See paras. 24-29, 42-62

Case Name:

Dataco Utility Services Ltd. v. Olameter Inc.

Between
Dataco Utility Services Ltd., Plaintiff, and
Olameter Inc., Defendant

[2009] A.J. No. 224

2009 ABQB 116

55 B.L.R. (4th) 303

176 A.C.W.S. (3d) 109

2009 CarswellAlta 300

Docket: 0401 05074

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.L. Rawlins J.

Heard: September 29-30, October 1-3 and November 25, 2008.
Judgment: February 25, 2009.

(70 paras.)

Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- Action for damages resulting from the use and misuse of the plaintiff's confidential information by the defendant dismissed -- Plaintiff alleged defendant used plaintiff's confidential financial information to secure a bid from plaintiff's major client -- Confidential information imparted to defendant by plaintiff during discussions of sale of plaintiff to defendant -- Sale did not materialize -- Defendant did not breach confidentiality agreement between parties and did not breach any duty of confidence to plaintiff -- Defendant had no obligation not to solicit the contract awarded.

Tort law -- Invasion of privacy -- Breach of confidence -- Action for damages resulting from the use and misuse of the plaintiff's confidential information by the defendant dismissed -- Plaintiff alleged defendant used plaintiff's confidential financial information to secure a bid from plaintiff's major client -- Confidential information imparted to defendant by plaintiff during discussions of sale of plaintiff to defendant -- Sale did not materialize -- Defendant did not breach confidentiality agreement between parties and did not breach any duty of confidence to plaintiff -- Defendant had no obligation not to solicit the contract awarded.

Action for damages resulting from the use and misuse of the plaintiff's confidential information by the defendant. In 2002, the defendant contemplated purchasing the plaintiff company. During the discussions for this sale, the parties entered into a confidentiality agreement protecting the plaintiff's financial information. The purchase transaction did not proceed. In 2003 the defendant was successful in outbidding the plaintiff for a meter reading contract with Aquila Networks, the plaintiff's major client. Prior to making the bid, the defendant set up procedures to ensure that no confidential information obtained from the plaintiff was used in connection with the defendant's bid. The plaintiff's and defendant's bids were the only bids for Aquila's 2004 contract. The defendant's bid was the lower of the two bids. The plaintiff argued that the defendant would not have been in a position to make a bid to Aquila without using the confidential information it had received during the proposed sale of the plaintiff company to the defendant and that the defendant thus breached the confidentiality agreement.

HELD: Action dismissed. The defendant did not breach the confidentiality agreement, nor did it breach any duty of confidence to the plaintiff. The defendant did not owe any fiduciary duty to the plaintiff. The evidence established conclusively that information from the plaintiff was not used in the preparation of or the pricing of the defendant's bid, so there was no misuse. The persons who prepared the defendant's bid had not been involved in the 2002 sales discussions with the plaintiff and had no knowledge of the plaintiff's confidential information. The plaintiff never provided the defendant with any information about its labour costs, a key component in determining the proposed meter rate. The defendant had no obligation not to solicit the Aquila contract.

Counsel:

Randall W. Block, Q.C. and Karen A. McHugh, Borden Ladner Gervais LLP, for the Plaintiff.

Peter F.C. Howard, Stikeman Elliott LLP, for the Defendant.

Reasons for Judgment

B.L. RAWLINS J.:--

Introduction

1 The Plaintiff company, Dataco Utility Services Ltd. ("Dataco") is suing Olameter Inc. ("Olameter") for the use and misuse of confidential business information ("Confidential Information") which Olameter received as a result of a proposed sale of Dataco to Olameter in the spring of 2002. During the discussions for this sale, confidentiality agreements were entered into as well as a letter of intent. For the purposes of this action, the confidentiality agreement protecting Dataco's financial information ("Confidentiality Agreement") is in issue. The purchase transaction did not proceed and in the fall of 2003 Olameter was successful in outbidding Dataco for a contract with Aquila Networks Canada (Alberta) Ltd. ("Aquila"). This corporation was formerly known as Utilicorp and, prior to that, as TransAlta. Aquila had been the major client of Dataco. Dataco asserts that Olameter would not have been in a position to make a bid to Aquila without using the Confidential Information it had received during the proposed sale of Dataco to Olameter and thus, that it breached the Confidentiality Agreement.

2 As a result of the loss of the Aquila contract, Dataco had to downsize its labour force and suffered substantial damages which they claim against Olameter in the amount of $3,884,551.00.

