See paras. 133, 137, 138

Case Name:

No Limits Sportswear Inc. v. 0912139 B.C. Ltd.

Between
No Limits Sportswear Inc. and Saxx Underwear Co. Ltd., Plaintiffs, and 0912139 B.C. Ltd., Pakage Holdings Inc., Keyhole Technologies Inc., Dustin Bigney, Desmond Price, Pakage Apparel Inc. and Gregg Alfonso, Defendants

[2015] B.C.J. No. 2043

2015 BCSC 1698

Docket: S124144

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

S.A. Griffin J.

Heard: June 22-26, 29, 30, July 2, 3 and 6-9, 2015.
Judgment: September 22, 2015.

(250 paras.)

Tort law -- Invasion of privacy -- Breach of confidence -- Action for damages for misuse of plaintiffs' business plans in relation to SAXX brand of men's underwear dismissed -- Plaintiffs had forwarded SAXX Confidential Investment Summary and market projections to interest defendants in investing in plaintiffs -- Plaintiffs alleged defendants misused this confidential information to develop and launch competing brand of "MyPakage" men's underwear -- Plaintiffs failed to establish liability or damages -- No credible evidence of loss of business opportunity, loss of market share or market position as a result of MyPakage business -- No obligation of confidence on the part of the defendants arose.

Action for damages for misuse of the plaintiffs' business plans in relation to a brand of men's underwear known as SAXX underwear. The plaintiffs alleged that the defendants misused the confidential information to develop and eventually launch a competing brand of men's underwear, the brand "MyPakage". The plaintiffs also claimed that Price, a former employee of the plaintiffs, breached a non-compete agreement by becoming part of the MyPakage business and breached a non-disclosure agreement. The plaintiffs argued that as a result of the defendants' alleged misconduct, the plaintiffs suffered a loss of opportunity and a reduction of their market share and market position and sought compensatory damages. The plaintiffs had the exclusive right to use the SAXX trademarks in its underwear designs and the exclusive rights to manufacture, advertise, sell and distribute the SAXX products. In 2009, the plaintiffs needed investors to inject cash in the company. The plaintiffs had preliminary discussions with the defendants and forwarded to the defendants a SAXX Confidential Investment Summary describing the potential investment and market projections. No agreement was reached. The defendants then began designing a comparable competing product. Price, while employed by the plaintiffs, was involved in all aspects of marketing the SAXX brand. The Non-Competition Agreement prohibited Price, for a period of two years, from engaging in or becoming financially interested in a business in North America competing with the Business of the Company.

HELD: Action dismissed. The plaintiffs failed to establish damages or liability. There was no the evidence to support a finding that the MyPakage product and MyPakage marketing efforts had a negative impact on the plaintiffs' sales of SAXX market share. The plaintiffs failed to prove that they would have been in a better position, with greater market share, and greater sales, but for the defendants' breach of confidence. There was no credible evidence that they had suffered a loss of business opportunity, loss of market share, or loss of market position as a result of the launch of the MyPakage business and MyPakage product as claimed and no evidence supporting factual conclusions as to what the plaintiffs could have achieved in sales of the SAXX product, but for alleged sales of MyPakage product, compared to what the plaintiffs did actually achieve in sales of the SAXX product after the alleged misconduct and launch of the MyPakage product. SAXX underwear was a publicly available product in 2009 and had received some media attention and publicity because of its unique feature and unique market niche. It did not have any intellectual property rights to prevent other companies from developing underwear that could also target the same niche. The mere fact that the defendants sought to develop a rival product and enter the same market did not prove there was a breach of confidence. There was at best limited confidential information in the Saxx Confidential Investment Summary and financial projections. Disclosing these documents to the defendants did not create an obligation on the defendants to treat them as confidential. Given the absence of an express confidentiality agreement and the circumstances under which his documents and the financial projections were forwarded to the defendants, there was no obligation of confidence on the part of the defendants. The information in the Saxx Confidential Investment Summary and financial projections was not misused. Any confidential information in these documents did not give the defendants any kind of a head start, advantage, or springboard in developing the MyPakage business. The evidence was insufficient to conclude that Price breached his Non-Disclosure Agreement. The Non-Competition Agreement was unreasonably

broad in scope of prohibited activity, geographic scope, and temporal scope and was unenforceable. The plaintiffs also failed to prove that any damages were caused by Price's alleged breach of the Non-Competition Agreement.

Counsel:

Counsel for the Plaintiffs: Paul Smith, Andy Y. Chow.

Counsel for the Defendant Gregg Alfonso: Robert W. Cooper, Joelle Walker.

Counsel for all other Defendants: J. Kenneth McEwan, Q.C., Caily DiPuma.

Reasons for Judgment

S.A. GRIFFIN J.:--

Introduction

1 The plaintiffs claim that the defendants misused confidential information provided to them by the plaintiff No Limits Sportswear Inc. ("No Limits") in 2009. The confidential information relates to the plaintiffs' business plans in relation to a brand of men's underwear known as SAXX underwear.

2 The plaintiffs allege that beginning in September or October 2009, the defendants other than Gregg Alfonso (who, for ease of reference, will be referred to as the "Pakage Defendants") misused the confidential information to develop and eventually launch in the following year a competing brand of men's underwear, the brand "MyPakage".

3 The plaintiffs also claim that Desmond Price, a former employee of No Limits, breached a non-compete agreement by becoming part of the MyPakage business, and breached a non-disclosure agreement as well.

4 The plaintiffs claim that Mr. Alfonso, who acted as legal counsel for the corporate defendants and then later became a shareholder in October 2010, learned of the misuse of confidential information in August 2010 because of his receipt of a "cease and desist" letter from the plaintiffs' lawyer.

5 The plaintiffs plead that as a result of the defendants' alleged misconduct, the plaintiffs have suffered a loss of opportunity and a reduction of their market share and market position, and they seek compensatory damages in this regard.

6 The plaintiffs submit that their damages should be calculated based on the theory that all sales and gifts by the defendants of MyPakage underwear, to date and for some years into the future, should be treated as a loss of sales of SAXX product by the plaintiffs. The plaintiffs have projected damages of approximately $23 million into 2018.

7 The plaintiffs also pleaded a claim for the defendants' profits from the MyPakage business. This claim was abandoned at trial. Apparently the MyPakage business has not yet been profitable.

8 The defendants deny the allegations of misconduct and say that in any event, the plaintiffs have not proven that they suffered any damages and this alone defeats the plaintiffs' claims.

Breach of Confidence Legal Principles

9 I will begin with a brief summary of the legal principles applicable to a claim for breach of confidence.

10 There are two leading Supreme Court of Canada decisions which give guidance on such claims: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*] and *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 [*Cadbury*].

11 In *Cadbury* at para. 20, the Court explained that a claim for breach of confidence is based on principles of equity, but it can also sound in contract, tort and property law. As summarized in *Lac Minerals* at 615, it is based on "the policy of the law that confidences be respected".

12 The Court in *Lac Minerals* accepted that there are three elements of a breach of confidence claim, at 608 and 635:

1. the information must have a necessary quality of confidence about it;

2. the circumstances under which the information was imparted must give rise to an obligation of confidence; and,

3. the defendant must have made unauthorized use of the information.

Quality of Confidence

13 As noted in Ronald Manes and Michael Silver, *The Law of Confidential Communications in Canada* (Toronto: Butterworths, 1996) at 93-96, the Court in *Lac Minerals* described two types of confidential information: information which is not public; and information which is work product because it has taken some independent thought process to assemble. Sopinka J. in *Lac Minerals* held at 610:

In this regard the statement of Lord Greene in *Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.) (leave to appeal to House of Lords refused), at p. 215, which was quoted by the trial judge, is apposite:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

[Emphasis added.]

14 The threshold for establishing that information is confidential is low, but the quality of confidential information was discussed in *Cadbury* as being on a continuum of specialness, affecting the potential remedy, at paras. 75-76:

> Equity has set a relatively low threshold on what kinds of information are capable of constituting the subject matter of a breach of confidence. In *Coco v. A.N. Clark (Engineers) Ltd.*, *supra*, Megarry J., at p. 47, considered that "some product of the human brain" applied to existing knowledge might suffice. A similarly expansive concept was adopted in *Lac Minerals* at p. 610 by Sopinka J., quoting Lord Greene M.R. *in Saltman Engineering Co. v. Campbell Engineering Co.* (1948), 65 R.P.C. 203 (C.A.), at p. 215. Gurry in *Breach of Confidence*, *supra*, gives instances of information which were protected from disclosure because they were otherwise inaccessible, despite the fact that they possessed little or no actual value, including the commercially disastrous invention for rearing pigs at issue in *Nichrotherm Electrical Co. v. Percy*, *supra*. He concludes, at p. 82:
>
> > It would seem, therefore, that the nonsensical nature of information is not to be regarded as a barrier to confidentiality, but, rather, as a factor which the court will take into account in the exercise of its discretion whether to

> grant equitable relief, or as a factor affecting the quantum of any damages which may be in question.

[Emphasis added.]

