See paras. 32-33, 53, 62

Case Name:

Trapeze Software Inc. v. Bryans

Between
Trapeze Software Inc., Plaintiff, and
Rob Bryans and Adam Kennedy, Defendants

[2007] O.J. No. 276

154 A.C.W.S. (3d) 944

Court File No. 06-CV324341 PD3

Ontario Superior Court of Justice

F.J.C. Newbould J.

Heard: January 18, 2007.
Judgment: January 24, 2007.

(63 paras.)

Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- The plaintiff software company's motion seeking injunctive relief to enforce non-competition and non-solicitation clauses against two former employees was dismissed -- The plaintiff failed to establish a strong prima facie case that the clauses were enforceable, or that it would suffer irreparable harm.

Employment law -- Contract of employment -- Express terms -- Restrictive covenants -- The plaintiff software company's motion seeking injunctive relief to enforce non-competition and non-solicitation clauses against two former employees was dismissed -- The plaintiff failed to establish a strong prima facie case that the clauses were enforceable, or that it would suffer irreparable harm.

The plaintiff software company sought to enforce non-competition agreements signed by the defendant former employees by enjoining them by way of interlocutory injunctions from being employed by a competitor for one year -- It also sought to enforce a clause under which the defendants had agreed not to solicit the plaintiff's clients or misuse confidential information --

HELD: The motion was dismissed -- There was not a strong prima facie case that the clauses were enforceable, and the plaintiff further failed to meet the irreparable injury or balance of convenience tests -- There was no evidence of any breach of confidentiality duties owed by the defendants to the plaintiff or a strong prima facie case that there would be any such breach -- There was no evidence that the plaintiff had lost any business to the competitor or that it was likely that such business would be lost -- The court found that the 12-month period of the restrictive covenant was reasonable -- However, the broad geographic scope of the non-competition clause was not; there was no evidence that the plaintiff needed protection from the defendants in the U.K., Continental Europe or Australia -- The non-solicitation clause was also unreasonable as it prohibited contact with any of the plaintiff's clients, whether or not the employees had any prior contact with them, anywhere in the world.

Counsel:

Timothy Lowman and Andrew Jones, for the Plaintiff.

Richard P. Stephenson and Jeffrey Larry, for the Defendants.

REASONS

1 **F.J.C. NEWBOULD J.**:-- This is a motion by the plaintiff Trapeze Software Inc. ("Trapeze") against the defendants to enjoin them by way of interlocutory injunctions from being employed by a competitor of Trapeze named Transched Systems Limited ("Transched") for a period of one year from the time when each of the defendants left the employment of Trapeze. Trapeze seeks to enforce non-competition agreements signed by the defendants with Trapeze which provided that they would not be involved with a competitor of Trapeze for twelve months after they left the employment of Trapeze. While the oral argument of the parties dealt mainly with the enforceability of the non-competition clause, Trapeze also asked for interlocutory injunctions in its notice of motion and factum (i) to enforce a non-solicitation clause under which each of the defendants agreed not to contact or solicit any Trapeze clients within twelve months of their leaving their employment with Trapeze and (ii) to enjoin the misuse or disclosure of confidential information of Trapeze which each of the defendants acquired in the course of their employment with Trapeze.

2 For the reasons that follow, the motion is dismissed. There is not a strong *prima facie* case that the non-competition and non-solicitation clauses are enforceable and I am not satisfied that the other tests of irreparable harm and balance of convenience for granting an interlocutory injunction have been met. There is no evidence of any breach of the confidentiality duties owed by the defendants to Trapeze or a strong *prima facie* case that there will be any such breach.

Business of Trapeze

3 Trapeze is in the business of software research and development as well as in the business of marketing, selling, installing and servicing of automated computer software for the transportation industry. Trapeze provides technical support, consultation and training services relating to its software products and is said to be a leader in the development and commercialization of transit software. The transit software of Trapeze is designed to assist in the day-to-day operation of public and private transit systems, primarily in urban areas. The software permits transit authorities and service providers to plan and develop bus routes, create public timetables or schedules, allocate vehicles to service the scheduled trips and assign drivers to operate the vehicles. This transit software permits the automation of (i) fixed route planning and scheduling, (ii) fixed route operations, (iii) paratransit planning, scheduling and operations and (iv) a supply of customer information. Trapeze's primary markets are Public Transit Operators, Paratransit Operators, School Transportation, Non-emergency Medical, Ride Share and Local Government. It was in the Public Transit operations that the defendants were employed by Trapeze.

4 Mr. Rick Bacchus, the President of Trapeze, stated in his affidavit that there are approximately 150 major public transit authorities or companies in North America. He stated that the relatively small size of the transit software market in North America has resulted in only a limited number of companies engaged in that business and that the marketing process for transit software North America is a highly competitive process involving a limited number of bids annually in which all or virtually all of the companies engaged in that business participate. He also stated that due to the complexity of transit software, the need for a significant investment of resources by transit authorities and private operators to install and integrate transit software in their operations, and the ongoing maintenance and support services required, relationships between transit software providers and their clients tend to last for a number of years and conversely, acquiring a customer is a difficult and typically long term process involving significant research, multiple meetings and written proposals.