3 Olameter claims that neither the Confidential Information received from Dataco nor that obtained as a result of their due diligence for the proposed sale transaction in 2002 was used to prepare the bid to Aquila and that proper ethical procedures were set up to ensure that there was no use or misuse of any Confidential Information.

4 Olameter asserts that the damages claimed by Dataco are overstated because they do not take into account the financial information for the years 2006 and 2007 and they fail to include pertinent assumptions, both of which factors result in a reduced amount.

Issues

5 (a) Did Olameter breach the Confidentiality Agreement?

(b) Did Olameter breach a duty of confidence to Dataco?
(c) Did Olameter breach a fiduciary duty to Dataco?

Decision

6 Olameter did not breach the Confidentiality Agreement, nor did it breach any duty of confidence to Dataco and it did not owe any fiduciary duty to Dataco. The Plaintiff's action is dismissed with costs to the Defendant. In the event I am incorrect, the damages suffered by Dataco are those set out in the report of the Defendant's expert, Mr. Jeff Lyons in Scenario 2a in the amount of $1,515,000.

Narrative History Including Findings of Fact

7 Dataco is an Alberta corporation incorporated in 1997 and jointly owned by two individuals, John Edmunds and Egidio Schiavone. Mr Schiavone had experience in Alberta in the meter reading business since 1992 and was the hands-on person in Dataco. Mr. Edmunds, as well as being President of Dataco, is an accountant and carries on a sole practice as a certified general accountant. Dataco is in the business of providing services, including meter reading, to electrical distribution companies. The meter readings are used to bill consumers and are charged on a price per read basis.

8 Starting in 1999, Dataco serviced an outsourced meter reading contract for TransAlta. The service area for that contract covered most of Alberta, excluding the larger centres of Edmonton, Red Deer, Calgary and Lethbridge. This contract was initially marginally profitable for Dataco, but by 2001 and 2002, net profits approximated $375,000 per year. The contract represented approximately 70% of Dataco's business.

9 In 2002, Dataco entered into discussions with Olameter with respect to a possible sale of Dataco to Olameter. Olameter's head office is in Montreal. It was formed in 1998 by Jan Peeters as CEO, John Carette as CFO and Mark Pietro, who resided in New Jersey, as COO. Olameter also had a wholly-owned subsidiary in the United States.

10 The original business model of Olameter was to approach large utilities and buy their metering assets. At that time and at the time of this action, metering assets were manually read, but Olameter's plan was to migrate the assets to automation. The target areas for acquisition were California, Texas, Pennsylvania, Maryland, Alberta and Ontario.

11 By 2001, Olameter had not been successful in convincing any utility companies to sell their metering assets to be automated and therefore Olameter switched its business model to see if it could acquire the servicing companies instead. Its first opportunity was to buy Edmonton Power Corporation which owned a meter lab in Ontario. Thereafter, Mr. Peeters asked Mr. Pietro to identify meter reading companies for prospective purchase and he determined that Dataco in Alberta and Utility Reading and Billing Ltd. ("URB") in Ontario might be potential targets. Olameter pursued both of these companies at the same time, the spring of 2002.

12 At the initial meeting of Olameter and Dataco on May 15, 2002, Olameter suggested that the parties execute confidentiality agreements, one to protect Dataco's information and one to protect Olameter's information. In the course of this meeting, Dataco provided Olameter with its five-year business plan.

13 Dataco advised Olameter that its most important assets were its long-term contracts (5 years) with almost guaranteed renewals. For the year ending July 2002, Dataco asserted that its EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) would be $496,000. The value of Dataco's EBITDA was integral to the Olameter offer to purchase because it is a major factor in determining the value of a company.

14 Armed with this information only, Olameter postulated a multiplier of Dataco's EBITDA based on a solid long-term book of contracts to determine its value and made a letter offer to Dataco on May 22, 2002 in the amount of $3.5 million, subject to due diligence, presumably for the purchase of the shares of Dataco. Interestingly, before Dataco accepted the offer, it requested a non-compete clause in the letter if the transaction did not proceed. Olameter refused and Dataco accepted the offer on May 31, 2002, notwithstanding it had no protection against competition.

