See paras. 25-47

Case Name:

FPH Group Inc. v. Gocher

Between
FPH Group Inc., Plaintiff/Applicant, and
Kimberly Gocher, Brent Hancock and Applied Industrial Technologies Ltd., Defendants/Respondents

[2014] O.J. No. 4609

2014 ONSC 2481

16 C.C.E.L. (4th) 96

240 A.C.W.S. (3d) 168

2014 CarswellOnt 5582

Docket No. 2342/13

Ontario Superior Court of Justice

A.J. Goodman J.

Heard: April 8, 2014.
Judgment: April 23, 2014.

(66 paras.)

Counsel:

W.P. Linley for Applicant.

J. Downing and J. Quick for Respondents.

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1 **A.J. GOODMAN J.**:-- This is an application for an interlocutory injunction seeking to restrain and prohibit the respondents from soliciting or providing services or conducting business with certain specified clients of FPH Group Inc. ("FPH"); from restraining the personal respondents, and prohibiting the use of FPH's confidential and proprietary information alleged to have been wrongfully taken or obtained by the respondents for their own use to the applicant's detriment.

Background

2 FPH engages in the business of the manufacture, distribution and sale of electrical, mechanical and hydraulic systems and accessories. One of FPH's divisions is called Integra. Integra manufactures, distributes and sells hydraulic hose assemblies, fittings and sundry accessories in conjunction with hydraulic systems used by its customers, one of whom is General Dynamics, a manufacturer of armoured personnel carrier vehicles for the Canadian military. Since the acquisition of Integra by FPH, overall it has flourished and has become a very profitable and important division of FPH and its predecessor company.

3 The respondent Applied Industrial Technologies Inc. ("AIT') is a limited partnership, which general partner is AIT Canada ULC. AIT is a large industrial distributor and supports the maintenance repair operations and original equipment manufacturing operations of business in virtually every industry segment. Among the produces that AIT sells are hydraulic hose assembly's fittings and adaptors.

4 Until July 2013, the respondents, Kimberley Gocher ("Ms. Gocher") and Brent Hancock ("Mr. Hancock") were employees of FPH, with its Integra Division. Ms. Gocher held the operations manager position with certain responsibilities, while Mr. Hancock was an employee who reported directly to Ms. Gocher.

5 On July 8, 2013, Ms. Gocher resigned her employment with FPH. Initially, she gave two weeks' notice. AIT considered Ms. Gocher to be a key member of its Integra Division and a valued employee and significant attempts were made to dissuade her from resigning. After several discussions between the parties, on July 10, 2013, Ms. Gocher advised that she was leaving FPH immediately. She immediately began employment with AIT, a competitor of FPH.

6 Shortly after Ms. Gocher's resignation, Mr. Hancock, also resigned and commenced employment with AIT. While Mr. Hancock accepted employment with AIT on June 29, 2013, he waited until July 15, 2013 to announce his resignation from his employment with FPH.

Position of the Parties

7 FPH submits that prior to resigning their employment with FPH, AIT representatives requested Ms. Gocher provide certain confidential and proprietary information to them, to which she complied. Further, the day before Ms. Gocher announced her resignation with FPH, a complete backup or copy was made of her Outlook folder from her work laptop which contained several

years of email history consisting of customer's lists, pricing guidelines and sensitive information, some of it subject to the provisions of the *Controlled Goods Regulations of Canada*.

8 FPH alleges that there existed a fiduciary relationship with the personal respondents. FPH submits that since resigning, Ms. Gocher and Mr. Hancock have attempted to solicit FPH clients for their own personal gain or for the benefit of AIT. In part due to Ms. Gocher's abrupt resignation, FPH was left in a vulnerable position and coupled with the respondents' attempts to solicit FPH customers, it is submitted that FPH's Integra Division has lost significant business from long-time customers. This problem was compounded by the fact that Ms. Gocher immediately commenced her employment with AIT with the use of FPH's confidential information. FPH submits that AIT has been fully complicit with Ms. Gocher and Mr. Hancock in their attempt to gain market share in London from confidential information obtained from FPH. As a result, FPH has suffered damages and will continue to do so if the relief sought is not granted.