Rob Bryans

5 The defendant Rob Bryans ("Bryans") graduated from the University of Western Ontario in the spring of 2004 with a Bachelor of Administrative Commercial Studies. He took one introductory course in computers at Western. In the summer of 2003 he had run a business that provided bookkeeping and financial statement preparation services, marketing, promotion and performing computer consulting services in customers' homes and offices. Prior to that he had worked since his high school days in the summer for JTI-Macdonald Corp. in Toronto and his duties included dealing with computer repair on a network scale and configuring and maintaining computers for users. It would appear that his computer training was for the most part acquired "on the job".

6 On June 7, 2004, Bryans accepted an employment offer from Trapeze to be effective June 14, 2004. On the latter date, the first day of his employment, he signed a Proprietary Rights Agreement

(the "Agreement"), the terms of which are the subject of this action. Bryans began work at Trapeze as an Account Manager - Inside Sales. He was 23 years old and started at a salary of $40,000 per annum. He was eligible to participate in a bonus plan. He was one of seven Account Managers at Trapeze and reported to a Regional Manager who in turn reported to the General Manager of the Public Transit Group who in turn reported to the President. He worked in Trapeze's Public Transit Division. As Account Manager - Inside Sales, he was responsible for communicating with and servicing existing clients as well as soliciting new business from the major public transit authorities or companies located in the territory assigned to him. His contact with clients in that role was by telephone from Trapeze's offices in Toronto. Commencing in 2006, he became an Account Manager - Outside Sales meaning that he traveled directly to clients' sites. By February 2006 he was assigned 14 specific accounts located in New Mexico, Texas, Ohio, Utah and Louisiana. From then on he had contact with and only serviced these 14 clients.

7 While at Trapeze, Bryans had access to technical information on Trapeze products and access to the Trapeze in-house computer network that contained that information. He acknowledged that he accessed the information in order to pass it along to customers and said that the information would have been of a sales nature, such as product description and previous proposal submissions.

8 Bryans states in his affidavit that since leaving Trapeze, he has not communicated with any of his former contacts. He states that when he left Trapeze he did not take any Trapeze property or confidential information and that he has not disclosed to Transched any information about Trapeze that would be considered confidential. Trapeze acknowledges that it has no information that he has disclosed confidential information to anyone. Trapeze says, however, that because of the difficulty of ever proving a breach of a confidentiality clause, it is necessary for it to be protected by a non-competition clause.

Adam Kennedy

9 The defendant Adam Kennedy ("Kennedy") graduated from the University of Western Ontario in the spring of 2005 with a joint Bachelor of Engineering Science and Business Administration Degree. His university education included two computer science courses. On December 13, 2004 he was offered a job by Trapeze effective June 6, 2005, which he accepted that same day. On the following day he signed a Propriety Rights Agreement identical to the Agreement that had been signed by Bryans.

10 When he commenced work with Trapeze in June 2005, he was 24 years of age. He began at a salary of $47,000 per annum and was eligible to participate in a bonus plan. He reported to the Director of Customer Solutions Delivery, who reported to the Public Transit Manager who reported to the President of Trapeze. Kennedy began as a technical product specialist providing technical assistance and support to Trapeze's clients with respect to Trapeze's INFO software program. He provided both on-site and over the phone support. The Trapeze INFO software was software to enable a public transit company to provide information to its customers using call centers, web sites,

automated phone systems and the like. Kennedy required a specialized degree of knowledge of the INFO product and he had access to technical information about it including access to the Trapeze computer network where that information was stored. He began project management work in April 2006 that involved other Trapeze products and his job involved planning the implementation of software and dealing with installing and getting the software to work. He said he was not in charge of installations other than planning and that there were technical resource people at Trapeze in charge of installations.

11 Kennedy stated in his affidavit that since leaving Trapeze he has had no contact with any of his former client contacts while at Trapeze. He stated that he did not take any Trapeze property or confidential information when he left Trapeze and that he has not disclosed to Transched any information to Transched that would be considered confidential. Trapeze has no information that he has disclosed confidential information to anyone and says, however, that because of the difficulty of ever proving a breach of a confidentiality clause, it is necessary for it to be protected by a non-competition clause.