15 Olameter retained Ernst & Young, Chartered Accountants ("E&Y") to conduct the due diligence and Dataco provided the requisite financial documentation to Mr. Carette - financial statements, copies of contracts (including the 2002 Utilicorp contract) with summaries of those contracts, an organization chart, information on capital assets, information on Dataco's line of credit and copies of actual accounts. In addition, Dataco provided information concerning wages, accounts payable, income tax and remuneration packages for key employees. As noted, all this information was forwarded to Mr. Carette who made copies for E&Y and retained the originals in his personal locked cabinet to which he alone had access.

16 When E&Y attended at the offices of Dataco to conduct the due diligence, it became apparent to them within two days that the underlying assumptions and EBITDA were incorrect. Olameter instructed E&Y to stop the exercise at that point. Dataco did not have long-term contracts, particularly with its most important customer, Utilicorp, as they had advised. The contract with Utilicorp was only a 2-year contract with renewals and the current contract expired in December 2002. It also had no definitive labour costs and appeared to be in a labour dispute with its union. The value of EBITDA was seriously in doubt, as was the value of Dataco. In short, Olameter was not interested and felt they had been misled by the initial representations of Dataco.

17 A further meeting between the parties occurred on July 5, 2002 at which time Mr. Edmunds, Mr. Schiavone and Jim Pappas, who was assisting Dataco in finding an investor, met with Mr. Peeters and Mr. Carette to discuss these problems. Dataco was still anxious to have the sale proceed and acknowledged these two concerns (no long-term contracts and no confirmed labour costs). They advised they would work diligently to acquire a long-term contract with Utilicorp and would work with the union to obtain a contract as soon as possible. It was apparent to me that these two issues were critical to Olameter's interest in this transaction and, given that the Utilicorp contract ended in a few months, a speedy resolution was required.

18 Olameter heard nothing more from Dataco for over a month; therefore, Olameter decided that its May offer was no longer viable and withdrew it by letter dated August 14, 2002, formally terminating the transaction.

19 There continued to be some contact between Dataco and Olameter over the next few months. Dataco advised Olameter in October 2002 that Utilicorp would be renewing its contract and that it expected a decision from the labour arbitration hearing by October 31, 2002. Dataco further advised that Aquila was increasing the frequency of meter reads to monthly with a resulting 40% increase in

expected revenues. In November 2002, Dataco requested and received renewal language acceptable to Olameter to be inserted into the Aquila contract. On January 15, 2003, Mr. Schiavone and Mr. Pappas attended a breakfast forum sponsored by Olameter, at which time Mr. Schiavone advised that Dataco was continuing to work to resolve the two issues.

20 While Dataco alleges that the parties continued to negotiate, it was obvious to me that the contact was all one sided. Olameter did not initiate any contact with Dataco after the August 14, 2002 termination letter. It did receive a number of calls and emails with information from Dataco on various issues and kept the lines of communication open as a matter of courtesy. However, after June 2002, Dataco did not provide any further information of the type requested for the transaction and more importantly, on the two crucial issues. Dataco never sent Olameter a copy of the new Aquila contract for 2003 when it was executed nor did it ever provide any information about the finalization of the arbitration hearing or its fixed labour costs. Neither Mr. Edmunds nor Mr. Schiavone attempted to contact Olameter to ascertain whether the share sale could be resurrected on the basis of the actual facts.

21 While these events were unfolding, Olameter was in the process of acquiring URB, a meter reading company in Newmarket, Ontario, which purchase was concluded on July 31, 2002. (For ease of reference I will hereafter refer to URB after it was acquired by Olameter in July 2002 as the "Newmarket Office".) The Newmarket Office computer system utilized a separate server from that at Olameter's office in Montreal and neither office had access to the other's computer system.

22 Some months after the termination letter of August 14, 2002, Olameter sent out standard marketing material to potential prospects across the country, Aquila being one such prospect. Dataco was aware of this contact with Aquila as early as March 2003, yet made no mention of this to Olameter.

23 On July 9, 2003, Aquila, in an email to Mr. Edmunds, advised that though the current 2 year contract had run for only 7 months, Aquila's contract would be going out to bid for the 2004 year. Mr. Jamieson, the manager of the meter data department of Aquila at the relevant time, stated that this was intended to test the market. At that point there did not appear to be any other companies vying for that business in Alberta and I got the impression that Aquila wanted to know if the price they were paying for meter reads was competitive. It did not appear that Aquila was concerned about the service that Dataco was providing.