9 AIT submits that FPH seeks injunctive relief in what is a "departing employee" case. At the time of her departure from FPH, Ms. Gocher had an extensive network of contacts in the industrial supply area, which she had cultivated over her 17 years of working in the industry. Similarly, AIT which operates North America-wide and has been in business in Canada for more than 60 years, already had a large customer base when Ms. Gocher and Mr. Hancock joined it in 2013.

10 AIT submits that FPH is seeking extraordinary relief in that it wants the court to enjoin them from conducting business with the list of customers attached to the application including many clients of long standing duration including General Dynamics, a significant customer with an upcoming multi-million dollar bid tender for the manufacture of armoured military equipment.

11 The respondents submit that FPH has failed to show that it meets the test for injunctive relief on any basis.

Legal Principles

12 The test to be met for the granting of an interim or interlocutory injunction has been set out by the Supreme Court of Canada in its seminal case of *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 (S.C.C.). The moving party must demonstrate:

a. that there is a serious issue to be tried;
b. that the moving party will suffer irreparable harm if the injunction is not granted; and
c. that the balance of convenience favours the granting of the injunction.

13 The Supreme Court directed that generally, the standard to be applied when considering whether there is a serious question to be tried is not an onerous one. The judge must make a preliminary assessment of the merits of the case in order to determine whether the application is either vexatious or frivolous.

14 The threshold for establishing a serious issue to be tried is elevated where an injunction will restrict a person's freedom to engage in his/her chosen field of employment and to earn a livelihood and where an injunction effectively would put an end to the action. In such cases, the moving party is required to demonstrate a strong *prima facie* case in order to meet the first branch of *RJR-MacDonald* :*RJR* at para. 48; *Planit Search Inc. v. Mann*, 2013 ONSC 6847 (Ont. S.C.J.), *Hearing Clinic (Niagara Falls) Inc. v. Ellesmere Hearing Centre Ltd.*, 2008 CarswellOnt 7964 (Ont. S.C.J.)

15 As explained by the British Columbia Court of Appeal in *Barton Insurance Brokers Ltd. v. Irwin*, 1999 CarswellBC 190 (B.C. C.A.) at para. 39. The elevated standard in cases brought by an employer against a former employee reflects the public Interest in free competition and employment mobility:

> ... the general interest of the public in free competition and the consideration that in general citizens should be free to pursue new opportunities, in my opinion, requires courts to exercise caution in imposing restrictive duties on former employees in less than clear circumstances. Generally speaking, as I noted from the earlier authorities referred to, the law favours the granting of freedom to individuals to pursue economic advantage through mobility in employment: See also *Paradigm Shift Technologies Inc. v. Oudovikine*, 2012 CarswellOnt 1444 (SCJ).

16 The court must strike a balance between competing considerations. "[M]ost employees possess some knowledge of economic value about their employer's business, but our economic and legal systems place great stock in the ability of persons to move from employer to employer in the pursuit of better opportunities. Such is the life-blood of a competitive economy." *Boehmer Box LP v. Ellis Packaging Ltd.*, 2007 CarswellOnt 2726 (Ont. S.C.J.) at para. 51.

Analysis

A) Fiduciary Obligations on Former Employees

17 According to Wilson J.'s reasons in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.), relationships in which fiduciary obligations have been imposed typically possess three characteristics: the ability to exercise discretion or power, the ability to unilaterally exercise discretion or power that affects the beneficiary's legal or practical interests, and the beneficiary is vulnerable to the fiduciary holding the discretion or power: *Planit Search*, at para. 31.

18 In his submissions, applicant's counsel conceded that Mr. Hancock was a mere employee during his employment with FPH. It is acknowledged that his duties, by themselves, would not give rise to a fiduciary obligation to FPH. However, based on his link and relationship with Ms. Gocher, with her fiduciary status, FPH submits that there was a fiduciary obligation on Mr. Hancock.

19 I agree with the proposition advanced that the applicant that a mere employee who joins an individual with fiduciary duties in the same enterprise or undertaking, becomes bound by the same duties as the fiduciary. *Scantron Corp. v. Bruce*, [1996] O.J. No. 2138 (Ont. Gen. Div.). However, that legal proposition does not arise on the facts presented here. At no time could Mr. Hancock be said to have had the role, responsibilities, or duties necessary to attract fiduciary obligations.