Propriety Rights Agreement

12 Each of Bryans and Kennedy signed the identical Agreement. It contained a broad non-competition clause covering Canada, the United States or anywhere else in the world where Trapeze marketed its products or services. The non-competition clause in its entirety provided:

> 6. I agree that while I am employed by the Company, and for 12 months following my resignation or the termination with cause of my employment with the Company, without the prior written approval of the Board of Directors of the Company, such approval not to be reasonably withheld, I will not become engaged directly or indirectly as an employee, consultant, partner, principal, agent, proprietor, shareholder (other than a holding of shares listed on a stock exchange that does not exceed 2% of the outstanding shares so listed) or advisor, in a business in
>
> (a) Canada;
> (b) the United States, or
>
> anywhere else in the world where the Company marketed its products or services during the period of my employment with the Company;
>
> that

(i) develops or markets software competitive with the software owned or marketed by the Company, or
(ii) provides consulting, maintenance, support or training services that are competitive with the consulting, maintenance, support or training services provided by the Company,

provided that if, with respect to the period after the termination of my employment with the Company, such business has two or more divisions located at different addresses, then this Section 6 will not prohibit me from becoming engaged in a division that neither develops nor markets software competitive with the software owned or marketed by the Company nor provides services that are competitive with the services provided by the Company (provided further that in such cases all the other obligations of the Agreement shall continue to apply to me).

13 The Agreement also contained a non-solicitation of clients' clause. It provided:

7. I agree that while I am employed by the company, and for 12 months immediately following the termination of my employment with the Company, I shall not, directly or indirectly contact or solicit any Clients of the Company for the purpose of selling or supplying to these Clients of the Company any products or software services which are competitive with the products or software services sold, owned or supplied by the Company at the time of my termination.

The terms "Client of the Company" in the preceding sentence means any business or organization that:

(a) was a client of the Company at the time of the termination of my employment with the Company; or
(b) became a client of the Company within six months after the termination of my employment with the Company if I was involved with the marketing effort in respect of such client prior to the termination of my employment with the Company.

14 The Agreement also provided a clause which confirmed the reasonableness of the non-competition and non-solicitation obligations. It stated:

I confirm that the obligations in Sections 6, 7 and 8 are fair and reasonable given that, among other reasons,

> (a) the sustained contact I will have with the clients of the Company will expose me to Confidential Information regarding the particular requirements of these clients and the Company's unique methods of satisfying the needs of these clients, all of which I agree not to act upon to the detriment of the Company; and/or
>
> (b) I will be performing important development work on the software owned or marketed by the Company,
>
> and I agree that the obligations in Section 6, 7 and 8, together with any other obligations under this Agreement, are reasonably necessary for the protection of the Company's proprietary interests. I further confirm that the geographic scope of the obligations in Sections 6 is reasonable given the international nature of the market for the products and services of the Company. I also agree that the obligations in 6, 7 and 8 are in addition to the non-disclosure and other obligations provided elsewhere in this Agreement. I also acknowledge that my obligations contained in this Agreement will not preclude me from becoming gainfully directly employed in the computer software industry following a termination of my employment with the Company given my general knowledge and experience in the computer industry.

15 Finally, the Agreement contained a clause regarding damages not being an adequate remedy. Section 11 provided:

> I acknowledge and agree that damages may not be an adequate remedy to compensate the Company for any breach of my obligations contained in this agreement, and accordingly I agree that in addition to any and all other remedies available, the Company may be entitled to seek relief by way of a temporary or permanent injunction to enforce the obligation in this Agreement.

Bryans and Kennedy join Transched

16 Kennedy resigned from Trapeze on September 26, 2006 and started with Transched on October 10, 2006. On October 5, 2006 Bryans wrote to Trapeze giving notice that he would be leaving as of November 2, 2006, and he joined Transched shortly thereafter.

17 Bryans stated in his affidavit that he was contacted by a technology recruitment firm and introduced to Transched, a company about which he knew very little. He stated that he had never come across Transched on any work related matter. He said that he did not consider Transched to be a competitor of Trapeze and that Trapeze did not consider Transched to be a competitor. Mr. Goddard of Trapeze contests the last statement in a reply affidavit.

18 Bryans stated in his affidavit that he accepted a position with Moore Resource Systems

(Ontario) Limited ("Moore"), an affiliate of Transched, and commenced his employment on November 6, 2006. He stated that while his official employer is Moore, he works out of the Transched office and most of his time and efforts is involved with Transched related matters. He carries business cards for both Moore and Transched. It is acknowledged that Moore does not compete with Trapeze.

19 Kennedy stated in his affidavit that he also was contacted by a technology recruitment firm and introduced to Transched. He said he knew very little about Transched, never came across Transched on any work related matter and did not consider it to be a competitor of Trapeze. He said that Trapeze did not consider Transched to be a competitor and that he never heard anyone at Trapeze discuss Transched as a competitor. This latter statement is also contested by Mr. Goddard in his reply affidavit.

