See paras. 39-40

Case Name:

Veolia ES Industrial Services Inc. v. Brulé

Between
Veolia ES Industrial Services Inc., Plaintiff
(Appellant/Respondent by way of cross-appeal), and
John Brulé and Clean Water Works Inc., Defendants
(Respondents/Appellants by way of cross-appeal), and
John Brulé, Plaintiff by Counterclaim

[2012] O.J. No. 1183

2012 ONCA 173

289 O.A.C. 207

[2012] CLLC para. 210-024

Docket: C53054

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, M. Rosenberg and A. Hoy JJ.A.

Heard: January 16, 2012.
Judgment: March 20, 2012.

(46 paras.)

Employment law -- Contract of employment -- Express terms -- Restrictive covenants -- Reasonability -- Appeal by plaintiff from damages awarded dismissed -- Cross-appeal by defendant from trial judgment finding he breached non-competition covenant or fiduciary duty allowed -- Defendant terminated employment contract with plaintiff in 2005 -- Pursuant to non-competition clause, defendant could not compete with plaintiff for two years commencing in 2007 if defendant terminated agreement -- Defendant's new company successfully bid on work in 2005 in competition with plaintiff -- Blue-pencil severance not available to remove "commencing in January 2007" -- Without deletion of these words, restrictive covenant was unreasonable and unenforceable -- Even

if enforceable, defendant did not breach it in 2005.

Employment law -- Implied duties of employee -- Confidential information and privacy -- Fiduciary duties -- Appeal by plaintiff from damages awarded dismissed -- Cross-appeal by defendant from trial judgment finding he breached non-competition covenant or fiduciary duty allowed -- Defendant terminated employment contract with plaintiff -- Defendant took with him a list of plaintiff's employees and a binder containing information about bids by plaintiff -- Defendant successfully bid on a project in competition with plaintiff -- No breach of fiduciary duty -- Defendant did not compete unfairly with plaintiff -- No evidence that defendant used or disclosed any confidential information of plaintiff in competing.

Appeal by the plaintiff from damages awarded for breach of a non-competition covenant and breach of fiduciary duty. Cross-appeal by the defendant from trial judgment finding that he breached his non-competition covenant or his fiduciary duty. The plaintiff was involved in rehabilitating sewers. The defendant sold the plaintiff company and remained as an employee pursuant to a Senior Executive Employment Agreement. The non-competition clause prohibited the defendant from competing with the plaintiff two years following termination for cause or for two years commencing January 2007 after termination without cause or by the defendant. The defendant terminated the agreement in 2004 and founded a new company rehabilitating water mains. When he left his employment, the defendant took with him a list of the plaintiff's employees and a binder containing recent municipal tenders and information about bids by the plaintiff and others. Both parties subsequently bid on a sewer project in 2005. The defendant was the successful bidder. The trial judge found that the parties were trying to get a two year non-competition agreement. He concluded that severing the words "commencing in January 2007" in the non-competition covenant would produce exactly what the parties had intended and was consistent with the Supreme Court of Canada's test for blue-pencil severance in restrictive covenants. The trial judge concluded that it would be reasonable that the term for the fiduciary duty would be the same length of time as the non-competition agreement. He then concluded that the defendant breached his duty to the plaintiff because he breached his non-competition covenant, and took the binder of information with respect to prior bids, which the trial judge described as confidential information, and he did not tell the plaintiff that he was submitting a bid.

HELD: Appeal dismissed. Cross-appeal allowed. The action was dismissed. Blue-pencil severance could not be resorted to in this case to remove the words "commencing in January 2007" from the non-competition covenant. Without the deletion of these words, the restrictive covenant, which commenced two years after the defendant ceased to be employed by the plaintiff, was clearly unreasonable and unenforceable. As the defendant competed with the plaintiff in 2005, and not in the two years commencing in 2007, he did not breach the non-competition covenant, even if it was enforceable. There was also evidence that the parties would not have agreed to remove the words "commencing in January 2007" without varying other terms of the contract. Blue-pencil severance was therefore not available. The defendant did not breach his fiduciary duty to the plaintiff. The

defendant did not compete unfairly with the plaintiff. He did not use the binder in making his bid. The trial judge also erred in inferring from the evidence that the information in the binder was confidential. The fact that the defendant did not tell the plaintiff that he was submitting a bid did not make his competition unfair. There was no evidence that the defendant used or disclosed any confidential information of the plaintiff in competing.