20 Applicant's counsel stressed that Ms. Gocher was a fiduciary in a top management role or a key player to FPH inasmuch as that her duties included *inter alia;* direct contact with and management of major customers of Integra, access to FPH's sensitive and confidential customer information as well as to any business strategies; sensitive and confidential information relating to the manufacturing process of FPH/Integra and responsibility for the supervision, hiring and firing of several employees.

21 In considering the affidavits filed in this motion, in my view, Ms. Gocher cannot be said to have been a fiduciary or a key player in her relationship to FPH. On the affidavit evidence I am satisfied that her job did not include the ability to exercise discretion or power without prior approval from the principals of FPH. Ms. Gocher provided quotes to customers; such quotes were based on prices that were established or directed by FPH; and she did not have the ability to unilaterally set prices. She did not have exclusive relationships with customers. She was not involved in the strategic decision-making process with respect to FPH and was not an integral and indispensable component of the management team that was responsible for guiding the business affairs of FPH.

22 Clearly, if FPH had wanted to restrict Ms. Gocher's or Mr. Hancock's ability to compete with it in the event of a termination of their employment, they could have negotiated an agreement whereby they would be subject to restrictive covenants. FPH failed to do so and no covenants or like-agreements exist in this case: *Aquafor Beech Ltd. v. Whyte*, 2010 CarswellOnt 3205, 2010 ONSC 2733 (Ont. S.C.J. [Commercial List]) at para. 83.

23 In any event, the law is clear that a fiduciary is not restricted from competing with the former employer. Rather, a fiduciary employee is restricted from unfairly competing with the former employer. In *IT/NET Inc. v. Doucette*, 2005 CarswellOnt 1805 (Ont. S.C.J.) the court held at paras. 21 and 22:

> When the nature of the employment gives rise to fiduciary obligations, then such employees must not unfairly solicit customers form their former employer.
>
> ...
>
> Generally, unfairness will be found where there is active, direct and aggressive solicitation of the former employer's clientele initiated by a former employee.

> Such conduct would include specifically targeting major business customers. If such facts are established, then provided the solicitation is the reason for, or the instrumental cause of, the client's decision to switch allegiance and divert their business, a remedy in law will prevail; but not otherwise.

24 Overall, I do not accept the applicant's argument that Ms. Gocher was a fiduciary to FPH and bound by any fiduciary duty and obligation. Further, I do not find that her managerial position with FPH and information concerning the business, her role or acquisition of special and intimate knowledge of FPH/Integra's customers creates the fiduciary relationship.

(B) Duty to not Misuse Confidential Information or Client Lists

25 In order to establish breach of confidence, the moving party must demonstrate that;

(i) the information has a quality of confidence about it;
(ii) the information was imparted in circumstances importing an obligation of confidence; and,
(iii) there was unauthorized use of that information to the detriment of the party communicating it.

26 An employer has a right of property in the names of its customers, its customer lists, its pricing lists and its costing documentation with the right to freedom from misuse of that information for the purposes of solicitation or otherwise by ex-employees. It is true that even non-fiduciary employees have a duty of confidentiality which continues after termination of employment, and which prohibits an ex-employee from using confidential information acquired during their employment for their own benefit or the benefit of a third party and from soliciting customers using confidential financial information of their former employer.

27 From an internal review audit conducted by FPH's IT Manager, Rob Pereira of Ms. Gocher's company laptop, the following was discovered:

(a) prior to July 8, 2013, information from Ms. Gocher's Integra computer was emailed to a private system not belonging to the plaintiff;
(b) on Wednesday, June 26, 2013, a USB stick that had not been previously used with Ms. Gocher's laptop was inserted into her laptop;
(c) Ms. Gocher's laptop was shut off on Friday, June 28, 2013. The laptop remained turned off for the entire following week and was not turned on again until Sunday, July 7, 2013, at 11:02 a.m.;
(d) on Sunday, July 7, 2013, a USB stick was installed in Ms. Gocher's laptop. A complete backup or copy was made of Ms. Gocher's Outlook folder from her Integra work computer which contained several years of email history consisting of Integra customer lists, pricing guidelines, business strategies, and sensitive information subject to the provisions of

the *Controlled Goods Regulations of Canada*. This was a non-standard, out of cycle, backup to a non-standard location on her laptop/computer; and

28 The applicant alleges that the only people who were to have access to Ms. Gocher's computer passcode were Ms. Gocher herself, the IT manager, Rob Pereira, and Ruth Laidlaw, the spouse of one of the co-owners of FPH. It is submitted that the wrongful taking of confidential information by Ms. Gocher and Mr. Hancock and the provision of that information to AIT to make themselves more attractive as potential employees to the AIT, constitutes a breach of their obligations owed to FPH as fiduciaries or employees. The applicant submits that such use of confidential information specifically, FPH/lntegra price listings, costing and rebate material was for the purpose of providing information to be used by AIT in order for them to determine the economic viability of entering into the hydraulic hose market in the London area.