20 Trapeze contends that Bryans, Kennedy and Transched took steps to conceal the fact that Bryans and Kennedy were working with Transched. It is argued that this is an indication that they were well aware that joining Transched would be in breach of their non-competition covenants. For example, Mr. Bacchus, the President of Trapeze, refers in his affidavit to information given to him by another Trapeze employee that Bryans had told his supervisor at Trapeze that he was taking a position with another software firm that was not engaged in the transit software business. On December 7, 2006 when Trapeze employees attended at the office of the Durham Regional Transit Commission, a Trapeze client since 1996, in connection with a RFP, they learned that Transched was bidding on the same project that Trapeze was bidding on and they noticed a Transched business card left on the table which contained Bryans name as an account manager. When complaints were made to Transched, the response was that Bryans was not employed by Transched but by Moore. Whether there was an intentional cover-up and what the implications of that would be is a contested matter and, if it is relevant, is a matter for the trial judge.

Trapeze Competition

21 In support of the motion, Mr. Bacchus, President of Trapeze, stated that Trapeze and Transched were in direct competition in the transit software business in North America for public and private transit business. He stated that both companies also sell professional services to these authorities. He identified five types of software products which each of Trapeze and Transched sold that are directly competitive. He listed seven public bodies as common transit clients of both Trapeze and Transched.

22 Counsel for Bryans and Kennedy concedes that there is some overlap in the markets of the two companies and that they are competitors to some extent. He asserts, however, that Transched is not a very significant competitor of Trapeze and that this is relevant to the issue of irrevocable harm. In the defendants' responding material is a prospectus dated May 11, 2006 issued by Constellation Software Inc. in connection with the distribution of common shares of that company. Constellation identified Trapeze as one of its operating groups with its primary geographic markets

being North America, the United Kingdom, Continental Europe and Australia. This business was identified as one of its "vertical" markets. The prospectus contained the following regarding competition and its Trapeze business:

> Competition for the licensing of vertical market software is generally based upon several factors including product features, the availability of high quality maintenance and support, price and the knowledge of the software vendors' sales team. We typically operate within vertical markets where there is limited competition from large software vendors. While many of the larger software companies compete with us within select markets, they rarely have industry specific solutions that closely meet the needs of the customers we target.
>
> We initially target markets that have a fragmented competitive landscape. In those markets, we primarily compete against small software companies who lack capital resources and long-term orientation to effectively grow their market share. Moreover, such companies typically offer only a limited suite of software solutions and often do not provide a more comprehensive enterprise software solution.
>
> **Public Sector**
>
> *Trapeze Operating Group*: In the public transit operators market our competitors include Giro Inc., StrateGen Systems Inc., IVU Traffic Technologies AG, Orbital Sciences Corp., Siemens Corporation and Versyss Commercial Systems LLC. In the paratransit operators market, our competitors include Mobisoft Oy, and RouteMatch Software Inc. In the school transportation market, our competitors include Education Logistics Inc. and Versatrans Solutions Inc. In the non-emergency medical transportation market, our competitors include LogistiCare Inc. In the ride share market, our competitors include NuRide Inc. In the local government, our competitors include Tribal Group plc.

23 There is no reference to Transched being a competition of Trapeze. However, in his reply affidavit, Matthew Goddard, the Director of Product Management of Trapeze, stated that Transched bought a company named Versyss Commercial Systems LLC ("Versyss") in 2005 and that Versyss is referred to in the prospectus as a competitor of Trapeze. He asserts that Bryans and Kennedy were aware of that when they joined Transched. Whether the latter is the case, which is contested, and whether it is relevant, is a matter for the trial judge.

Bryans and Kennedy meet with Trapeze Customers after joining Transched

24 Bryans and Kennedy both swear that after leaving Trapeze they have not met with any of the Trapeze clients with whom they had any contact while at Trapeze. This evidence is not contradicted. However there is evidence that each have met with Trapeze customers, albeit not customers with whom they dealt while at Trapeze.

25 The record is not entirely clear as to what Bryans' sales territory is at Transched. In his affidavit, he stated that when he joined Transched, he identified for Mr. Cameron, the General Manager, the geographic region in which he operated while at Trapeze and that he was assigned to a sales territory by Transched that did not conflict with his former territory or accounts. He attached as an exhibit a map of the United States, which identified his sales territory as being generally the Midwest and Western states, and the sales territory for the Florida office, being the balance of the states. The map is identified as "TRANSCHED -- DIVISION OF SALES TERRITORY". This map includes Utah as part of Bryans' sales territory, which was part of his sales territory at Trapeze. There is no evidence that he has approached any former Trapeze client in Utah and he was not asked that question on his cross-examination. It appears from the fact that Bryans attended at the office of the Durham Regional Transit Authority after joining Transched that he has some responsibility in Canada.

26 As referred to earlier, Bryans' business card with Transched was found by Trapeze at the Durham Regional Transit Commission on December 7, 2006. Bryans in his affidavit acknowledges that he attended a meeting at Durham on December 7, 2006 with other Transched employees and that Transched was involved in responding to Durham's public RFP before he started working there. He denied that he had solicited Durham as a client for Transched as Transched had approached Durham one year earlier in anticipation of bidding on the RFP expected to be released by Durham. Bryans was cross-examined, but not on the issue of what he was doing there.