24 On September 18, 2003, Aquila sent out a Request for Proposal ("RFP") to various companies, including Dataco and Olameter. The RFP to Olameter was inadvertently sent to Michael Lunau in care of Olameter's Montreal office instead of the Newmarket Office where Mr. Lunau worked. The Newmarket Office was designated to be the place to deal with any bid and the package was forwarded to Mr. Lunau at that office. I find that no one in the Montreal office opened that package nor had any information on what was contained inside; it was simply readdressed to Mr. Lunau. I find that the persons designated to determine if a bid by Olameter should be made in

response to the Aquila RFP (the "Bid Team") were in the Newmarket Office. The Bid Team made that determination in the regular course of business prior to any discussions with Mr. Peeters and Mr. Carette. The involvement of the latter two was confined to considering whether the Confidentiality Agreement and/or the transaction discussed with Dataco in mid-2002 precluded Olameter from making a bid.

25 I am satisfied that the Newmarket Office and all employees there did not have any access to any information about Dataco or its Confidential Information and that there were no discussions between Mr.Carette and/or Mr. Peeters with anyone at the Newmarket Office concerning any Confidential Information obtained as a result of the Dataco proposed purchase in 2002. I accept that either Mr. Peeters or Mr. Carette had the ability to reject the proposal of the Newmarket Office to proceed with a bid, but that in itself does not imply their involvement.

26 After contacting counsel to determine how to proceed, Mr. Peeters caused a memorandum entitled "Ethical Wall Procedures" dated October 3, 2003, to be circulated to various Olameter employees. That memorandum stated that Olameter intended "to adopt procedures to ensure that no information that may be confidential to Dataco that we obtained as a result of our prior discussions, is used in any way in connection with [Olameter's] bid." Various procedures were detailed in the memorandum, which the employees were directed to sign and date.

27 Mr. Lunau was not enthusiastic about the Aquila contract and voted against submitting a bid, but he was overruled by the management team in Newmarket. The bid was prepared by the Bid Team which included Mr. Lunau and Mr. James Douglas, who had become Vice-President/General Manager of Olameter following the acquisition of URB. Mr. Lunau indicated that he prepared the bid with a mind to achieving a 12.6% profit margin. However, he testified that there were items such as rate top-ups which, in retrospect, he did not take into account in preparing the bid.

28 The Plaintiff alleges that because Mr. Douglas was by then part of the management team of Olameter along with Mr. Peeters and Mr. Carette, he must have known or had access to Dataco's Confidential Information to prepare the bid. The Plaintiff points to excerpts of pre-board meeting memos in the fall of 2002 where there were general references concerning the possibility of a transaction with Dataco. Although there was ample opportunity for the Plaintiff to ask Mr. Douglas as a new board member at the relevant time if Dataco was ever discussed at a board meeting, no such questions were asked. The Plaintiff has invited this Court to infer such discussions took place as evidence of misuse. No inference is required or shall be made. The best evidence was available; the obvious questions should have been put to the witness.

29 I accept the evidence of Mr. Peeters that while he instructed the Newmarket Office to submit the bid, he did not have any discussions with anyone on the Bid Team about the preparation of it. I further accept that he did not review the bid prior to its submission and did not know any of the details thereof. In essence, his role was limited to the veto power noted above; he could have prohibited the Bid Team from preparing and submitting a bid, but he did not participate in its

preparation.

30 Olameter expressly advised Dataco in early October 2003 of its intention to submit a bid to the Aquila RFP. The evidence reveals that Dataco waited for over ten days, submitted its own bid on October 14, 2003, and then, after it knew or ought to have known that Olameter would already have sent in its bid to Aquila in compliance with the deadlines, sent a lawyer's letter after close of business on October 15, 2003. Olameter promptly responded to that lawyer's letter requesting information by October 27, 2003. Dataco did not respond and did not seek an injunction either after the contract was awarded in late 2003 or before the transition of the contract as of March 1, 2004.

31 Aquila received only two bids for its 2004 contract, one from Dataco and the other from Olameter. Dataco's bid price was $1.8 per read for the first two years, with a cost of living adjustment for the three additional one-year terms. Olameter's bid was $1.426 per read.

32 Aquila awarded the 2004 contract to Olameter for a fixed term of two years with three one-year renewals, the same arrangement it previously had with Dataco. In the first year of the contract, Olameter lost $475,000; in the second it lost $122,000. By March 1, 2006, it had negotiated a new price per read of $1.96 and by April 2007, was successful in negotiating a four year contract to February 28, 2011. Unlike Dataco, Olameter finally received what it had requested from Dataco in 2002, a long-term contract. Olameter's earnings on the Aquila contract for the 12 months ending February 28, 2007 were $993,939 and for the following year were $460,615.