While equity is thus quick to protect confidences, it cannot be blind to the nature of the opportunity lost to the respondents, or the value of their information, when consideration turns to remedies. Equity will avoid unjustly enriching the confider by overcompensating for "nothing very special" information just as it will avoid unjustly enriching the confidee by awarding less than realistic compensation for financial losses genuinely suffered. Characterizing the action as "sui generis" does not alter the relevance of this equitable principle.

[Emphasis added.]

Circumstances Giving Rise to an Obligation of Confidence

15 An obligation to keep information confidential may arise by express contract, or by implication based on the circumstances and relationship of the parties.

16 Even if no mention of confidentiality is made, a communication may be considered to have been made in confidence if there was a mutual understanding that the parties were working towards a joint venture or some other business arrangement: *Lac Minerals* at 612-613.

17 In *Lac Minerals* at 612-613, and at 642, the Court adopted the following passage of the judgment of Megarry J. in *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41. at 48:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence...

Misuse of the Confidential Information

18 In *Lac Minerals* at 642, La Forest J. held that any use of confidential information other than a permitted use is a misuse; and further, where it is shown that the confidential information was used, the burden lies on the user to show that it was a permitted use.

19 Where information is the creation of work product and it can give the reader of the document a "head start" or a "springboard" and advantage to the detriment of the information-provider, the information may have the necessary quality of being confidential and give rise to liability for its use even if the information later becomes public: *Lac Minerals* at 610; *Cadbury* at para. 67.

20 In this regard, Sopinka J. in *Lac Minerals* held at 610-611:

> *Seager & Copydex Ltd.*, [1967] 1 W.L.R. 923 (C.A.), cited by the appellant, provides a useful illustration of the concept of the use of added information to get a head start or to use it as a springboard. The plaintiff Seager was the inventor of a patented carpet grip. He negotiated with the defendant Copydex with a view to development of his invention. Negotiations were terminated without a contract. Copydex then proceeded to produce a competing grip. The Court found that much of the information which Seager gave to Copydex was public. But there was some private information that resulted from Seager's efforts such as the difficulties which had to be overcome in making a.satisfactory grip. At pages 931-32, Lord Denning M.R. stated:
>
>> When the information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.
>
> [Emphasis added.]

Claims Against Subsequent Recipients of the Information

21 As set out by Binnie J. in *Cadbury* at para. 19, a claim in equity for breach of confidence can be made against a third party who knowingly comes into possession of information obtained in breach of confidence:

> Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

Remedy

22 In *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319 [*Minera*] the Court of Appeal discussed the range of remedies available for breach of confidence, including injunctive relief, a proprietary remedy such as a constructive trust, and damages. Relying on *Lac Minerals* and *Cadbury*, the Court confirmed that the overriding objective of a remedy was to put the plaintiff in the position it would have been but for the breach of confidence, at para. 99:

> [99] Thus the remedy should be the one that is most appropriate on the facts of the case, bearing in mind that in choosing the "appropriate relief from the full gamut of available remedies", "[t]he objective in a breach of confidence case is to put the confider in as good as position as it would have been in but for the breach" (*Cadbury*, at para. 61).

Is Detriment a Necessary Element?

23 The defendants submit that the third element of a breach of confidence claim, namely misuse of confidential information, also requires that the unauthorized use of the information be to the detriment of the information-provider in order to complete the cause of action. Thus they argue, if the information-provider has suffered no damages, there is no valid claim for breach of confidence.

24 The defendants overstate the clarity of the law on this issue.

25 The facts in *Lac Minerals* were that the defendant did make unauthorized use of the information to the detriment of the plaintiff. The judgment of La Forest J. in *Lac Minerals* commented on this as part of the analysis of the third element above, but it is unclear whether he was referring to the remedy rather than the cause of action because he also held that any use other than a permitted use was a breach of duty: see 635-642.

26 In *Cadbury*, the issue before the Court concerned the proper remedies for breach of confidence. The fact of breach of confidence was not questioned.

27 The Court in *Cadbury* at para. 54 declined to rule definitively on the question of whether detriment to the information-provider is a necessary element of the cause of action for breach of confidence.

28 In *Minera*, the BC Court of Appeal noted that the law is unsettled on whether detriment is a necessary element of an action in breach of confidence: see para. 85. However, in that case a detriment was proven.

29 In *Seaway Marine Services Ltd. v. Weiwaikum General Partner Limited*, 2014 BCSC 2102,

Thompson J. dealt with a claim for breach of confidence and held that "the proposition that detriment is an essential element of the cause of action is not entirely free of doubt" at para. 94.

30 Nevertheless, the judgment in *Cadbury* does suggest that general damages for breach of confidence cannot be awarded where the party suing has elected to claim that the breach of confidence caused financial loss but has failed to prove a financial loss. This appears to be the reasoning of Binnie J. at paras. 52-54:

> F. *Relevance of Detriment*
>
> [52] La Forest J. said in *Lac Minerals* that if the plaintiff is able to establish that the defendant made an unauthorized use of the information to the detriment of the party communicating it, the cause of action is complete (at pp. 635-36 and 657; see also *ICAM Technologies Corp. v. EBCO Industries Ltd.* (1991), 36 C.P.R. (3d) 504 (B.C.S.C.), affirmed (1993), 52 C.P.R. (3d) 61 (B.C.C.A.), per Toy J.A., at pp. 63-64; *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1993), 13 O.R. (3d) 229 (C.A.); *655 Developments Ltd. v. Chester Dawe Ltd.* (1992), 42 C.P.R. (3d) 500 (Nfld. S.C.).
>
> 53 The issue of detriment arises in this case because the trial judge made a specific finding that the respondents had not suffered financial loss, yet she proceeded to find liability and award damages "in the interest of fairness". While La Forest J. in *Lac Minerals* considered detriment to be an essential element of the breach of confidence action (Sopinka J. did not express a view on this point in his discussion of the applicable principles), it is clear that La Forest J. regarded detriment as a broad concept, large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information (see, e.g., *Argyll (Duchess) v. Argyll (Duke)*, [1967] Ch. 302. In the *Spycatcher* case, *supra*, Lord Keith of Kinkel observed, at p. 256, that in some circumstances the disclosure itself might be sufficient without more to constitute detriment:
>
>> So I would think it a sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way.
>
> 54 The concept of detriment need not be explored on this occasion because, as the Court of Appeal correctly emphasized, the parties had agreed prior to trial

> that any evidence regarding losses allegedly suffered by the plaintiff would be deferred to a post-trial reference. This arrangement obviated the need for the respondents to lead evidence of detriment at the liability trial. In the end, however, having elected the remedy of financial compensation, the respondents will obviously have to demonstrate at the reference the nature and extent of any detriment suffered to establish the basis for a monetary award.
>
> [Emphasis added.]

31 Since the goal of the remedy for breach of confidence is to restore the plaintiff to the position it would have been but for the breach, I conclude that in a case where the only remedy claimed is compensation for the plaintiff's losses, failure to prove any losses would mean failure to prove entitlement to a remedy.

Facts

32 The plaintiffs were the only parties who called evidence. The facts are therefore relatively uncontested. Where the parties differ is the interpretation placed on those facts and the inferences to be drawn from them.

33 The defendants took the position that it was unnecessary to call evidence, because the plaintiffs failed to meet the burden of proof on all issues.

34 The plaintiffs read-in to the evidence at trial evidence from the examinations for discovery of the defendants Dustin Bigney, Mr. Price and Mr. Alfonso. Also the plaintiffs were free to serve the personal defendants with notice that they would be called as adverse witnesses pursuant to R. 12-5(21) and to cross-examine them, or to subpoena them as ordinary witnesses, which they did not do.

35 The plaintiff No Limits is a company founded by Darren Hawrish, who was president during the material times at issue in this case. He left the employ of No Limits in June 2012, but was called as a witness by the plaintiff.

36 The No Limits business is primarily involved in the distribution of clothing, shoes and accessories.

37 The plaintiff Saxx Underwear Co. Ltd. ("SaxxCo") is a company that owns Saxx Apparel Inc. (the latter company will be referred to as "Saxx Apparel"). SaxxCo became owner of Saxx Apparel in 2014 as part of a corporate reorganisation.

38 Both No Limits and SaxxCo are now divisions of a parent company NLS Group Holdings Inc. ("NLS"). Another company in the group is A52 Warehouse Inc. which provides warehouse services.

39 Saxx Apparel is a company founded by Trent Kitsch, who is still involved with the business but was not called as a witness at trial. As a business student in 2006, Mr. Kitsch came up with the idea of developing a new style of men's underwear that would provide extra fabric panels to separate a man's testicles from his thighs. His idea was to market the product as suitable for athletic activities as well as for every day. Mr. Kitsch is from Kelowna, BC.

40 As part of his brand development in the start-up phase of the business, Mr. Kitsch appeared on the nationally broadcast television show "Dragon's Den" to explain the product to a panel of possible investors. He attracted one offer to invest from one of the members of the panel, which he turned down. Mr. Kitsch also managed to have the product promoted by Richard Branson on a television show on the MTV channel, and to have the business mentioned in a national newspaper, the Globe & Mail, which also posted online a version of his business plan for the product. He sold some product in 2008.