27 Kennedy was a technical product specialist providing support to Trapeze clients, and he has continued to fulfill a similar role at Transched. He speaks to existing clients of Transched whom he services. He is a support person. In his affidavit he acknowledged that he had worked on a few Transched accounts where the client was using a software application provided by Trapeze in instances where the client relationship with Transched had been in existence for several years before he joined Transched. He identified those clients on cross-examination as Avail Technologies, a private company, and the Metropolitan Atlanta Regional Transportation Authority. Avail is in the paratransit business. Kennedy stated that he did not know whether Avail was a Trapeze customer before he left to go to Transched and that he had had no connection with Avail while he was at Trapeze. He knew that the Atlanta Transportation Authority was a customer of Trapeze before he joined Transched but he had not had any contact with it while he was at Trapeze.

28 There is no evidence that Trapeze has lost any business to Transched as a result of the activities of Bryans or Kennedy, or that it is likely that such business will be lost. The position of Trapeze is that it should not have to wait to lose business before obtaining an interlocutory injunction.

Applicable Law

(a) Need For a Strong *Prima Facie* Case

29 The general rule is that a party will be entitled to an interlocutory injunction upon satisfying the tests established in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 as follows:

(a) Is there a serious issue to be tried?
(b) Will the applicant suffer irreparable harm if the injunction is not granted?
(c) Which party will suffer the greatest harm from granting or refusing the injunction, i.e. where does the balance of convenience lie?

30 In *RJR-MacDonald Inc. v. Canada, supra,* the Supreme Court made an exception for cases in which the interlocutory injunction would effectively put an end to the action and stated that in those cases the judge would be required to consider more fully the likelihood that the plaintiff would succeed at trial. Since then the requirement to establish a strong *prima facie* case has generally been applied in Ontario in cases in which employers have sought to enforce restrictive covenants in employment agreements by way of interlocutory injunctions. A number of these cases are cited by Perell J. in *Sherwood Dash Inc. v. Woodview Products Inc*., [2005] O.J. No. 5298, 2005 CarswellOnt 7191 at para 58.

31 Counsel for Trapeze agrees that in this case the strong *prima facie* test is the applicable test for this motion.

(b) Covenants in restraint of trade

32 A contract in restraint of trade is one in which a party to a contract agrees to restrict his or her liberty in the future to freely carry on trade with other persons not parties to the contract: *Stephens v. Gulf Oil Canada Ltd*. (1975), 11 O.R. (2d) 129 (Ont. C.A.) at p. 138-9; *Esso Petroleum Co. v. Harper's Garage (Stouport) Ltd.* (1967), [1968] A.C. 269 U.K. H.L.) at p. 317. All restraints of trade are contrary to public policy and are *prima facie* void unless they can be justified as being reasonable with respect to the interests of the parties and the public: *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.,* [1984] A.C. 535 (U.K. H.L.) at p. 565; *J.G. Collins Insurance Agencies v. Elsley,* [1978] 2 S.C.R. 916 (S.C.C.).

33 The tests to be applied in considering whether a restrictive covenant can be enforced were discussed in *Elsley, supra.* The issue was more recently discussed by MacPherson J.A. in *Lyons* v. *Multari* (2000), 50 OR (3rd) 526. In that case, he stated:

> 19. The general rule in most common law jurisdictions is that non-competition clauses in employment contracts are void. This proposition, and the rationale for it, were succinctly stated by Lord Macnaghten in the leading English case,

Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535 (U.K. H.L.) at 565:

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

20. The general rule is not without exception. In *Nordenfelt*, Lord Macnaghten went on to say that for a restraint on trade to be valid it must be reasonable in the interests of the contracting parties and also reasonable in the public interest.

21. The position in Canada is similar. The leading Canadian case dealing with non-competition clauses in an employment context is *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 (S.C.C.) [n.1]. In *Elsley*, Dickson J. began his analysis by recognizing that such clauses presented a collision between two long-standing common law principles - - discouraging restraints on trade and respecting freedom of contract. Dickson J. explained, at p. 923:

> The principles to be applied in considering restrictive covenants of employment are well-established ... A covenant in restraint of trade is enforceable only if it is reasonable between the parties and with reference to the public interest. As in many of the cases which come before the courts, competing demands must be weighed. There is an important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants. On the other hand, the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power.

22. In *Elsley*, Dickson J. said that a proper reconciliation of these conflicting principles was anchored in the notion of reasonableness, which could be determined "upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances" (at p. 924).

23. Importantly, Dickson J. then set out the factors that require special attention when considering a restrictive covenant in an employment contract. In his view, there are three such factors: first, whether the employer has a proprietary interested entitled to protection; second, whether the temporal or spatial features of the clause are too broad; and, third, whether the covenant is unenforceable as

> being against competition generally, and not limited to proscribing solicitation of clients of the former employee (at p. 925).