29 The applicant adds that the use of confidential information wrongfully taken from FPH constitutes an unfair practice and AIT should be prohibited from use of such information for its own gain. This is especially so when representatives of AIT have encouraged or conspired in the wrongful obtaining of such information.

30 While I accept the general legal principles espoused by the applicant, I am not persuaded that the factual matrix advanced by the applicant has been sustained in evidence. Much of the argument presented is mere conjecture.

31 FPH did not restrict or regulate the use of USB devices by employees. Mr. Pereira conceded during cross-examination that he has no information to suggest that anything confidential was surreptitiously copied onto a USB key. Further, he agreed with the evidence of Ms. Gocher and Mr. Hancock that they would receive and use USB keys for business purposes. Mr. Pereira agreed that the event logs that he reviewed showed other occasions on which USB keys were used on the laptop.

32 Ms. Gocher sent the emails to AIT that are found at ex. "D" of Mr. Gilmour's affidavit. However, despite FPH's suggestion, it seems to me that most of these emails pertain to general office and shop equipment and contain nothing that is confidential or proprietary. This position has been endorsed by Mr. Stabile in his affidavit and whose evidence I prefer to that offered by Mr. Gilmour.

33 One of the emails that FPH highlighted is with regards to Veyance/Goodyear's "incumbency policy". I agree with the respondents that it appears to be a standard policy and is likely available to all companies that distribute Veyance/Goodyear-branded products.

34 FPH highlighted a spreadsheet containing pricing information that was attached to a May 7, 2013 email from Ms. Gocher to Robert Sharpe. In his affidavit, Mr. Stabile claims that pricing information in the industrial supply industry is not particularly confidential or secret. According to the affidavits filed, most companies provide pricing quotes to their customers over the telephone,

Competitive pricing information also can be collected from the internet. Further, there is some evidence to suggest that customers will often volunteer pricing information in order to try to drive down the price that they pay.

35 Mr. Stabile deposed that AIT is the largest customer for Veyance/Goodyear products in the world and has access to any pricing information at any time. Based on the evidence, I accept that AIT in its position as a huge conglomerate can readily find out the rebate and pricing information directly from Veyance/Goodyear, While the applicant submits that rebate policy is specific to each customer and is highly confidential in order to protect a customer from being undercut by competitors in the same market, I do not find a reliable basis to support this proposition. I am not persuaded that the amount or structure of rebate a customer may receive is a matter between Veyance/Goodyear and that particular customer. From my review of the affidavits filed, a competitor of FPH could likely determine the amount of rebate for certain hydraulic assembly parts being extended by Veyance/Goodyear and the amount of rebate that it would need to negotiate with Veyance/Goodyear, in order to be competitive or to attempt to obtain more favourable terms.

36 In her cross-examination on her affidavit, Ms. Gocher acknowledged providing Veyance/Goodyear rebate information specific to FPH to AIT. She further indicated, in a somewhat self-serving manner, that she did not know why she provided that information to representatives of AIT. She acknowledged that this rebate information could be important information to a party determining whether to establish a competing business. According to Mr. Stabile, when asked about the receipt of the alleged confidentiality of the pricing information in the spreadsheet, he claimed that the spreadsheet was never provided to him (prior to the lawsuit). I note that the impugned email was sent to Robert Sharpe, and I have no direct evidence that the particular contents of the email were transmitted to the principals at AIT.

37 Mr. Stabile deposed that he has neither used the information nor discussed it with anyone and that AIT has never used the pricing information to pursue any FPH customers. Mr. Gilmour has not provided any evidence to the contrary and if Mr. Stabile's assertions are proven to be incorrect, it is clear that FPH will not be left without recourse.