41 The SAXX product began attracting attention and came to the attention of No Limits.

42 A friend of Mr. Hawrish told him about watching the Dragon's Den episode featuring the SAXX product. Mr. Hawrish then watched the television episode, tried some of the SAXX underwear, and thought it was a good product.

43 Mr. Hawrish was aware that Mr. Kitsch was looking for a buyer for the business or a strategic partner to grow the business.

44 In approximately October 2008 Mr. Kitsch came to the offices of No Limits and met with Mr. Hawrish and Paul McCurry, then the chief financial officer of No Limits. Mr. McCurry is a chartered accountant who is currently the managing director of NLS.

45 Mr. McCurry also watched the Dragon's Den episode, and after trying the underwear also became interested in the product.

46 Mr. Hawrish recalls that Mr. Kitsch showed him a business plan, a version of which Mr. Hawrish later learned was posted on the internet. Mr. Kitsch also showed to Mr. Hawrish an offer he had received for the business which had valued it in a similar range to what No Limits came to value the business. Mr. Hawrish understood that Mr. Kitsch preferred a deal with No Limits because of No Limits' existing business operations.

47 No Limits entered into a trademark and patent license agreement with Saxx Apparel signed January 19, 2009 ("License Agreement"). No Limits' shareholders entered into an option to purchase Saxx Apparel shares from Mr. Kitsch made February 24, 2009 ("Option Agreement"). No Limits began to distribute the SAXX product in early 2009. Mr. Kitsch became an employee of No Limits.

48 The License Agreement gave No Limits the exclusive right to use the "IP Rights", namely the

SAXX trademarks including logos, and SAXX patent rights, if any, in its underwear designs. These rights were supposed to be identified in an exhibit to the agreement, but if it existed, the exhibit was not put into evidence.

49 Under the License Agreement, No Limits had the exclusive rights to manufacture, advertise, sell and distribute the SAXX products. No Limits had the right to subcontract the actual manufacturing of the Licensed Products, as defined in the License Agreement.

50 The Option Agreement provided for initial payments to Mr. Kitsch totalling $50,000 but this was deferred on the schedule of: payment of $20,000 on or before December 1, 2009; and annual payments of $10,000 on January 1 of 2010, 2011 and 2012. In addition, within three years of the date of the Option Agreement, which would be by the end of February 2012, the option could be exercised to purchase 90% of the shares in Saxx Apparel for a price based on a formula having to do with the net sales of SAXX products.

51 The parties agree that pursuant to the Option Agreement formula, the lowest price that No Limits' shareholders would pay for 90% of the Saxx Apparel shares would be $1.8 million.

52 The defendant Mr. Bigney was the owner of a sports store in Kelowna, BC, called Island Snow. He became interested in the SAXX product in early 2009. His store sold some of the SAXX product distributed by No Limits.

53 In early 2009 No Limits needed investors to inject cash in the company because it was in a precarious financial position and in breach of its financial covenants with its bank lender. Also, if it did not find investors, it was going to have difficulty exercising the option to purchase shares of Saxx Apparel.

54 Two people in No Limits began looking for potential investors, Mr. Hawrish, and Mr. McCurry. Lists were prepared of their contacts for this purpose. Their lists did not include Mr. Bigney.

55 Mr. Bigney was friends with Mr. Price who many years earlier had worked at Mr. Bigney's store, Island Snow. Mr. Price was the Marketing Director for No Limits. As such, Mr. Price was aware of how the SAXX products were doing in the marketplace and all marketing plans for the product.

56 Mr. Bigney was a friend of Shawn Ellis, who also was a friend of Mr. Price's.

57 Mr. Ellis was one of two principals of a company, KE Imports. The other principal was Glen Kirk. The business was based in Kelowna, BC. KE Imports acted as agent for companies wanting products manufactured in China. Mr. Hawrish and Mr. McCurry learned about this sometime between March and June of 2009. None of Mr. Ellis, Mr. Kirk, or KE Imports was included on Mr. Hawrish's or Mr. McCurry's list of potential investors in No Limits.

58 At some point around March 2009, Mr. Ellis and Mr. Bigney learned that No Limits was looking for investors. Mr. Ellis saw this as an opportunity for his company, KE Imports, to offer to find No Limits a better source for the manufacturing of the SAXX product in China.

59 In the first half of 2009, No Limits was seeking investors in No Limits generally. No Limits had prepared documents titled Confidential Information Memorandum ("No Limits CIM") and Confidential Investment Summary ("No Limits CIS") describing the potential investment. The latter document was a summary of the key points from the former, and it was provided to several possible leads but there was no interest. These documents were not put into evidence.

60 In March 2009, No Limits sent a form of confidentiality agreement to Mr. Bigney at Island Snow. It was a template letter prepared by Mr. McCurry, and referred to potential interest in a transaction involving No Limits and its related company A52 Warehouse Inc. It referred to the provision of information, defined as "Evaluation Material", and restrictions on use of that information which was to be treated as strictly confidential. There were exceptions for material that became generally available to the public in other ways, or became available on a non-confidential basis from another source. Mr. Bigney did not sign the agreement.

61 Mr. Bigney expressed no interest in such an investment. No claim is made that he received confidential information in March 2009.

62 In about June 2009, No Limits revised its strategy and documents to seek an investment in a new company to be known as Saxx International Corp. ("SIC"), which was proposed to be the entity which would hold the license agreement with Saxx Apparel and the option to purchase 90% of the shares of Saxx Apparel. The business model proposed that SIC would be operated by No Limits as an "integrated division", benefiting from its experience, organizational structure and management services. No Limits was seeking to raise $3 million in equity financing in SIC, of which $1.8 million would be used to exercise the Saxx Apparel option.

63 The new SAXX specific documents were described as a Confidential Information Memorandum (the "Saxx CIM"), a summary of that document called a Confidential Investment Summary (the "Saxx CIS"), and a financial model.

64 Mr. Ellis knew a person who had the wherewithal to invest, by the first name "Ken", and this potential contact was communicated to Mr. Hawrish. However, this contact was not interested.

65 On June 16, 2009, Mr. Hawrish sent an email to Mr. Bigney inquiring as to whether Mr. Bigney might be interested in a new form of investment for Saxx Apparel. In his message, he touted how well sales were going for the SAXX product.

66 There was no evidence of a reply from Mr. Bigney.

67 On June 22, 2009, Mr. Ellis signed a Confidentiality Agreement with No Limits, inserting the

name of KE Imports as the signing party ("KE Confidentiality Agreement"). The cover date of the document was March 2009. There was no evidence as to when it was actually prepared and sent to Mr. Ellis.

68 On July 29, 2009, Mr. Kitsch sent some email messages to Mr. Ellis, attaching design specifications for SAXX underwear. These were sent on Mr. Kitsch's own email account and not via a No Limits email account. Under the License Agreement, Saxx Apparel continued to own the intellectual property in the underwear. In this litigation No Limits was unable to find any record of this email in its own business records and so may not have been copied on the messages.

69 Mr. Hawrish knew that Mr. Kitsch was talking to Mr. Ellis about the possibility of KE Imports finding an alternative manufacturer for the SAXX product. Mr. Ellis thought he received these design specifications for that purpose, pricing of the manufacturing.

70 Mr. McCurry was the person at No Limits who prepared the KE Confidentiality Agreement. However, Mr. McCurry never spoke to Mr. Ellis about the KE Confidentiality Agreement or otherwise during the material times at issue in this proceeding.

71 In the summer of 2009, likely in July, Mr. Bigney met with Mr. Hawrish at the No Limits office. There were some discussions about the investment opportunity that No Limits was then trying to promote through the Saxx CIM and Saxx CIS. Mr. McCurry remembered being on stand-by for that meeting, but was not called into it. Mr. Hawrish could not recall what document he reviewed in that meeting but recalled speaking about some projections.

72 Mr. Bigney recalled that Mr. Hawrish gave a valuation of No Limits that he thought was astronomical, and Mr. Bigney told him so. He recalls receiving a summary of No Limits' sales and projections and no other documents at the meeting.

73 Mr. Ellis gave evidence that he was there. It is likely he was mistaken. Neither Mr. Hawrish nor Mr. McCurry mentioned that Mr. Ellis was present at the meeting, nor was this mentioned in the evidence from Mr. Bigney's examination for discovery read-in at trial.

74 Mr. Ellis did not give evidence as to specific confidential information shared at that meeting, but he believes he saw the Saxx CIS, not the Saxx CIM, at the meeting, and some forecasts. He did not take any paperwork away from No Limits with him and did not know if Mr. Bigney did.

75 After the meeting, Mr. Hawrish sent two emails on July 28, 2009, to Mr. Bigney which attached a copy of the Saxx CIS and Saxx financial model "v4" which was an excel spreadsheet. Neither email referred to confidentiality but there was a note on the cover page of the CIS that it was confidential.