33 Dataco had to lay off 75 employees and pay out corresponding severance packages. The loss of over 70% of its earnings seriously affected its ability to survive. Fortunately it had other meter reading contracts with Alberta municipalities so that it could continue as a viable business entity. Its profits decreased from $1,100,000 to $300,000.

Analysis

The Confidentiality Agreement

34 The salient portions of the Confidentiality Agreement provide as follows:

> Clause 1: Definitions:
>
> For the purposes of this Agreement, "Confidential Information" shall include all information or material that has or could have commercial value or other utility in the business or prospective business of the Disclosing Party. Confidential Information also includes all information of which unauthorized disclosure could be detrimental to the interests of Disclosing Party whether or not such information is identified as Confidential Information by Disclosing Party. By example and without limitation, Confidential Information includes, but is not

> limited to the following: **Dataco Utility Services Financial statements, projections and marketing and business development information strategies as it relates to the Alberta meter reading services market.** For the purposes of this Agreement, the term "Recipient" shall include Recipient, the company he or she represents, and all affiliates, subsidiaries, and related companies of Recipient. For purposes of this Agreement, the term "Representative" shall include Recipient's directors, officers, employees, agents and financial, legal and other advisors.
>
> ...
>
> Clause 3: Confidentiality:
>
> Recipient and its Representatives shall not disclose any of the Confidential Information in any manner whatsoever, except as provided in paragraphs 4 and 5 of this Agreement, and shall hold and maintain the Confidential Information in strictest confidence. Recipient hereby agrees to indemnify Disclosing Party against any and all losses, damages, claims, expenses, and attorney's fees incurred or suffered by Disclosing Party as a result of a breach of this Agreement by Recipient or its Representatives.
>
> ...
>
> Clause 6: Use:
>
> Recipient and its Representatives shall use the Confidential Information solely for the purpose of evaluating a possible transaction or relationship with Disclosing Party and shall not in any way use the Confidential Information to the detriment of Disclosing Party. Nothing in this Agreement shall be construed as granting any rights to Recipient, by license or otherwise, to any of Disclosing Party's Confidential Information. [Emphasis in original.]

35 Olameter acknowledges that Dataco provided it with information that is Confidential Information within the above definition; however, it takes the position that other information Dataco provided does not fall within the definition. In any event, Olameter asserts that none of the information it received from Dataco was used in the formulation of Olameter's bid for the Aquila contract.

36 Dataco submits that use of the Confidential Information was permitted under the Confidentiality Agreement only "for the purpose of evaluating a possible transaction or relationship with Dataco". It argues that "any use other than a permitted use is prohibited and amounts to a breach of duty" and that "Olameter ... carries the heavy burden of showing that it did not use the information in any way other than for the purpose of evaluating the transaction with Dataco."

37 Assuming that all of the information in question was Confidential Information as defined in the Confidentiality Agreement, the crux of the issue is what use, if any, Olameter made of that information in the preparation of its bid for the Aquila contract. As such, this issue may be conveniently dealt with below along with the question of breach of confidence.

38 Though Dataco did not make this argument explicitly, Olameter asserts that Dataco is trying to imply a non-compete agreement into the Confidentiality Agreement. It points to the following excerpt from Mr. Edmunds' testimony:

> Q. So I'm saying if - if they - even if you ask the information back so what? I mean, there's photocopies, I suppose. So my question to you is, is if I could - so - so you say, Okay, they shouldn't have bid in 2003 because of the information they received from us.
> A. Right.
> Q. Which - which you'd understand even if they gave it back to you they could keep it forever.
> A. Right.
> Q. Okay. So would that preclude them forever from bidding on the Aquila contract, in your mind.
> A. In my mind, yes.
> Q. Forever. So - so effectively, what you've got was a non-competition clause forever without putting it in a contract?
> A. Well, in the confidentiality agreement there was no time limit.
> Q. So - there was nothing about non-competition. So your - your position is even though there's nothing in there about not competing because of the relationship between the parties they would forever precluded -
> A. That's right.
> Q. - from competing?
> A. That's correct.

39 There is nothing in the Confidentiality Agreement that would support such a restriction on Olameter. Indeed, though the question is not before me, I am not certain that such a non-compete restriction would be enforceable even if it were contained in the Confidentiality Agreement.