38 I am also not persuaded that since the time Ms. Gocher and Mr. Hancock resigned with FPH and commenced employment with AIT, they had been actively attempting to solicit business from clients of FPH/lntegra. I do not accept that Ms. Gocher, while negotiating with AIT for possible employment was providing advice to representatives of AIT as to what equipment and resources would be required for AIT to immediately set up a competing operation to manufacture, distribute and sell hydraulic hose assemblies, fittings and sundry accessories in the London area, in competition with FPH/lntegra. There is no cogent evidence to support the assertion that as a pre-condition for employment with AIT, Ms. Gocher was requested to provide pricing or rebate data.

39 I find it to be conjecture that the only reason that AIT could be interested in this information

would be to determine the exact rebate being extended by Veyance/Goodyear to FPH so as to try and negotiate a similar rebate for itself with Veyance/Goodyear for the purpose of competing and undercutting FPH in the marketplace.

40 Despite the fact that the emails were sent approximately 10 and 11 months ago, nowhere in its materials has FPH indicated beyond mere assertion that it has in fact suffered, or that it realistically and reasonably expects to suffer, a loss or damage due to this information having been provided to AIT. Further, there is no evidence to suggest that pricing information was Used by AIT to solicit or obtain any customer. To that end, the respondents have filed numerous affidavits from customers on the applicant's list, and none of them have indicated that they were aggressively or unfairly solicited, or that confidential pricing information was ever provided to them by Ms. Gocher or Mr. Hancock. By way of example, Mr. Renaud at CK Manufacturing states:

> Kim has never spoken to me negatively about FPH. I have told Kim about the problems that I have had with FPH on several occasions. In response, Kim did not express an opinion or speak negatively about FPH. In fact, she told me that the guy with whom I was dealing at FPH was a "good guy".
>
> ...
>
> Kim has never communicated to me any confidential information relating to FPH (for example, she has never said that I am paying too much for a certain part at FPH and she can provide the same part for less).
>
> I do not believe that I am getting a better price for parts at AIT. If anything, AIT may be a bit more expensive than FPH. I am not buying parts from AIT because of price. I am buying them because AIT provides excellent service and delivers on-time.

41 FPH has not adduced direct evidence from any customer to support its allegation that the respondents were or are currently "soliciting" business from FPH's customers. Similarly, FPH has adduced no specific evidence of any loss of business. Moreover, FPH has alleged that prior to Ms. Gocher's departure; she misquoted projects and entered into improvident contracts, yet FPH has failed to provide any specific examples of this allegation.

42 I accept that Ms. Gocher has a network of contacts, relationships, and friendships with both suppliers and customers. She has developed and nurtured these contacts and relationships over the course of her 17 years in the industry. Many of the customers with respect to which FPH is seeking an injunction are customers with whom Ms, Gocher had relationships prior to working at FPH. AIT had existing relationships with at least 11 of those customers.

43 On several occasions, Ms. Gocher provided new contact information to a customer. In several other cases, the customers sought out Ms. Gocher and expressed their dissatisfaction with the service that they were receiving from FPH. I am not satisfied that Ms. Gocher disclosed confidential information to these customers or use such information to, for example, attempt to undercut or lure the customers from FPH to AIT[1]

44 As mentioned, neither Ms. Gocher nor Mr. Hancock entered into an eomplyment contract with FPH containing any restrictive covenants, However, even if they had entered into such an agreement, it is not a breach of any obligation to accept work from customers who approach them without solicitation.

45 In *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 (Ont. S.C.J.) at para. 14, the court held:

> Secondly, I have even greater reservations about the restriction by which the plaintiffs seek to prevent the individual defendants from doing work for customers who approach them without any solicitation. The effect of that restrictive covenant would be that a third party customer who wished to continue to use the services of either or both of the individual defendants without any encouragement or urging in the part of the individual defendants would still be precluded from using their services. I am unaware of any legal principle or case authority (and none was cited to me) that would support such a broad restriction.

46 FPH alleges that Ms. Gocher downloaded or disclosed information that would be subject to the *Controlled Goods Regulations of Canada.* Ms. Gocher denied that she disclosed any sensitive or controlled information that would be subject to the *Controlled Goods Regulations of Canada.* Neither Ms. Gocher nor Mr. Hancock received any training from FPH in respect of these *Regulations.*

47 In sum, the evidence (or lack thereof) can be summarized as follows: FPH has not provided any specific examples of customers that it alleges were solicited or any details with respect to business that it alleges was lost as a result of the defendants' conduct. The customers that have decided to do business with AIT since Ms. Gocher left FPH have deposed that they did not receive any confidential information.