76 There is no evidence of Mr. Hawrish or anyone else at No Limits sending the Saxx CIM to Mr. Bigney.

77 There is no evidence that Mr. Bigney expressly indicated to anyone at No Limits that he agreed to any terms of confidentiality before the meeting with Mr. Hawrish in July or in respect of the documents that No Limits sent to him.

78 The Saxx CIS was a summary of the investment model then being contemplated by No Limits (the hypothetical involving a new company, SIC), with a summary of financial projections into 2013. The financial model contained more detail about the financial projections into 2013. Both documents also referred to sales to date. These numbers included sales of SAXX product in 2008, before No Limits' involvement, and sales for the first five months of 2009 when No Limits was involved. Also included were figures for the cost of goods sold, selling expenses, and profit margins.

79 There is no evidence that Mr. Bigney expressed any interest to Mr. Hawrish in pursuing an investment with No Limits as contemplated in the Saxx CIS. There are emails from Mr. Hawrish to Mr. Bigney on August 6, 2009 and September 11, 2009 suggesting that Mr. Bigney did not express any interest in moving forward with No Limits.

80 Mr. Bigney admits that he may have used the financial projections spreadsheet forwarded to him by No Limits as a starting point template for building projections for MyPakage. However, it was not established that he was relying on the content of figures within that form, as opposed to simply using the electronic form of the document and, or, the names of some of the items, as a spreadsheet template. His evidence read-in from his discovery suggests the latter.

81 Mr. Hawrish's evidence regarding the usefulness of the information in the Saxx CIS was as follows:

> Q Okay. And so as you're looking at this, sir, would you see this information as being valuable to someone who was going into a new start-up business?
>
> A You mean somebody starting a business or you mean investing in this business?
>
> Q Somebody starting a business.
>
> A It's not a big help for somebody starting a business.

82 Mr. Hawrish's evidence was that the financial models he sent to Mr. Bigney were fairly

readily put together and also would not be of much use to someone going into a start-up company.

83 In August 2009, Mr. Bigney, Mr. Ellis, Mr. Kirk and Scott Hannan, using a numbered company as the vehicle, made an offer to Mr. Kitsch to purchase 90% of Mr. Kitsch's shares in Saxx Apparel.

84 Mr. Ellis explained it was his understanding at the time that No Limits was not going to be in a financial position to complete its own option to purchase Saxx Apparel shares from Mr. Kitsch.

85 Mr. Kitsch apparently accepted the offer but on the day of closing, the deal fell through. Mr. Kitsch was told by No Limits that the deal he made with No Limits precluded him from moving forward with this other group.

86 Mr. Ellis testified that around the time he and Mr. Bigney were planning on purchasing Saxx Apparel, Mr. Bigney had a document on his computer which had numbers in it, and Mr. Bigney said "if we could do half the numbers these guys are doing, we'd be laughing". The implication of this evidence was that Mr. Bigney felt that if his group including Mr. Ellis purchased Saxx Apparel, it would be a good business even if actual sales were half of what No Limits was projecting in sales.

87 Mr. Kirk gave evidence that Mr. Bigney showed him a spreadsheet that he had on his computer of financial information relating to Saxx Apparel, and told him that he received the information from No Limits. Mr. Bigney expressed the view that if they came close to those numbers they would do really well. This discussion appears to be the same one that Mr. Ellis gave evidence about, as Mr. Kirk said it occurred in August 2009 when they were talking about purchasing Saxx Apparel. Mr. Kirk said that he saw the spreadsheet a couple of times at the KE Imports office.

88 After the Bigney-Ellis-Kirk offer to purchase Saxx Apparel shares from Mr. Kitsch fell through, Mr. Ellis and Mr. Kirk decided to try to design their own unique underwear. Mr. Ellis wanted a design that met his own personal condition. He described this as being a man who, after turning 40 years old, had everything "drop". He wanted to design underwear that would separate the testicles from the thighs, like the Saxx Apparel product, but also provide more support.

89 Mr. Ellis and Mr. Kirk in September 2009 began taking apart Calvin Klein underwear and sewing pouches into it, and testing it for fit. Mr. Kirk's mother did some of the sewing as did a tailor in Kelowna. Numerous prototypes were tried. They had a Mr. Gouin make a hand-drawn sketch of a prototype in October 2009, and sent it to Mr. Bigney. There is nothing about this sketch that is alleged to have been derived from Saxx Apparel confidential information.

90 Mr. Bigney became interested in the project of starting a new line of underwear. Mr. Price also became involved, sending Mr. Ellis and Mr. Bigney ideas about a possible logo and packaging for the new underwear in October 2009.

91 The working on prototypes continued, mostly involving Mr. Ellis and Mr. Kirk, and included travelling to China to meet with manufacturers and obtain samples. They did not come up with a prototype new underwear that they felt was satisfactory until approximately mid-January 2010.

92 At some point in the design of the new product, Mr. Kirk was inspired by a detail he noticed in the SAXX design specifications that had been sent to Mr. Ellis by Mr. Kitsch in July 2009. He noticed that the front rise and back rise were different lengths, and this influenced him to make a modification to the front and back rise of his own design. However, Mr. Kirk agreed in cross-examination that what he noticed in this regard was equally evident by looking at SAXX underwear and measuring it. Also, Mr. Kirk was unaware as to whether this was a common feature in other brands of underwear.

93 There was no evidence that Mr. Kirk told any other defendants about his source of inspiration for the change in front and back rise of their new underwear product.

94 After the prototype was developed, Mr. Ellis took some samples to a show in Las Vegas. Mr. Price began using his contacts to market the new product, including through his contact Jeffrey Williams who was an employee of a distribution company, Rampion. The group called their new product "MyPakage" and went about trying to get protection for their intellectual property in the product.

95 There are several design differences as between the SAXX and MyPakage underwear, including: the shape of the pouch, stitching, waistband, seams, and fabric.

96 In July of 2010, Mr. Bigney forwarded to Rampion a list of current Saxx Apparel accounts. There was no evidence as to how he came into possession of this but it was admitted at trial that the SAXX website allowed one to find the names of Saxx Apparel retailers.

97 The group of Mr. Bigney, Mr. Ellis, Mr. Hannan, Mr. Kirk and Mr. Price decided to incorporate companies for the new business and used Mr. Alfonso's legal services in this regard. On their behalf, Mr. Alfonso incorporated two companies for the business in approximately June or July 2010, Pakage Holdings Inc. and Keyhole Technologies Inc. Mr. Alfonso became a shareholder of these companies in approximately October 2010, in return for providing some administrative services to the company and in lieu of legal fees.

98 As of the start of 2011, the shareholders of these companies were: Mr. Bigney, Mr. Price, Mr. Kirk, Mr. Ellis, and Mr. Hannan, each holding 20 Class A voting common shares; and Mr. Alfonso holding 5 Class A voting shares.

99 Later in 2011 the defendant Pakage Apparel Inc. and the numbered company defendant herein, 0912139 B.C. Ltd., were incorporated. As of March 23, 2015, the shareholders of those two companies were: Mr. Bigney, Mr. Price, Mr. Alfonso, and Nikki Jewell.

100 By letter dated August 16, 2010, the law firm of Davis LLP, on behalf of No Limits and Saxx Apparel, wrote to KE Imports, Mr. Ellis, Mr. Kirk, Mr. Price, Mr. Bigney, and Mr. Hannan. The letter stated that the MyPakage product was an infringement of the SAXX intellectual property, and alleged both breach of confidence and breach of the non-competition agreement signed by Mr. Price. The letter appeared to suggest that No Limits had given Mr. Bigney a copy of the Saxx CIM and this was the confidential information, although it was unclear. The letter demanded that the recipients cease marketing, manufacturing and selling the MyPakage products and threatened an injunction to prevent this activity as well as to prevent further use of confidential information. The letter was provided to Mr. Alfonso who replied to it on August 31, 2010, denying the allegations and asking for specifics.

101 There was much uncertainty that No Limits would survive as a business in 2009. However, new investors did provide the much needed financial support for New Limits as of April or May 2010.

Additional Facts Concerning Mr. Price

102 Mr. Price started his employment with No Limits in 2001. He was team and marketing manager for the six brands then being distributed by No Limits.

103 In 2006, Mr. Price became the director of marketing for No Limits, again for all of the brands. He signed a Non-Competition Agreement and a Non-Disclosure Agreement with No Limits.

104 Once No Limits became the distributor for Saxx Apparel, Mr. Price was privy to the sales figures achieved by No Limits for the product, as well as the manufacturing costs, profitability, and marketing plans, all of which he admitted were treated as confidential by No Limits.

105 At No Limits, Mr. Price was involved in all aspects of marketing the SAXX brand, including the packaging and box design.

106 There was a mutual agreement to terminate Mr. Price's employment with No Limits evidenced by a letter dated August 18, 2009, to become effective October 13, 2009.

107 The Non-Competition Agreement prohibited Mr. Price, for a period of two years, from engaging in or becoming financially interested in a business in North America competing with the "Business of the Company", which was defined.

108 By email dated October 27, 2010, Mr. Price told his contact, Mr. Williams at Rampion, that "with Saxx we were selling close to 5-8000 pairs a month".