Breach of Confidence

40 The law with respect to confidential information is not seriously in dispute. Dataco referred to

Lac Minerals v. International Corona [1989] 2 S.C.R. 574 for the proposition that breach of confidence requires the following three elements: that the information conveyed was confidential, that it was communicated in confidence and that it was misused by the party to whom it was communicated.

41 Olameter has acknowledged that at least some of the information provided to it by Dataco was Confidential Information and was communicated in confidence. Therefore, as with the Confidentiality Agreement, this issue turns on the question of whether Olameter misused information it received from Dataco.

42 In this respect, Dataco relies heavily on the notion of a reverse onus. It argues that "once the plaintiff has proved that confidential information was conveyed in confidence, then the burden shifts to the defendant to establish that it did not misuse the information." It cites *MacDonald Estate v. Gray* (1990), 77 D.L.R. (4th) 249 (S.C.C.).

43 Dataco also invites this Court to draw an inference against Olameter. It cites *Matrox Electronic Systems Ltd. v. Gaudreau* [1993] Q.J. No. 1228 (S.C.) for the proposition that "misuse can rarely be proven by direct convincing evidence" and that "the plaintiff must rely upon circumstantial evidence from which the Court can draw inferences".

44 I have some difficulty reconciling these two arguments. While I take Dataco's point that in these cases, the plaintiff could have difficulty providing affirmative evidence of the alleged misuse of information, it seems to me that this difficulty is alleviated by the reverse onus without the necessity of resorting to adverse inferences. If the defendant has the burden of proving to the Court that it did not misuse confidential information and it fails to discharge that burden, then the plaintiff will have won its case and there is no need for the Court to draw inferences.

45 Further, Dataco advocates a broad approach to the concept of "use" of confidential information. It cites *NIR Oil Ltd. v. Bodrug*, [1983] A.J. No. 876 (Q.B.), aff'd. [1985] A.J. No. 1097 (C.A.), a case of insider trading under the *Securities Act*. In that case, the Court accepted that to "make use of" information, that information must be a factor in the defendant's decision, "either by inducing him to enter into it or by assisting him or otherwise influencing him in the manner in which he performs."

46 In light of the evidence presented by Olameter, I am of the view that none of this assists Dataco. All of Mr. Carette, Mr. Peeters, Mr. Douglas and Mr. Lunau gave evidence that there was no participation by Mr. Carette or Mr. Peeters in the preparation of Olameter's bid. As noted above, Mr. Carette testified that he placed Dataco's information in a locked cabinet and did not disseminate it to anyone other than E&Y. Mr. Peeters, Mr. Douglas and Mr. Lunau all testified that they never saw it. Further, Dataco did not send Olameter the 2003 Aquila contract; so Olameter was not in possession of Dataco's most recent pricing at the time of its bid for the 2004 Aquila contract. Lastly, Dataco never provided Olameter with any information about its labour costs, a key component in determining the proposed meter rate. All of this evidence was uncontroverted.

47 Dataco takes issue with Olameter's evidence regarding the use of ethical walls or, as they are often called, "Chinese walls". It cites several cases in which such ethical walls have been found to be ineffective to prevent the sharing of confidential information. Nevertheless, it is important to bear in mind that the efficacy of ethical walls is a question of fact. While they are by no means a panacea, it would be wrong in my view to hold that such measures are never effective or that they must be in place by a designated time in order to be effective. Each case must be decided on its own facts.

48 Dataco disputes the effectiveness of Olameter's ethical walls, arguing that they were put in place too late. It asserts that Confidential Information must have been disseminated by then and points to the bid pricing as evidence that such occurred.

49 First, Dataco argues that Mr. Peeters must have been aware of Dataco's profitability or he would not have authorized the bid. Second, it asserts that Olameter's significant losses in the first two years of its contract with Aquila show that Olameter deliberately undercut Dataco's bid which, in turn, indicates that Mr. Lunau must have been aware of Dataco's pricing at the time he prepared Olameter's bid.

50 The difficulty with these arguments is that they fly in the face of the testimony of Olameter's witnesses. In its reply submissions, Dataco takes the position that this Court "...is not required to disbelieve the Olameter witnesses before it can find [in] favour of Dataco. Rather, [Olameter] has not met the onus upon it and therefore the Court must draw the inference that Confidential Information was exchanged." I disagree. The testimony given by Olameter's witnesses, in my view, refutes Dataco's claims and establishes that the Confidential Information was not misused.