48 Integra has claimed that is has lost customers, sales and market share since Ms. Gocher departed FPH and commenced employment with AIT. FPH places some of this development on Ms. Gocher by virtue of her abrupt departure. While I find no merit to the argument, a failure to give reasonable notice does not amount to a breach of fiduciary duty, *per se.* Further, at no time prior to their respective departures from FPH or prior to this litigation did the applicant advise Ms. Gocher or Mr. Hancock that their notice periods were insufficient. I do not see any breach of duty by virtue of negotiations between Ms. Gocher and AIT during her employment with FPH, although I am far from impressed with her assertion in one letter to the effect that "it is essential that we get on those bids" in reference to a potential competitive from GDLS. There are many other factors that can lead

to Integra's diminished performance and even if the loss of Ms. Gocher as an employee is one cause, absent unfairness it does not rise to the level of the injunctive relief sought here.

49 I am mindful that I am not trying this action. However, I do not accept the applicant's position that this action involves a serious question to be tried. At this juncture, the evidence falls short of establishing that Ms. Gocher was a high level management or key employee subject to fiduciary duties restricting her activities after leaving FPH. Whether the extent and nature of the duties owed by Ms. Gocher and Mr. Hancock to FPH/lntegra have been breached as well as the extent of the damages suffered by FPH is properly a matter for trial. FPH has failed to satisfy the first branch of the *RJR-MacDonald* test for an interlocutory injunction.

Irreparable Harm

50 I have effectively disposed of this application, however, for completeness sake; I will briefly review the remaining prongs of the *RJR-MacDonald* test.

51 In *RJR-MacDonald*, the Supreme Court of Canada has defined "irreparable harm" as the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss; or irrevocable damage to its business reputation. An injunction is an extraordinary remedy that should only be issued to restrain a clear breach of legal obligations.

52 To succeed on an application for an interlocutory injunction, the moving party must establish that it would, unless the injunction is granted, suffer irreparable harm. The moving party must show that a refusal to grant the requested relief would so adversely affect its own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory motion. *RJR-MacDonald*, at para. 63.

53 In order to establish irreparable harm, the moving party's evidence must be clear and not speculative. Absent clear evidence that irreparable harm will result, an interlocutory injunction should not issue. *Ciba-Geigy Canada Ltd. v. Novopharm Ltd.*, 1994 CarswellNat 700 (Fed. T.D.) at para. 118.

54 An assertion that a plaintiff is likely to suffer irreparable harm is insufficient to warrant the granting of an interlocutory injunction. It is necessary for the evidence to support a finding that the defendant would suffer irreparable harm. The onus is on the party seeking an injunction to place sufficient financial and other evidence before the court on which a finding can be made that irreparable harm will be sustained.

55 Mr. Gilmour has deposed that, "the performance of Integra had been dismal compared to prior to Ms. Gocher's resignation". However, FPH has not produced any financial information or

objective evidence to support that statement. In *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CarswellOnt 3653 (Ont. S.C.J.) at para. 18, the court dealt with a similar lack of hard evidence and held:

> ... evidence of irreparable harm must be clear and not speculative. Barton-Reid has provided no real evidence, other than its bald statement, that it will either lose market share, or be put out of business. Lost sales and market share can be compensated in damages, and can generally be calculated on the basis of sales histories, and sales projections. Although perhaps difficult, the damages can be calculated, If the nature of the damage can be calculated in money, then no matter how hard it may be to quantify the damages, the court should decline to grant an injunction.

56 It is true that courts have granted injunctions in the appropriate case where former employees have taken a copy of customer lists or other proprietary information from their former employer, However, FPH has not adduced any evidence to suggest that there is a threat to the survival of its business or any evidence that it has lost sales or market share. Further, in this case, I do not have any reliable evidence to suggest that lost sales or market share cannot be quantified and compensated in damages. A difficult or complex calculation does not equate to irreparable harm and the court should not grant an injunction where the alleged damages are capable of being quantified.