Issues

109 The plaintiffs' claims raise the following issues:

a) Did No Limits provide confidential information to Mr. Bigney, one of the founders of the MyPakage business, in circumstances giving rise to an obligation of confidentiality, and if so, did Mr. Bigney misuse it?

b) Did No Limits provide confidential information to other people with whom Mr. Bigney was working to establish the MyPakage business, namely, two other founders of that business, Mr. Ellis or Mr. Kirk, and if so, did any of the defendants knowingly misuse it or take advantage of its misuse?

c) Did Mr. Alfonso knowingly take part in the misuse of any confidential information after August 2010?

d) Did Mr. Price breach his Non-Disclosure Agreement with No Limits and disclose confidential information about No Limits?

e) Is the Non-Competition Agreement between No Limits and Mr. Price enforceable, and if so, did Mr. Price breach it by going to work for the MyPakage business and promoting the MyPakage brand?

f) Did No Limits suffer any damages as a result of any of the alleged misconduct?

110 While the plaintiffs also claim breach of a fiduciary duty by Mr. Price, there was no attempt to call evidence to prove that he was a fiduciary and I find that this was not proven.

Analysis

111 I am going to start with the last mentioned issue first: the claim for damages.

Damages

112 The plaintiffs' only pleaded claims for relief are: damages for loss of business opportunity, loss of market share and market position; and, the defendants' profits from the MyPakage business or from their participation therein. As mentioned, the latter claim was abandoned.

113 The claimed loss of business opportunity is not based on the defendants' failed offer to purchase Saxx Apparel. That failed offer did not disrupt the plaintiffs' business arrangement with Saxx Apparel.

114 Rather, the claimed loss of business opportunity is based on the theory that the SAXX product has lost market share to the MyPakage product, which got a head start in the market due to the defendants' misuse of confidential information.

115 The plaintiffs have failed to call any credible evidence that they have suffered a loss of business opportunity, loss of market share, or loss of market position as a result of the launch of the MyPakage business and MyPakage product as claimed.

116 On the question of whether the MyPakage product caused a loss of market share for the SAXX product, the most significant evidence was that of No Limits' former president, Mr. Hawrish, as follows:

> Q: Okay. And, sir, you were with No Limits until 2012? June 2012?
>
> A: That's correct, yeah.
>
> Q: And you started No Limits in 1993?
>
> A: That's correct.
>
> Q: And, sir, in your experience could competing brands in a particular segment help one another by growing the pie?
>
> A: Sure. You mean like the surf industry would grow, the skate industry would grow. For sure yeah.
>
> Q: Right. And there could be a sort of media happening between them that made it better for everybody that there was competition?
>
> A: Sure.

Q: And to your observation did MyPakage take anything away from Saxx Apparel?

A: Take away meaning did it hurt sales.

Q: Yeah.

A: I can't say it affected the sales overall. If what you're meaning which that competition thing I mean it created -- it created media around the underwear category or a new form of underwear category for sure.

Q: Right. So it may well be the pie expanded as a result?

A: Yeah.

Q: And there's no reason to say that it hurt Saxx's sales to your observation?

A: No. I mean that would be very difficult to say but no -- I mean it was -- it would have grown the pie if that's what you are talking about yes.

Q: Yes?

A: Creating a category.

Q: A diverging category that could grow to the benefit of both presumably?

A: Correct. Yeah.

[Emphasis added.]

117 The plaintiffs submit that Mr. Hawrish's evidence on sales should not be given any weight, as it is simply unqualified opinion evidence.

118 However, Mr. Hawrish was in a position to know the No Limits plans and projections for sales of SAXX product, the actual market response to marketing efforts, and actual sales. Surely if he had seen a deviation from Saxx Apparel's market expectations as they existed before MyPakage came on the scene, or had seen a market response which began to prefer the MyPakage brand, he would be in a position to give factual evidence on these matters.

119 Likewise, if Mr. Hawrish's evidence regarding the impact on sales was incorrect, he could be cross-examined on this and contrary evidence could be led, which did not happen.

120 The evidence from Mr. Hawrish highlights the fact that there are a number of potential outcomes that could arise from MyPakage underwear being sold in the market. One outcome could be that MyPakage has educated consumers about this new category of specialty men's underwear, expanding the overall customer base for SAXX products as well. Indeed, some consumers introduced to this specialty market by the MyPakage product and advertising could have since become loyal Saxx Apparel consumers if they found the Saxx Apparel product to be superior. This is speculative, but so too is any theory to the contrary.

121 To prove damages, the plaintiffs rely solely on the evidence of two members of the No Limits corporate team, Mr. McCurry and Don Jewell. Neither witness was independent or objective in the way an independent expert witness would be.

122 Mr. McCurry had no evidence to give that would allow the Court to conclude that every sale or gift of the MyPakage product (or any portion thereof) resulted in lost Saxx Apparel sales. He simply did some calculations on the instructions of the plaintiffs' counsel that he should assume 100% of sales or gifts of MyPakage product, beginning in 2011, equated to lost sales of SAXX product, and then apply Saxx Apparel profit margins to those figures. He also assumed without any evidentiary basis that any loss of sales of SAXX product due to sales of the MyPakage product would increase by 20% each year from 2011 through 2018, and projected a total loss of sales of just over $23 million.

123 No independent evidence, such as that by a business valuator, was tendered to justify Mr. McCurry's calculations, including: the 20% increase, the time span of the claim, and the fact there were no allowances for contingencies and no present valuing of this enormous claim.

124 There was no evidentiary basis on which one could conclude that Mr. McCurry's calculation was a fair assessment of the plaintiffs' damages.

125 The plaintiffs called no evidence as to their market share or market position in relation to other brands of men's underwear in 2009 or subsequently.

126 There is therefore no evidence capable of supporting factual conclusions as to what the plaintiffs could have achieved in sales of the SAXX product, but for alleged sales of MyPakage product, compared to what the plaintiffs did actually achieve in sales of the SAXX product after the alleged misconduct and launch of the MyPakage product.

127 Instead, the plaintiffs ask the Court to simply infer that any sales and gifts by the defendants of the MyPakage product equate to a loss of sales by Saxx Apparel of its product at Saxx Apparel profit margins.

128 At a minimum, Mr. Hawrish's evidence puts to rest that this is the only capable inference. His evidence establishes that an equally capable inference is that the MyPakage product increased awareness of a new category of men's underwear generally, and had a positive impact on sales of SAXX product.

129 As for Mr. Jewell, he was an investor in the No Limits group in April 2010 and is currently the chairman of the board of the parent company. He had strong views that he would have taken a "different view" of investing if he had known that a "competing product" had been created by a group who had "looked at all the confidential information". He clearly was not able to be an objective witness.

130 This Court cannot of course comment on what due diligence Mr. Jewell did or did not conduct before deciding to invest in No Limits. Interestingly, his investment was not preceded by a non-disclosure agreement ("NDA"), although it was preceded by a non-competition agreement.

131 The evidence does suggest that the SAXX product was targeting a new niche in the market, and may have been the first underwear of its sub-category, namely, men's underwear that provides a fabric barrier between the testicles and the thigh. However, SAXX underwear was a publicly available product in 2009 and had received some media attention and publicity precisely because of this unique feature and unique market niche. It did not have any intellectual property rights to prevent other companies from developing underwear that could also target the same niche.

132 The present claim is not a claim that the MyPakage product infringes intellectual property rights.

133 Mr. Jewell testified that he presently knows of one retailer who carries both the SAXX and MyPakage products; and another retailer, a sports shop at a country club, who carries just the MyPakage product. This evidence is not capable of supporting any inferences as to the plaintiffs

suffering a loss of sales due to sales of the MyPakage product. The plaintiffs called no evidence comparing the number of retailers who carried their product before and after the dates of the alleged misconduct; and no evidence to suggest that if a former retailer who carried Saxx Apparel products added MyPakage products to the store this negatively impacted Saxx Apparel sales.

134 Both Mr. McCurry and Mr. Jewell are chartered accountants and cannot be unfamiliar with the bare minimum of independent and objective evidence that might be needed to support the plaintiffs' damages claim.

135 Mr. Hawrish was a credible witness who appeared objective and without any hidden agenda. I prefer his evidence to the evidence of Mr. McCurry or Mr. Jewell regarding the impact of the MyPakage business on the plaintiffs' sales of Saxx Apparel product.

136 The comments of Rice J. in *Anani et al v. Uniglobe Travel (Western Canada) Inc.*, 2004 BCSC 824, are applicable here:

> [91] The claim remaining is essentially one of loss of opportunity. It was for the Ananis to establish on the evidence a real probability of realizing profits but for the breach of contract. They must prove that an opportunity was lost.
>
> [92] Uniglobe will not be relieved from liability merely because the calculation of damages is difficult. However, the Ananis must tender all available evidence to support the claim and there must be enough to establish a foundation upon which a court may at least make an intelligent guess as to the value of the loss of opportunity. The following passage from the Court of Appeals of South Carolina in *S.C. Fed. Savings Bank v. Thorton-Crosby*, 399 S.E. 2d 8 (1990) at p. 11 as cited in *Murano et al v. Bank of Montreal et al* (1995), 20 B.L.R. (2d) 61 (Ont. Ct. Gen. Div.), varied (1990) 41 O.R. (3d) 222 (C.A.) is instructive:
>
>> If the fact of damage is established, the law does not require the amount of damage to be proved with absolute mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made. [Cite omitted] The estimation of damages, however, cannot be based on conjecture or speculation; it must pass the realm of opinion not founded on facts and must rest on evidence from which a reasonably accurate conclusion regarding the amount of loss can be logically and rationally drawn. [Cite omitted] There must be a certain standard or fixed method by which the loss may be estimated with a fair degree of accuracy.

