgement of the defendant's profit is the appropriate remedy, this is not such a case. It seems to me to be inherently unfair to allow the defendant to dictate the measure of liability he would have arising from a breach of his fiduciary duties, if such a breach had occurred. It would result, as in the case here, in the

plaintiff receiving less than it has lost from the defendant's breach simply because of the manner in which the defendant organized his affairs while committing the breach. The proper remedy for a breach of a fiduciary duty is set out in the dissenting judgment of Madam Justice Wilson in Frame v. Smith (1987), 42 D.L.R. (4th) 81 (S.C.C.) at p. 108:

> "The remedies normally awarded for breach of fiduciary duty are the imposition of a constructive trust and the accounting of profits. Neither remedy is applicable here. However, equitable compensation is also an available remedy: see, for example, Seager v. Copydex Ltd., [1967] 1 W.L.R. 923 (C.A.); Dowson & Mason Ltd. v. Potter, [1986] 2 All E.R. 418 (C.A.); Nocton v. Lord Ashburton, [page 109] [1914] A.C. 932 (H.L.), at pp. 946, 956-7; U.S. Surgical Corp. v. Hospital Products Int'l Pty. Ltd., [1982] 2 N.S.W.L.R. 766 (S.C., Eq. Div.) at p. 816. The purpose of equitable compensation is to restore to the plaintiff what has been lost through the defendant's breach or the value of what has been lost." (emphasis added)

65 As was the case in Frame v. Smith, neither the imposition of a constructive trust nor the accounting of the defendant's profits is an appropriate remedy in this case. I take from the above-quoted observation of Wilson, J. that the fundamental purpose behind the remedy is to place the plaintiff, to the degree possible, in the same position it would have been had the breach not occurred. In my view, an award of damages representing the profits that the plaintiff would have earned from the lost sales would appear, in this case, to best achieve that result. This approach is consistent with the conclusion reached by the Supreme Court of Canada as to the appropriate remedy in Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142 wherein Mr. Justice Binnie said, at p. 193:

> "This case is closer to Dowson & Mason Ltd. v. Potter, supra, where the plaintiff, as here, was a manufacturer, not a seller of information. In that case, the court affirmed the trial judge's view (at p. 424) that:
>
> > ... the proper basis for the assessment of damages is the loss suffered by the plaintiffs according to their loss of profits resulting from the assumed wrongful disclosure and use of the confidential information ... .'" (emphasis by Binnie, J.)

I also refer, in this regard, to the discussion-generally by Mr. Justice Binnie at pp. 193-198 of that decision as to the proper measure of financial compensation in such cases.

Bonus paid

66 The plaintiff also claimed the return of the bonus that it paid to the defendant approximately a week before the defendant, resigned. The plaintiff says that had it known of the activities of the

defendant, particularly of the proposal which he had sent to Tact in May, it would have terminated the defendant's employment for cause and would not have paid the bonus as a consequence. Had there been a finding of liability on the defendant, the plaintiff says that it would be entitled to have the bonus repaid by the defendant on the basis that it was paid by mistake. The plaintiff relies on the decision of the Supreme Court of Canada in Air Canada v. British Columbia, [1989] 1 S.C.R. 1161 in this regard.

67 The 1997 bonus plan under which the defendant was paid this bonus contained a term relating to the resignation or termination of the defendant's employment as follows:

> "Should you resign your position dismissed for cause, you will forfeit any bonus payment which may have been payable under the terms of the plan. Should you be terminated without cause, you will be paid a pro-rated bonus payment for the period up until the date of termination."

68 This issue is complicated by the fact that the copy of the bonus plan that was placed in evidence has after the words "which may have been payable" a handwritten insertion of the words "and not paid" and then what appears to be someone's initial. The bonus plan was signed by both the defendant and Mr. Robinson. The defendant's evidence was that he wrote those words in when he signed the plan and before Mr. Robinson signed it. The defendant says that while he first thought that the initial that appears on the document was his, on reflection he does not think that it is. He concluded that he does not know whose initial it is. Unfortunately, neither counsel asked Mr. Robinson about this handwritten insertion so I am left without the benefit of Mr. Robinson's position on this particular point.

69 In my view, in these circumstances, the document must be read as amended by the handwritten notation. I do not have any reason, in the absence of evidence to the contrary, not to accept the defendant's position that the handwritten insertion was on the document when it was signed by both parties. That provision makes it clear that once a bonus has been paid, there is no right in the plaintiff to reclaim it even if their was a termination of the defendant's employment for cause. Therefore, the plaintiff's claim for the return of the bonus must fail.

Counterclaim

70 The defendant counterclaims for the salary and bonus that he was not paid for the thirty day notice period that he offered to work for the plaintiff when he announced his resignation. The defendant says that he is entitled to this payment because he offered to work that notice period and the plaintiff refused to let him do so.

71 The purpose behind giving notice, whether by an employer to an employee or vice versa, is to allow a transition to take place. However, there is no requirement that the party, for whose benefit the notice is being given, must accept that notice. In other words, the offering party may not insist that the responding party accept the notice period. For example, if an employer offered a reasonable

period of notice to an employee arising from a decision that the employee's employment was to be terminated, the employee could waive the notice requirement. Similarly here, the legal requirement for the defendant to give the plaintiff notice of his resignation could be waived by the employer and that is clearly what happened during the course of the telephone conversation between Mr. Robinson and the defendant on the weekend. In my view, the parties effectively agreed to terminate the employment contract as of that date and the defendant's entitlement to remuneration ended accordingly. Therefore, the defendant has no entitlement to his salary and bonus for the thirty day notice period.

72 The defendant's counterclaim must therefore be dismissed.

Summary

73 In the end result, while I conclude that the defendant owed a fiduciary duty to the plaintiff because of his senior position, I am of the view that the defendant did not breach his fiduciary duties through the actions that he took either before or after his resignation. I also find that the defendant did not misuse confidential information that resulted in any detriment to the plaintiff. The plaintiff's claim is therefore dismissed.

74 As I am also of the view that the patties mutually agreed that the defendant would not be required to work any period of notice after his resignation, the defendant's counterclaim is also dismissed.

75 The parties may make written submissions as to the appropriate disposition of the costs of the proceeding. The defendant's submissions shall be delivered by Friday, January 14, 2000 and the plaintiff's by Monday, January 24, 2000.

NORDHEIMER J.

cp/s/qlrme/qlkra/qlana

1 These figures are taken from Schedule 3 of the KPMG report, Exhibit #2.

2 I use the term Matrox-related sales in the same fashion that it was used at trial, namely, to refer to sales made to Matrox and to its CEMs.

3 Mr. Robinson and Mr. Hynds had purchased Edac from its parent company as a result of a management buyout in 1994.