The non-competition clause

(a) A proprietary Interest

34 In *Elsley, supra,* which established the test of whether the employer has a proprietary interest entitled to protection, the proprietary interest was the trade connection between the dentist and his clients whose business was acquired by the plaintiff. If it is the proprietary interest in a customer base which is the issue, the evidence is somewhat mixed. The evidence of Mr. Bacchus, the President of Trapeze, to which I have earlier referred, is that the marketing process for transit software in North America is a highly competitive process involving a limited number of bids annually, in which all or virtually all of the competing companies participate. This evidence would tend to refute any proprietary interest of Trapeze in its customer base. Mr. Goddard, the director of product management of Trapeze, said however in a reply affidavit that a significant portion of sales made in the transit software industry are made through "sole-source procurements" which do not involve a public tender process. Mr. Goddard did not describe how significant that portion of sales is. Whether the defendants were involved in any significant sole-sourced business while at Trapeze is not established.

35 Mr. Bacchus also said that the relationships between transit software providers and their clients tend to last for a number of years and that acquiring a customer is a difficult and typically long-term process involving significant research, multiple meetings and written proposals. Trapeze contends that in these circumstances it is vulnerable to departed employees who had access to confidential information because that confidential information could be used by a competitor to avoid long-term research and other steps required to obtain new business. On the other hand, counsel for the defendants contends that a 12-month restriction on competing has little value to Trapeze, as the defendants were low level of employees at Trapeze and could take no significant business from Trapeze. Certainly in the short time period of 12 months, that could well be the case.

36 I have some doubt that Trapeze had a sufficient proprietary interest that required protection for 12 months from the defendants. However, as this is not the major issue in my view, I will assume that Trapeze had a proprietary interest in its customer base.

(b) Temporal and Spatial Features

37 The non-competition clause applies for 12 months after each defendant left Trapeze. It cannot be seriously contended that if the clause were otherwise enforceable, one year would be too long. In my view the 12-month period in itself is reasonable.

38 The non-competition clause applies to Canada, the United States and anywhere else in the world where Trapeze marketed its products or services during the period of employment of the

defendants. Beyond Canada and the United States, therefore, there is no special limitation. In 2006 at the time of the prospectus, Trapeze operated in North America, the United Kingdom, Continental Europe and Australia. It was only in parts of North America that the defendants worked on behalf of Trapeze.

39 Trapeze contends that this broad geographic scope is driven by the nature of its business. Counsel for Trapeze stated- "its customers are where you find them". That may be, but the issue is whether this broad geographic scope was necessary to protect Trapeze from these two defendants who had no connection with customers in parts of North America or in other parts of the world at all.

40 The affidavit of Mr. Bacchus, the President of Trapeze, dealt with the North American market. No reference is made to any markets elsewhere. The reply affidavit of Mr. Goddard on behalf of Trapeze was the same. There is no evidence before me as to the nature of the business in the other parts of the world or what the competitive situation is. There is no evidence on the record before me to establish that Trapeze needs protection from these defendants in other parts of the world, yet the clause would prevent these defendants from working in the United Kingdom, Continental Europe or Australia. Counsel for Trapeze contends that it is reasonable that the defendants be prevented from working, for example, in Australia. I disagree.

41 In *Sherwood Dash Inc. v. Woodview Products Inc., supra,* a non-competition clause prevented a departing employee from competing with any business activity competitive with the business than being carried on by the employer. While that language did not refer to any particular geographic area, its meaning was no different than the meaning of the non-competition clause at issue in this case. Perell J. dismissed a motion for an interlocutory injunction to enforce the non-competition clause, and in so doing he stated:

> 68. The spatial feature of the restrictive covenant is particularly problematic. There is no spatial limitation, and Messrs. Nguyen and Burton are essentially disqualified from working in a field in which they have acquired skills and knowledge. The information and training provided by an employer to an employee that do not involve trade secrets are beyond the reach of a restrictive covenant: *Maguire v. Northland Drug, [1935] 3 D.L.R. 521, supra*; *Sir W.C. Leng & Co. v. Andrews* (1908), [1909] 1 Ch. 763 (Eng. C.A.). In my view, the non-competition clause in the immediate case goes too far in protecting the proprietary interests of Sherwood and is not reasonable as between the parties nor is it reasonable in terms of the public interest.
>
> 69. Further, as a solution, the non-competition clause in this case extends beyond the actual problem of the misappropriating of confidential information. Put somewhat differently, it is not that the former employee is competing; it is how the former employee competes. By absolutely foreclosing employment for any competitor anywhere, the covenant in this case precludes the employee from

> using acquired skills or knowledge that do not encroach on confidential information or the employer's proprietary interests. It is arguable in the immediate case that the restrictive covenant goes too far; colloquially speaking, it is "overkill."