137 While the equitable principles upon which a claim for breach of confidence is based are

flexible, there still needs to be some evidence to support the remedy claimed.

138 In conclusion, there is not the proper evidentiary support on which to base a finding that the MyPakage product and MyPakage marketing efforts had a negative impact on the plaintiffs' sales of SAXX or Saxx Apparel's market share. The plaintiffs have failed to prove their claim for relief which is based on the allegation that they would have been in a better position, with greater market share, and greater sales, but for the defendants' breach of confidence. The plaintiffs have therefore not proved their only claim to a remedy.

Confidential Information and Mr. Bigney

139 Given that the plaintiffs have failed to prove an entitlement to their chosen remedy, damages, I will be brief in addressing the remaining issues.

140 I note that there is ongoing litigation involving some of the witnesses for the plaintiff, namely Mr. Ellis and Mr. Kirk, and some of the defendants. It would, in my view, be unwise to make unnecessary findings of fact.

141 I will begin with the plaintiffs' claim that confidential information was provided to Mr. Bigney in circumstances giving rise to an obligation of confidentiality, and that he misused it.

Confidentiality

142 The mere fact that the MyPakage defendants have sought to develop a rival product and enter the same market does not prove there was a breach of confidence. The three elements of breach of confidence must be proved: quality of confidence, circumstances giving rise to an obligation of confidence, and misuse of the confidential information.

143 The only allegedly confidential documents or information given to Mr. Bigney were the Saxx CIS and the financial projections.

144 I find that there was some information in those documents that would typically be considered confidential by a business, namely a very brief outline of No Limits' License Agreement and Option Agreement with Saxx Apparel; as well as some historical and projected data, identifying such things as sales, cost of goods sold, and net income, and some information on "doors opened".

145 The historical data was very short-term, as it was less than one year, while the projections were from 2009 through 2013. This data would have indicated a hopeful view of the sales and margins that might be generated by manufacturing and selling the SAXX product. However, there was no evidence as to the quality of the projections, which may have been very speculative. In this regard, the information was likely of little commercial value and at best, was nothing very special.

146 The overall business strategy disclosed by the documents was quite bare-bones, consisting mainly of strategies to use No Limits' distribution relationships and to grow sales. These strategies

were rather obvious and do not appear to me to have had any quality of confidence.

147 Leaving aside the content of the data in the documents, I do not see the spreadsheet template itself as having the necessary quality of confidence. The electronic format of the spreadsheet on which the financial projections were laid out does not appear novel or to have involved any kind of creative thought or extensive work in putting together.

148 I conclude that the most important information in the Saxx CIS was the information that there was a market demand for the SAXX product in the first three months of No Limits distributing it. This information was the "hook" needed to attract potential investors. However, Mr. Hawrish was not shy about spreading this information around, and said as much in his email to Mr. Bigney dated June 16, 2009, in which he wrote:

> After spending only three months with this brand it's like experiencing No Fear all over again. I think we all knew it would do well but it is doing better than we originally expected. The best real indicator Saxx will be a success is that guys are buying one pair to try then coming back for the rest of their supply. Stores are telling us they are selling half their darn orders to staff as soon as they come in!

149 There was no suggestion in the email message itself, or in the evidence at trial, that the content of the email message was considered confidential. Rather, it was an attempt to engage Mr. Bigney's interest in the SAXX product in the hopes that he would become interested in investing in No Limits.

150 Thus the general information that there were initial signs of consumer interest in this new niche product, causing excitement in No Limits' management, was not considered or treated as confidential by No Limits.

151 I therefore conclude that there was at best limited confidential information in the Saxx CIS and financial projections, namely a very brief outline of the nature of the License Agreement and Option Agreement, and some limited financial data and projections.

152 In concluding that there may was some limited confidential information in the documents, I have not forgotten that it was likely this kind of information and the Saxx CIS were shared by No Limits with a number of prospective investors without any confidentiality agreement in place. However, sharing this information with other prospective investors did not mean it was generally known public information that could have been discovered in other ways by the defendants.

Did the Circumstances Create an Obligation of Confidentiality?

153 I turn to the question of whether the circumstances of disclosing these documents to Mr. Bigney created an obligation on his part to treat them as confidential.

154 Mr. Bigney did not expressly agree to any contract imposing an obligation of confidentiality on him.

155 The plaintiffs take the position that the KE Confidentiality Agreement signed by Mr. Ellis on behalf of KE Imports as of June 22, 2009 applied to bind Mr. Bigney. The defendants say that it did not.

156 The plaintiffs rely on the evidence of Mr. Ellis to support their position. He was called as a witness by the plaintiff and gave evidence as to his understanding of why No Limits wanted the KE Confidentiality Agreement signed, namely that it was a pre-condition to Mr. Bigney and Mr. Ellis having a meeting with Mr. Hawrish in the summer of 2009 to discuss investing through No Limits in the business of Saxx Apparel in some way.

157 I do not find Mr. Ellis's evidence on this point reliable for a number of reasons.

158 By the time of the present litigation, Mr. Ellis and Mr. Kirk and KE Imports, on the one hand, had become adversarial and embroiled in separate litigation with all or some of the Pakage Defendants. Mr. Ellis and Mr. Kirk had agreed to cooperate with the plaintiffs in the present lawsuit. The plaintiffs had originally named them as defendants, and discontinued the action against them. Mr. Ellis's evidence was not simply that of an impartial witness.

159 Most importantly, Mr. Ellis does not speak for the plaintiffs and his evidence was not confirmed by any witness who was working for No Limits at the material time.

160 There is no evidence of any direct discussions at the time between Mr. Bigney and anyone on behalf of No Limits, such as Mr. McCurry or Mr. Hawrish, which addressed the KE Confidentiality Agreement.

161 At the time, KE Imports was being considered as a possible agent for the manufacturing of SAXX products. Soon after the KE Confidentiality Agreement was signed, Mr. Kitsch sent some SAXX design specifications to Mr. Ellis.

162 The KE Confidentiality Agreement was a different form than three other confidentiality agreements produced in evidence (including the one not signed by Mr. Bigney). The other three agreements all had to do with other potential business transactions with No Limits and were not limited as to time.

163 The KE Confidentiality Agreement referred to confidential information regarding the business as "specifically including Saxx Apparel and its trademark and patented designs", something not referenced in the other form of agreement.

164 The KE Confidentiality Agreement had a term limiting it to one year, unlike the other form of confidentiality agreement. I note as an aside that the plaintiffs have never explained how it is that

they can now rely on this one year agreement, expiring in June 2010, to support a claim for damages spanning eight years.

165 Mr. Hawrish said he assumed he had a confidentiality agreement signed by Mr. Bigney. He was not asked to confirm nor did he give any evidence that he had any reason to think that the KE Confidentiality Agreement applied to Mr. Bigney.

166 Mr. Ellis gave evidence that Mr. Bigney knew that Mr. Ellis was signing the KE Confidentiality Agreement, and did not want his own name on the agreement. This evidence, even if accepted, does not equate to an admission by Mr. Bigney that he considered himself bound by the KE Confidentiality Agreement, nor does it amount to evidence that No Limits had reason to consider Mr. Bigney bound by the KE Confidentiality Agreement.

167 Mr. Bigney said nothing to No Limits to mislead it to think he was part of KE Imports or that he considered himself bound by that agreement as he was not a shareholder, director or officer of KE Imports.

168 Mr. Hawrish's only perception of the relationship between Mr. Bigney and Mr. Ellis was that they were friends; and his understanding of KE Imports was that it was a production agent that would source manufacturing in Asia.

169 I find that the reason for the KEConfidentiality Agreement related to KE Imports' business of arranging manufacturing in China, and it did not impose any confidentiality obligations on Mr. Bigney.

170 Given the absence of an express confidentiality agreement between No Limits and Mr. Bigney, the question is whether other circumstances gave rise to a confidentiality obligation.

171 No Limits followed a two-step process in trying to attract investors: first, sharing information with a variety of prospects to initiate preliminary interest in investing, and then moving on to share more information if interest was expressed by the prospect.

172 Mr. McCurry shared the Confidential Information Summary first with his contacts, hoping to spark interest in investing. If interest was expressed, they would move on to the stage of preliminary due diligence and he would send the party a confidential information memorandum ("CIM").