51 Mr. Peeters acknowledged that, as CEO of Olameter, no bid for the Aquila contract could have been submitted without his approval. Dataco argues that "the profitability of Dataco was at least one factor" in Mr. Peeters' decision to allow the bid to proceed. However, as noted above, Mr. Peeters' evidence was that he never saw the Dataco information. Further, he testified that he did not see the bid and was not aware of the proposed pricing or the projected profit margin. Finally, Olameter clearly intended to expand its business into the Alberta market. The Dataco acquisition having failed to proceed in 2002, it is not surprising that Olameter would have pursued another avenue. I do not think Olameter's bid for the Aquila contract leads inexorably to the conclusion that Dataco's Confidential Information must have been misused.

52 Mr. Lunau testified that he prepared Olameter's bid on the basis of a 12.6% profit margin. While, as Dataco points out, this is lower than Olameter's profit margin for its Ontario work, it is clear from Mr. Lunau's testimony that he made some mistakes in preparing the pricing for the bid and was perhaps not as familiar with the Alberta market as might have been hoped. However, there was nothing to indicate that he specifically undercut Dataco's bid and, indeed, that question was never put to him.

53 I can say it no better than the written argument of the Defendant: "Olameter's witnesses

expressly dealt with the allegations of misuse head on. Their testimony, individually and collectively demonstrates that the Dataco information and indeed any information provided by Dataco was only used for the purpose specified in the Confidentiality Agreement. To put it another way, resorting to a double negative, the evidence establishes conclusively that information from Dataco was not used in the preparation of or the pricing of the Olameter Bid in response to the Aquila RFP so there is no misuse. Olameter did everything that a defendant faced with an accusation of misuse can do to refute that serious allegation. The Plaintiff essentially asks this Honourable Court to imply a non-compete term in a contract where there is no basis in fact or law to do so. It also is necessarily asking this Honourable Court to simply disbelieve both the sworn evidence of five people and the certificates of three others. Again, there is no basis for doing so."

54 Taking into account all of the evidence, particularly the witnesses' testimony, I am satisfied that Olameter has discharged its burden of establishing that it did not misuse Dataco's Confidential Information. Therefore, I find that there was no breach of the Confidentiality Agreement and no breach of Olameter's duty of confidence.

Fiduciary Duty

55 As with breach of confidence, the parties here are in substantial agreement as to the law on fiduciary duties; it is the application of that law to these facts that gives rise to the dispute.

56 The Supreme Court of Canada held in *Lac Minerals* that fiduciary duties can arise between arm's length commercial parties, though this is not normally the case. However, the Supreme Court made clear in cases subsequent to *Lac Minerals* that vulnerability of one party is an important element to be considered in such cases. In *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.), the Supreme Court held as follows:

> From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important *indicia* of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation. [Emphasis in original.]

57 The Supreme Court went on in *Hodgkinson* to state that a fiduciary relationship will arise between commercial parties only when one party has, in essence, surrendered its own self-interest in favour of the good of the other party. The Court held as follows:

> In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party

> would act in the former's best interests with respect to the subject-matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.
>
> Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

58 Dataco argues that it was in such a vulnerable position by virtue of its disclosure of confidential information. However, the Supreme Court of Canada in *Cadbury Schweppes Inc. v. FBI Foods Ltd.* (1999), 167 D.L.R. (4th) 577 held that such disclosure is not necessarily sufficient to ground a finding of fiduciary duty. The Court quoted with approval Professor Davies' statement that "strong evidence should be required before a breach of confidential information is metamorphosed into one of fiduciary relationship". The Court also held as follows at para. 32:

> In some sense, disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse. Such vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of a contractual term, express or implied...

59 In this case, I see nothing to take the relationship between the parties out of the ordinary contractual realm and into the fiduciary sphere. The Supreme Court of Canada stated as follows at para. 32 of *Cadbury Schweppes*:

> While the law will supplement the contractual relationship by importing a duty not to misuse confidential information, there is nothing special in this case to elevate the breached duty to one of a fiduciary character.

This statement is all the more apropos in this case given my finding that there has been no breach of confidence.