42 In my view these comments of Perell J. are apposite to this case. Trapeze has thus failed to satisfy me that it has a strong *prima facie* case that the non-competition clause in this case is enforceable.

The non-solicitation clause

43 The non-solicitation clause contains much the same problem in this case as the non-competition clause. It prevents the defendants from contacting or soliciting any persons who were clients of Trapeze at the time they left Trapeze. That is, it prevents the defendants from contacting any company anywhere in the world that was a client of Trapeze, regardless of the fact that the defendants worked only in parts of North America for Trapeze.

44 Moreover, the non-solicitation clause applies to all clients of Trapeze at the time the defendants left Trapeze whether or not the defendants had anything whatsoever to do with those clients. The definition makes a distinction between clients of Trapeze at the time of the termination of their employment and a business that became a client of Trapeze within six months thereafter. In the latter case, it is only if the defendants were involved with the marketing effort in respect of such a business while they were at Trapeze that they would be prevented from contacting or soliciting such business. That is some recognition that Trapeze needed only to be protected if the defendants were involved in marketing efforts with any Trapeze client. I see no reasonable basis for the distinction in this clause between clients at the time the defendants left Trapeze and a business that became a client of Trapeze within six months thereafter.

45 The non-solicitation clause prohibits more than solicitation. It prohibits contact with any client of Trapeze for the purpose of selling products to such client. If, for example, one of the defendants was called by a company to meet with it to discuss transit software and then went to meet with persons of that company, it arguably would be a breach of the covenant if during the course of the meeting the defendant learned that the company had previously acquired some software or service from Trapeze. This regardless of whether it occurred in North America, the United Kingdom or elsewhere in the world.

46 In *IT/NET Inc. v. Cameron*, [2006] O.J. No. 156, the Court of Appeal held the following non-solicitation clause to be unenforceable:

> 4.2 he/she will not attempt to solicit business from any *IT/NET* clients or prospects without the written consent of *IT/NET*. The intent of this clause is to reasonably protect the goodwill of *IT/NET* while at the same time not unduly limiting the ability of the Subcontractor to continue in the practice of his/her

profession.

47 Goudge J.A. for the court stated:

> 17. However, clause 4 goes considerably beyond what is needed to protect this proprietary interest. The language of clause 4.2 prevents the contractor from soliciting business from any *IT/NET* client or prospect, not just from the client where the contractor has been placed. This prohibition applies whether or not the contractor knows that the target of his solicitation is an *IT/NET* client or prospect or whether he has any prior relationship with that client or prospect due to his work for *IT/NET*.
> 18. Moreover, the clause has no spatial limitation. It would apply throughout Canada not just in the city or to the branch of the department of the government in which the contractor has been working.

48 In my view, these comments by Goudge J.A. are applicable to the non-solicitation clause signed by Bryans and Kennedy.

49 As with the non-competition clause, Trapeze has failed to satisfy me that it has a strong *prima facie* case that the non-solicitation clause as drafted in this case is reasonably required or valid.

50 In these circumstances, it is not necessary for me to consider irreparable harm or the balance of convenience tests. However, in case I am wrong as to the enforceability of the non-competition and non-solicitation clauses, I shall do so.

Irreparable harm

51 What constitutes irreparable harm was described in *RJR-MacDonald Inc. v. Canada, supra* as follows:

> 59. "Irreparable" refers to 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 of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious doe not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

52 Evidence of irreparable harm must be clear and not speculative. In *Kanda Tsushin Kogyo v. Coveley*, [1997] O.J. No. 56, 1997 CarswellOnt 80 (Div. Ct.) the Court stated:

> As to the question of irreparable harm, we are in concurrence with the Federal Court of Appeal's view that evidence of irreparable harm must be clear and not speculative: see *Syntex Inc. v. Novapharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.) at p. 135, leave to appeal to S.C.C. refused [1991] S.C.C.A. No. 309, 39 C.P.R. (3d) v, 137 N.R. 391n.; see also *Centre Ice Ltd. v. National Hockey League*, [1994] F.C.J. No. 68, 53 C.P.R. (3d) (F.C.A.) at p. 54; *Willow Corp. v. McDonald's Restaurants of Canada Ltd.*, [1994] O.J. No. 1169 at para. 7; *Risi Stone Ltd. v. Omni Stone Corp.*, [1989] O.J. No. 103

53 There is no evidence that Trapeze has lost any business to Transched. Nor is there any evidence that the defendants have disclosed any confidential information to Transched or its customers. Trapeze contends that knowledge of its confidential information would provide an invaluable unfair competitive edge in the sales and bidding process and in ongoing service components of its business. Mr. Bacchus asserts that given the nature of the business, misuse of confidential information by these former Trapeze employees is inevitable. I am not persuaded that that assertion is anything more than speculation.