57 The respondents argue that FPH was aware of the issues alleged herein for approximately six months before it commenced a proceeding. Delay on the part of the moving party is a factor that the court will consider in determining whether the moving party has satisfied the requirement to show irreparable harm.

58 Delay in bringing an interim or interlocutory injunction motion may be detrimental to the plaintiff's credibility on such a motion. If the moving party, in fact, was suffering irreparable harm, then it should move for injunctive relief expeditiously. A plaintiff who is entitled to an injunction may lose that right on account of delay in asserting the claim as the nature of injunctive relief begs for a plaintiff to proceed with dispatch. However, given my overall finding on the *RJR-MacDonald* criteria for injunctive relief, I need not address this issue further.

59 Much of the applicant's argument stems from the allegations that it has suffered damages and continued to suffer damages, which could be irreparable, as a result of the circumstances surrounding Ms. Gocher's resignation and the respondents' subsequent conduct. There are many other factors that can lead to Integra's diminished performance at the relevant time. While, in due course this may have to be established at trial, I do not have reliable evidence to suggest that FPH's business is threatened and that damages cannot be so quantified. I find that the applicant's bald allegations that they will lose market share or that they have and will continue to suffer financially as a result of the respondents' conduct is inadequate to ground a finding of irreparable harm.

Balance of Convenience

60 There are numerous factors that must be considered in addressing this prong of the *RJR-MacDonald* test. FPH submits that the balance of convenience in this case favours them as the potential negative effects of denying the injunction are much more severe than prohibiting the respondents from soliciting FPH clients or using confidential information wrongfully obtained from FPH; to the use and benefit of the respondents in a competing undertaking.

61 All parties' interests must receive the same consideration in assessing the balance of convenience. I am not persuaded by FPH's position, rather I am satisfied that an injunction would have a severe impact on AIT. As noted above, AIT has operations throughout North America and provides complementary services and products to customers. Over many years, it has built relationships with customers, some of whom also are customers of FPH. These relationships pre-date the arrival of Ms. Gocher and Mr. Hancock at AIT. An injunction could destroy those customer relationships, as the relationship in the industry is premised on the level of service provided by the supplier.

62 In my view, the jist of the applicant's injunctive relief sought here is to potentially gain a competitive advantage over its rival AIT in the bidding for the lucrative, upcoming General Dynamics contract. Further, the injunction that FPH seeks would prevent the respondents from doing business with existing clients and clients that are well-known to the entire industry. It is my view that an injustice to the individual defendants and AIT would result if I were to grant an injunction, I accept that if AIT was prohibited from servicing its clients, including at least one of its largest customers, based on the evidence, it would be in breach of its contractual obligations, which would result in additional litigation involving third parties and potentially incur significant damages.

Conclusion

63 I am not satisfied on the evidence that either Ms. Gocher or Mr. Hancock were fiduciaries or owed fiduciary duties to FPH. In any event, even if they were fiduciaries or key players, they are allowed to compete with FPH, as long as they did not do so unfairly. Based on the evidence in this motion, I find that Ms. Gocher and Mr. Hancock have not actively, directly, and aggressively solicited FPH's customers, or acted in an unfair manner during their tenure with FPH or after their departure. Further, I am not satisfied that AIT was the direct recipient of Ms. Gocher's emails that contained FPH rebate or alleged confidential information nor am I convinced that the respondents have used or intend to use any of FPH's information in promoting their business or attracting existing or prospective customers, including General Dynamics.

64 FPH has failed to establish that it will suffer and will continue to suffer greater harm if an injunction is not granted. It has failed to produce any financial information in support of its claim of harm and the potential for damages. Overall, any detrimental consequences damages flowing from the respondent's actions can be remedied by an appropriate award of damages.

65 In my opinion, FPH has failed to demonstrate that they have met the test for injunctive relief.

The application is therefore dismissed.

66 If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). The respondents shall file their costs submissions within 10 days of the date of this endorsement, The applicant shall file its costs submissions within 10 days of the receipt of the respondents' materials. The respondent may file a brief reply within five days thereafter.

1 The Integra division was not a direct supplier to GDLS, rather the MPH division of FPH was the direct supplier. According to Ms. Gocher, all of the opportunities to bid on a project and all quotes that were provided to GDLS were presented through MPH and not Integra. Sales to GDLS made up approximately eighty percent (80%) of the gross revenue of the Integra division.