173 Mr. McCurry kept a list of those who were interested enough to "commence preliminary due diligence" and receive a CIM. Only two parties that he and Mr. Hawrish dealt with were interested enough to obtain a CIM, according to Mr. McCurry's list. One, Banyan Capital, was provided the No Limits CIM; the other, the Onni Group, received the Saxx CIM. There is no evidence that either one provided a NDA. According to Mr. McCurry, this was because his and Mr. Hawrish's relationship with them was such that they expected these parties would treat the information as confidential even without a NDA in place.

174 I conclude that No Limits did not obtain a NDA from any potential investor.

175 In considering the circumstances, it is important to keep in mind that it was Mr. Hawrish who was dealing with Mr. Bigney, not Mr. McCurry. Mr. McCurry was more expansive in his evidence as to the No Limits expectations of confidentiality, but his evidence is at best hearsay when it comes to considering what Mr. Hawrish said or did or expected in his direct dealings with Mr. Bigney. Mr. McCurry did not in fact know what information Mr. Hawrish was distributing and to whom.

176 Mr. McCurry mainly dealt with private equity firms, and it was his expectation that they would treat information as confidential. He said he would ask his contacts if they wanted to receive the CIS, and if they did, he would send it to them. He felt that Mr. Hawrish could do the same for people he trusted, but should get a NDA from people that they did not know that well.

177 Mr. Hawrish was the person within No Limits management who had the job of contacting high net worth individuals to see if they might be potential investors in No Limits.

178 Unlike Mr. McCurry and his relationships with his contacts, Mr. Hawrish did not testify as to any business or personal relationship with Mr. Bigney that led him to believe that they had a mutual understanding that the information he shared would be treated as confidential absent an express confidentiality agreement.

179 When Mr. Hawrish was asked what was his "approach to confidentiality" with respect to the information he was disclosing to prospective investors, he testified that "we", meaning No Limits, would obtain NDAs from them.

180 Mr. Hawrish, the very person having the discussions with Mr. Bigney, did not testify that he had any reason to have any general expectation that Mr. Bigney would consider their discussions to be confidential.

181 Mr. Hawrish did not suggest in his evidence that there was a common trade practice or understanding in the clothing manufacturing business such that all persons approached to potentially invest in a business to promote a new clothing product would know to treat all information provided as confidential.

182 The evidence supports a conclusion that absent a NDA, Mr. Hawrish had no expectation that the people he was approaching to sell an investment in No Limits would keep what he told them confidential.

183 Mr. Bigney had declined to sign a NDA when he one was sent to him by Mr. McCurry in March 2009. At that time, the investment was being structured as an investment in No Limits, not as an investment limited to the SAXX product. Mr. Bigney did not sign the NDA because he was not interested in the No Limits business.

184 When Mr. Hawrish contacted Mr. Bigney by email in the summer of 2009 to assess his interest in a SAXX specific investment, he offered to send Mr. Hawrish "our investment summary". He did not describe this as a confidential investment summary or suggest that their discussions must be preceded by Mr. Bigney signing a NDA.

185 By the summer of 2009, according to Mr. McCurry's list, No Limits had approached at least 27 private equity groups and had received no interest in the investment opportunity. No Limits then had reorganized the proposed investment into the more focused SAXX-related investment, and still was not generating interest. His list shows 14 entities were approached with not even preliminary interest generated, other than the Onni Group which passed on any further involvement after receiving the Saxx CIM.

186 Mr. Hawrish's evidence is that when he met with Mr. Bigney in the summer of 2009, he "would have assumed" they were under a confidentiality agreement, and by this he appears to mean he assumed No Limits had a signed NDA from Mr. Bigney.

187 Mr. Hawrish gave no explanation as to why he assumed he had a signed NDA from Mr. Bigney.

188 It has to be kept in mind that Mr. Hawrish was of the view that the SAXX product was protected by patent. There was no new discovery or yet-to-be patented novel design that he was revealing to Mr. Bigney.

189 Mr. Bigney's meeting with Mr. Hawrish was just at the preliminary prospect stage.

190 Mr. Bigney did not do anything to imply that he was willing to accept an obligation of confidentiality. There was no evidence on which to draw the inference that he went to the meeting with Mr. Hawrish expecting to be or indicating he would be bound by a confidentiality agreement.

191 There is also no evidence that Mr. Bigney did something at that meeting or afterwards to mislead Mr. Hawrish into thinking that he was interested enough in a potential investment in the business that he was willing to exercise due diligence by examining confidential information.

192 I find that Mr. Hawrish sent to Mr. Bigney the Saxx CIS and financial projections by email on July 28, 2009, after his meeting with Mr. Bigney, as part of his attempt to foster initial interest, and not because of any advancement in negotiations or interest expressed by Mr. Bigney in doing a deal. Mr. Bigney had not led him to believe there was any strong interest on his part but Mr. Hawrish still wanted to try to engage him.

193 I find that the most likely scenario is that by the summer of 2009, Mr. Hawrish was concerned that No Limits had been unsuccessful in attracting investors, and he was willing to meet with Mr. Bigney and give Mr. Bigney some information about the SAXX-specific investment, without a NDA in place. It is likely that Mr. Hawrish was concerned that if he insisted on Mr.

Bigney agreeing to a NDA, he would have been met with the response "no thanks" and that would have been the end of that prospect.

194 There was nothing in the July 28, 2009 email from Mr. Hawrish attaching these documents stating that there was an expectation of confidentiality. Although the word "confidential" appears on the Saxx CIS, the information in it, as already mentioned, was not very special. There was also no language in the financial projections identifying them as "confidential".

195 It is significant that Mr. Hawrish did not send to Mr. Bigney the Saxx CIM.

196 This is consistent with the pattern that had been established by No Limits, of sending the confidential information summary first and only sending the CIM if there was real interest expressed.

197 Mr. Hawrish would not likely have thought he was taking much of a risk in sending the Saxx CIS and financial projections to Mr. Bigney without a NDA in place.

198 Mr. Hawrish's evidence was that the information in the Saxx CIS would not be of much use to someone trying to start a new company. The same can be said for the Saxx financial projections.

199 The facts of this case are distinguishable from the facts in *Lac Minerals*. In that case, as noted by La Forest J. at 658, Lac Minerals and Corona were negotiating in good faith towards a business relationship. They had certain expectations as members of the mining industry, including that confidential information would be exchanged.

200 Here, the discussions between Mr. Hawrish and Mr. Bigney were far more preliminary, and I find that they occurred without any expectation that they be kept confidential.

201 I conclude that the circumstances under which Mr. Hawrish met with Mr. Bigney and then sent the Saxx CIS and financial projections to him did not give rise to an obligation of confidence on the part of Mr. Bigney.

Was the Information Misused?

202 Despite the above findings, I will go on briefly to consider whether the information in the Saxx CIS and financial projections was misused.

203 The only reason these documents were sent to Mr. Bigney was to try to stimulate an interest on his part in investing in No Limits.

204 If Mr. Bigney was under a confidentiality obligation and used confidential information in these documents for another purpose, this would not be a permitted use.

205 The plaintiffs submit that Mr. Bigney used the disclosed terms of the Option Agreement to

form his opinion as to the value of Saxx Apparel and to make an offer, with other defendants, to purchase Saxx Apparel.

206 Mr. Kirk gave evidence that it was the investment discussions between Mr. Bigney, Mr. Ellis and No Limits that led to his own involvement in the underwear business, because he learned from them that it was a profitable business. However, he did not give any evidence as to what specific information they told him in this regard.

207 The evidence does not support the inference that Mr. Bigney's group's offer to Mr. Kitsch was based on information obtained from the Saxx CIS, as opposed to information provided by Mr. Kitsch.

208 It is to be remembered that the No Limits' valuation of Saxx Apparel for purposes of the Option Agreement was based on information of a prior offer that had been received by Mr. Kitsch which he then shared with No Limits. This suggests that Mr. Kitsch was not shy about seeking to generate new offers by revealing the terms of existing ones.

209 The plaintiffs further submit that the defendants misused the confidential information provided by No Limits to Mr. Bigney to develop and bring to market the competing MyPakage product.

210 The best case for the plaintiffs turns on this Court accepting the evidence that Mr. Bigney was encouraged by the sales projections received from No Limits that the business of specialty men's underwear might be a good business generally, and used the excel spreadsheet as a template for building projections for MyPakage.

211 But Mr. Bigney was already told by Mr. Hawrish in a non-confidential email that the sales were doing well. The idea that there might be a new market niche for a more sophisticated men's underwear product was a public idea; so too were the preliminary indications that there would be market interest in such a product.

212 Further, as previously noted, I am not convinced that the excel spreadsheet contained helpful information.

213 The conclusion that the information in the Saxx CIS and financial projections would be of no utility to a new business is consistent with the evidence of Mr. Hawrish.

214 I conclude that any confidential information in the Saxx CIS and financial projection documents did not give the defendants any kind of a head start, advantage, or springboard in developing the MyPakage business.

Confidential Information and Mr. Ellis and Mr. Kirk

215 The Saxx design specifications were provided to KE Imports by Mr. Kitsch for the purpose

of it potentially acting as agent for Chinese manufacturing.