54 Trapeze relies upon statements in cases to the effect that irreparable harm has been found to exist where there is evidence that the plaintiff will lose market share if an injunction is not granted. However, this too is speculative. There is no evidence of a reasonable likelihood that the plaintiff will lose any business or market share, and certainly not within 12 months of the defendants leaving their employment with Trapeze, or that any such likely loss of market share would be due to the actions of the defendants. This is not a case in which either defendant has contacted any of the clients of Trapeze that he dealt with while employed by Trapeze or a case in which either defendant has close important relationships with any Trapeze client that would enable him by virtue of such close relationship to sway business to Transched. The evidence of Mr. Bacchus referred to earlier in these reasons that the relationship between transit software providers and their clients tends to last for a number of years would suggest that the risk of losing significant business or market share may be small. The information provided in the prospectus of Constellation Software Inc. to which I referred earlier in these reasons states that Trapeze operates within vertical markets where there is limited competition from large software vendors and that Trapeze targets markets with a fragmented competitive landscape and competes in those markets against small software companies who lack capital resources and long-term orientation to effectively grow their market share.

55 Trapeze relies upon Section 9 of the Agreement referred to above in which each of the defendants confirmed that the non-competition and non-solicitation provisions are fair and reasonable and reasonably necessary for the protection of the proprietary interests of Trapeze. Trapeze also relies upon paragraph 11 of the Agreement in which the defendants acknowledged and agreed the damages may not be an adequate remedy for breach of their obligations contained in the

Agreement. In my view, boilerplate clauses such as these are of little assistance to a court in determining whether the public interest would be served by the enforcement of restrictive covenants. In this particular case, these agreements were signed by two young men, albeit intelligent young men, who had never worked at Trapeze or in the industry in which Trapeze is involved and who could hardly be said to have been in any knowledgeable position to assess whether the provisions were reasonably necessary for the protection of Trapeze.

56 Trapeze also contends that any damage award that ultimately might be awarded at trial would likely not be collectible from Bryans or Kennedy. The fact that one party may be impecunious does not automatically determine the application in a favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration: see *RJR-MacDonald v. Canada, supra* at p. 341. The difficulty with this point, in my view, is that there is no real evidence of the likelihood of a loss being caused to the plaintiff or what the size of any loss might be. Therefore the issue of being unable to collect any damage award is speculative. Also, while Transched has not been made a defendant to this action so far, it is not beyond the realm of possibility for the plaintiff to add Transched, particularly as it made Transched aware of the Agreement from the outset of the hiring of the defendants.

57 In summary, I am not persuaded that Trapeze has established irreparable harm on the basis that there is a reasonable likelihood that it will lose business or market share.

Balance of Convenience

58 The issue here is which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction. Trapeze relies upon the provisions of the Agreement already referred to in which the defendants acknowledged that the non-competition, non-solicitation and confidential information covenants were reasonably necessary for the protection of the proprietary interests of Trapeze. I have already indicated that this argument is not persuasive.

59 Trapeze also asserts that the defendants would not be precluded from becoming gainfully employed in other areas of the computer software industry. It points to the fact that Bryans acknowledges having been hired by Moore Resource Systems, an affiliate of Transched and says that Bryans would be free to work for Moore as it is not a competitor of Transched. That is not the case with Kennedy.

60 The defendants assert that the software transit industry is the only industry in which they have been employed on a full-time basis since they left university and that if they were obliged to start over, it would likely be at a lower position and salary. To some extent, this too is speculative. In the case of Kennedy, who is not employed by Moore Resource Systems, he would be out of work for some period of time if required to resign from Transched. Whether Bryans could be able to stay on with Moore on a full-time basis and at the same salary level is unknown, but presumably he would be entitled to reasonable notice if he were terminated.

61 In my view the balance of convenience is a bit of a wash in this case, although it is slightly is in favour of the defendants. The evidence does not indicate a reasonable likelihood of Trapeze suffering a loss at the hands of the defendants within the remainder of the one-year period in the non-competition and non-solicitation clauses. On the other hand, the effect of an injunction, if granted, would to some extent be immediately felt by the defendants.

Confidentiality provisions

62 Trapeze has requested an interlocutory injunction to enforce the confidentiality provisions of the Agreement. The difficulty with this request is that there is no evidence that the defendants have given any Trapeze confidential information to anyone. They have sworn that they have not done so. Mr. Bacchus asserts in his affidavit that given the nature of transit software products and services, and the marketplace, misuse of confidential information by the defendants is inevitable. That statement amounts to speculation. In my view an injunction ought not to be granted without an evidentiary base that it is likely that a breach of the confidentiality provisions will occur without an injunction being granted. There is no basis for the granting of such an injunction.

Conclusion and order

63 It follows from the foregoing that the motion is dismissed. As the defendants were wholly successful, I am inclined to order they be paid their costs. However, if Trapeze wishes to assert otherwise, it may do so within seven days by brief written submissions, in which case the defendants will have five days to respond.

F.J.C. NEWBOULD J.