60 The thrust of Dataco's argument seems to be that Olameter was not entitled to solicit for itself the Aquila contract. In my view, Olameter was under no such prohibition. While it maintained what it described as a "cordial" relationship with Dataco following the termination of the formal acquisition offer, I am satisfied that Olameter had no obligation to refrain from bidding on the Aquila contract, provided that it could do so without breaching its duty of confidentiality, under the Confidentiality Agreement or otherwise. As noted above, Mr. Edmunds testified that, in his mind, Olameter was precluded forever from bidding on the Aquila contract. Clearly, this cannot be supported, either as a matter of non-competition or of fiduciary duty.

61 I have already found that Olameter did not breach either the Confidentiality Agreement or its

duty of confidence to Dataco. Therefore, even had I found that Olameter owed fiduciary obligations to Dataco, I would have found that the fiduciary duty was not breached.

Conclusion

62 I have not described in detail the evidence of each of the witnesses because I had the benefit not only of the oral argument of counsel but also of their comprehensive written argument. Normally I would have included such detail but in this case I did not find it necessary because I was able to adopt the reasoning and facts as outlined by the Defendant in its written argument. I accept that the initial facts of this case may have caused suspicion that Olameter did utilize Confidential Information of Dataco given the outcome of the Aquila bid, but the evidence of the Plaintiff was nothing more than suspicion. It appeared to rest its case on adverse inferences and failed to ask pertinent questions of the witnesses in cross-examination. I suspect it did not do so because it knew the answers would not support its case. I was satisfied that any initial suspicion was dissipated by the Defendant's witnesses. Any reverse onus on the Defendant has been met. The Plaintiff has failed to satisfy me on the balance of probabilities that any wrongdoing in law was committed by the Defendant.

63 While I have found that the Defendant is not liable to the Plaintiff, it is nevertheless prudent that I make a finding on the issue of damages in the event that I am wrong with respect to liability. Both the Defendant and the Plaintiff presented expert testimony on this issue. The Plaintiff's expert was Mr. Robert White of PricewaterhouseCoopers while the Defendant put forward Mr. Jeff Lyons of Deloitte & Touche LLP.

64 The difference in damages between the two reports was the result of the assumptions that were used and, apparently, the availability of financial information in a timely fashion. To that end, I had some difficulty with the evidence of Mr. White in two respects. First, he did not have available to him all of the pertinent information, particularly the figures for 2006 and 2007 until just before the trial and, although he did make some changes as a result, I find that he did not amend his numbers sufficiently to satisfy me they were correct. I find the damages arrived at in his report must be considered suspect on that ground and overstated. Second, and perhaps more importantly, he agreed that his numbers should be adjusted downwards to account for the potential change in margins for 2006 and 2007 when advised of same but nevertheless declined to amend his conclusions. Accordingly, I decline to rely on his report.

65 For the most part, I prefer the report of Mr. Lyons and his testimony over that of Mr. White. Mr. Lyons' report sets out four options for the calculation of damages. Though none is entirely in accord with the facts as they subsequently unfolded, I am satisfied that there is one option that fairly reflects Dataco's loss in the event that I am wrong on the question of liability.

66 Mr. Lyons' Scenario 1a assumes that Aquila would have terminated the contract with Olameter after the initial two years. More importantly, it is based on Olameter's having lost money on that contract in those initial years; therefore, damages under this approach are nil. Since Dataco's

bid price was higher, it would not have suffered the loss that Olameter did. Therefore, this is not an appropriate measure of damages.

67 Scenarios 1b and 2b both assume that all three one-year renewal options would have been exercised by Aquila. The difficulty with this approach is that it assumes that Dataco would have had long-term security in the contract with Aquila. Clearly, this was not the case. Indeed, Dataco's inability to secure a long-term contract with Aquila was one of the reasons that the sale to Olameter never materialized.

68 Scenario 2a, like Scenario 1a, assumes that Aquila would have terminated the contract after the initial two years. Granted, this is not what occurred; Olameter remains the service provider to this day. However, in calculating the damages, I must consider not what happened to Olameter, but what would have happened had Dataco continued to hold the contract. As noted above, there is nothing to indicate that Dataco would have had long-term security had it been awarded the 2004 Aquila contract.

69 In Scenario 2a, damages are calculated using Olameter's actual revenues and Dataco's average gross margin and variable cost structure. This, in my view, reasonably reflects the profits Dataco stood to make without assuming a long-term security that was not there. Under this scenario, Mr. Lyons calculates the damages to be $1,515,000. Therefore, I find that, had there been a breach, Dataco's damages would have been in that amount.

70 In the result the Plaintiff's action is dismissed. Costs follow the event pursuant to the Rules.

B.L. RAWLINS J.

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