216 The plaintiffs' claim pleads that this information was provided by No Limits. The evidence does not prove this. Mr. Kitsch could have provided the information from the separate Saxx corporate entity.

217 The evidence does not establish that the defendants knew about these specifications or misused them.

218 Mr. Kirk's evidence that the specifications educated him on a difference in front rise and back rise lengths does not establish that this detail was confidential and misused. This detail is obvious from looking at the publicly-available product.

219 The plaintiffs have failed to prove that the defendants knowingly took part in in the misuse of confidential information provided by No Limits to Mr. Ellis or Mr. Kirk.

Confidential Information and Mr. Alfonso

220 In the evidence and then the final submissions at trial, the plaintiffs were unable to point to any evidence that Mr. Alfonso received or misused confidential information.

221 In final submissions the plaintiffs suggested that as of the date Mr. Alfonso became aware of the August 16, 2010 "cease and desist" letter from No Limits' lawyers at Davis LLP, Mr. Alfonso then knew that others within the Pakage Defendants group had misused confidential information, and so he is fixed with liability as an alleged directing mind of the corporate defendants.

222 There is no basis in the evidence for any finding of liability on the part of Mr. Alfonso. There is no evidence that he received or misused confidential information or that he in any way knowingly assisted others in or benefited from receiving or misusing confidential information. There is also no evidence to support a conclusion that he was a directing mind of the corporate defendants, leaving aside the hurdle to the plaintiffs' case that even if he was this would not impose personal liability on him.

Confidential Information and Mr. Price

223 Mr. Price was a party to a non-disclosure agreement with No Limits.

224 The plaintiffs allege one breach of that agreement specifically, at para. 40 of the Fourth Amended Notice of Civil Claim: that in October 2010, Mr. Price disclosed the monthly sales figures of the SAXX product to Rampion.

225 It is true that Mr. Price sent an email to Rampion on October 27, 2010, in which he wrote "with Saxx we were selling close to 5-8000 pairs a month".

226 Leaving aside the vagueness inherent in such a broadly-ranging estimate of past sales, importantly, the plaintiffs did not attempt to prove that this information was accurate and therefore a breach of Mr. Price's Non-Disclosure Agreement.

227 Further, there is evidence that casts doubt on the accuracy of Mr. Price's estimate of past sales. The content of the message in the email was very general and promotional, and seemed to be part of an effort by Mr. Price to persuade Rampion to take more MyPakage product. Comparing Mr. Price's numbers to the financial information in the Saxx CIS also suggests it was an inflated estimate of past sales.

228 The evidence is not sufficient to conclude that Mr. Price breached his Non-Disclosure Agreement.

Claim Against Mr. Price for Breach of Non-Competition Agreement

229 The plaintiffs claim that Mr. Price breached his agreement with No Limits not to compete with it for two years following the termination of his employment, by working with the defendants "in respect of a business of making and marketing men's underwear to compete with the SAXX product": see para. 32 of the Fourth Amended Notice of Civil Claim.

230 The relevant terms of Mr. Price's Non-Competition Agreement are as follows:

> [...]
>
> ARTICLE I
>
> DEFINITIONS
>
> In this Agreement:
>
> (a) "Affiliate" has the same meaning as in the B.C. *Business Corporations Act*, S.B.C. 2002, Chapter 57 or any successor legislation, as amended from time to time.
>
> (b) "Business of the Company" means (i) distributor of clothing, shoes and accessories; and <u>(ii) any other material business carried on from time to time by the Company or any other member of the Group.</u>

(c) "Competitive Business" means any business or enterprise that competes with the Business of the Company.

[...]

ARTICLE 2

NON-COMPETITION

2. 1 The Employee agrees to comply with all of the restrictions set forth below at all times during the Employee's employment with the Company and for a period of two (2) years after the termination of the Employee's employment with the Company.

(a) the Employee will not, either individually or in conjunction with any Person, as principal, agent, director, officer, employee, investor or in any other manner whatsoever, directly or indirectly, engage in or become financially interested in a Competitive Business within North America.

[...]

[Emphasis added.]

231 As mentioned, the Non-Competition Agreement was entered into in 2006.

232 The parties agree that the case of *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 [*Shafron*] sets out the general principles applicable to the enforceability of a restrictive covenant. There Rothstein J. held:

> [16] Restrictive covenants give rise to a tension in the common law between the concept of freedom to contract and public policy considerations against restraint of trade. In the seminal decision of the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, this tension was explained. At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and should be free. Lord Macnaghten stated, at p.

565:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.

[17] However, recognition of the freedom of the parties to contract requires that there be exceptions to the general rule against restraints of trade. The exception is where the restraint of trade is found to be reasonable. At p. 565, Lord Macnaghten continued:

> But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable -- reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. [Emphasis added.]

Therefore, despite the presumption that restrictive covenants are *prima facie* unenforceable, a reasonable restrictive covenant will be upheld.

233 As emphasized in *Shafron* at para. 23, the courts will subject a restrictive covenant between an employer-employee to more rigorous scrutiny, because of the imbalance in power. This is in contrast to such a clause in a contract for the sale of a business which may be in exchange for payment for goodwill and thus may be more reasonable.

234 It did not appear to me that the plaintiffs seriously argued the enforceability of Mr. Price's restrictive covenant. The plaintiffs argued that the clause was unambiguous, but did not deal with the larger problem, the obvious breadth of the restraint.

235 There are three areas of breadth in the restrictive covenant: the scope of activity covered; the temporal scope; and the geographical scope.

236 The scope of activity covered is extremely broad and has the additional practical problem that its limits were unknown at the time that the agreement was entered into. The agreement covered

not only the known business of No Limits in 2006, of distribution of clothing, shoes and accessories, but also any other "material business" carried on by No Limits or any member of the No Limits group.

237 Mr. Hawrish agreed that at the time the agreement was signed, it was accurate to describe No Limits' business as a distributor of clothing, shoes and accessories.

238 Mr. Hawrish later explained that prior to No Limits' involvement in Saxx Apparel, No Limits dealt mostly with finished products. They were involved, through a subcontractor, in the manufacturing of only one product in China for a brand named Lifetime. Mr. McCurry explained that No Limits was responsible for the entire Lifetime brand, as though they owned the brand, including manufacturing and distribution. However, it is unclear whether this happened prior to or after Mr. Price entered into the Non-Competition Agreement.

239 The distribution of the MyPakage product may have been caught by the first part of the definition of "Business of the Company". But the manufacturing and marketing of a men's underwear product targeting a niche market, the real focus of the MyPakage business, would have to fall under the second part of the definition as "any other material business" carried on by the company or its affiliates, in order for this to be caught by the Non-Competition Agreement.

240 In *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344 the Ontario Court of Appeal found that a restrictive covenant restraining a former employee for one year from any activity "that would be in competition with [the employer's] business" was overly broad, unreasonable and unenforceable: see para. 21.

241 When you combine the breadth of scope of the prohibited activity, with its geographic scope -- across North America -- and its temporal scope -- two years -- the restrictive covenant would make Mr. Price virtually unemployable for two years in the very wide field of clothing distribution, manufacturing, and marketing. It would also appear to cover the business of the affiliated company in the group, providing warehouse services.

242 Mr. Price could not know what he was bargaining for when he entered into the agreement as he could not know what other businesses No Limits or its affiliates might engage in. He was with the company for only three years after the agreement was signed before his employment was terminated without cause. There was no evidence about his level of income while at No Limits or his severance package and no suggestion that he had bargained for an exceptionally high salary or severance package in return for such a manifestly unfair restriction.

243 It is notable that Mr. Hawrish admitted under cross-examination that after Mr. Price's employment with No Limits ended, he had discussions with Mr. Price about the possibility of Mr. Price providing marketing and sales support for brands in the marketplace, as one of the places he might land. In this regard, there was a discussion that Mr. Price might bring a new brand back to No Limits to distribute.

244 This evidence was left very vague in cross-examination and there was no follow-up in re-examination. Mr. Hawrish was not asked what the time frame was for this discussion of expected work of Mr. Price, although it is implicit that he could not have been expecting that the restrictive covenant would operate so broadly as to prohibit Mr. Price from such work for two years. Implicitly, the president of No Limits at the time, Mr. Hawrish, must have recognized that it would be unfair to so restrict Mr. Price.

245 I find that in the circumstances the Non-Competition Agreement is unreasonably broad in scope of prohibited activity, geographic scope, and temporal scope. As such, it is unenforceable.

246 As with the claim for breach of confidence, No Limits also failed to prove that any damages were caused by Mr. Price's alleged breach of the Non-Competition Agreement.

Conclusion

247 The plaintiffs have failed to prove that they suffered any damages as a result of any actions of the defendants. There is no other remedy sought.

248 I have also concluded that the plaintiffs have failed to prove the facts necessary to establish liability against the defendants.

249 The plaintiffs' claim is dismissed.

250 The parties requested the opportunity to address costs after receiving the trial judgment. If they are unable to settle costs they may arrange a further hearing before me. I ask for notice in this regard within 45 days of this judgment.

S.A. GRIFFIN J.