Appeal From:

On appeal and cross-appeal from the judgment of Justice Albert J. Roy of the Superior Court of Justice, dated October 27, 2010.

Counsel:

Rodney M. Godard and Daniel Ableser, for the appellant/respondent by way of cross-appeal.

Joseph Y. Obagi and Elizabeth A. Quigley, for the respondents/appellants by way of cross-appeal.

The judgment of the Court was delivered by

1 **A. HOY J.A.**:-- Veolia ES Industrial Services Inc. ("Veolia") successfully sued its former employee, John Brulé, for breaching a non-competition covenant in his employment contract and for breach of fiduciary duty. Veolia appealed the quantum of damages awarded. Mr. Brulé cross-appealed, claiming that the trial judge erred in finding that he breached the his non-competition covenant or his fiduciary duty.

2 In my view, the trial judge erred both in finding that Mr. Brulé breached his non-competition covenant and in finding that he breached his fiduciary duty. I would allow Mr. Brulé's cross-appeal and dismiss the action. It is not necessary to address the issue of damages raised by Veolia and I would dismiss its appeal.

BACKGROUND

3 Mr. Brulé founded Veolia. Veolia engaged in inspecting, cleaning and rehabilitating sewers using a cost-effective technique that it developed.

4 In 1999, Mr. Brulé sold Veolia to its current shareholders. As part of that transaction, Mr. Brulé entered into an employment agreement which obliged him to continue as Veolia's President and Chief Operating Officer until December 31, 2004 and prohibited him from competing with Veolia's business for five years thereafter.

5 Irritants developed in the employment relationship. Before the expiry of the initial employment agreement, Veolia's parent corporation approached Mr. Brulé with a new proposal and Mr. Brulé, Veolia and its parent corporation entered into the Senior Executive Employment Agreement dated for reference January 1, 2004 (the "Agreement") at issue on this appeal.

6 The Agreement expressly superseded Mr. Brulé's initial employment agreement. The parties stipulated that the Agreement was the "whole of the agreement between the parties" and that there "are no collateral representations, agreements or conditions not specifically set forth herein."

7 Pursuant to the Agreement, Mr. Brulé was employed by Veolia, as President. In addition, he was to act as Chief Executive Officer of the parent corporation's business in Ontario and as President of Veolia's Ontario affiliates. The arrangement was to continue for a three-year term (s. 1.2), subject to Veolia's right to terminate Mr. Brulé for cause or without cause upon payment of the compensation to which he was entitled until the end of the term (s. 2.3(a)), and to Mr. Brulé's right to terminate the arrangement on 180 days notice (s. 2.3(b)).

8 The Agreement contains the following non-competition covenant:

> 5.1 Non-Competition. Subject to sections 1.2 and 2.3, and to any other provision of this Agreement, during the Senior Executive's employment with the Employer and for a period of:
>
> (a) Two (2) years following the termination of the Senior Executive's employment for cause or, two (2) years from the termination of the Agreement pursuant to section 1.2, the Senior Executive covenants and agrees not to compete, either directly or indirectly, with the core Business within;
>
> (i) the Provinces of Ontario and Quebec; or
>
> (b) Two(2) years *commencing on January 1, 2007* following termination by the Senior Executive's employment without cause.
>
> (c) Two years *commencing on January 1, 2007* following termination by the Senior Executive pursuant to section 2.3(b). [Emphasis added.]

9 On July 7, 2004, Mr. Brulé gave notice to Veolia, pursuant to s. 2.3(b) of the Agreement, that he was terminating his employment in 180 days. Veolia advised Mr. Brulé that he was not to come into work, but was to be available for consultation and discussion, if necessary. Veolia continued to pay Mr. Brulé until one or two weeks prior to the January 3, 2005 end of the 180 day notice period.

10 Mr. Brulé had a Veolia employee assemble a binder containing 30-50 recent municipal tenders and information about bids by Veolia and others. He took this binder and a list of Veolia's employees when he left Veolia.

11 Mr. Brulé incorporated the defendant Clean Water Works Inc. He intended Clean Water Works to be involved in rehabilitating water mains, not sewers. Veolia was not engaged in rehabilitating water mains.

12 In the fall of 2005, Clean Water Works did not have sufficient work to keep all of its employees employed. The City of Ottawa issued a public tender for sewer work. Mr. Brulé obtained the tender documents and sought legal advice regarding his obligations to Veolia. Veolia was aware that Mr. Brulé had obtained the tender documents. Both Veolia and Clean Water Works submitted bids. Clean Water Works was awarded the tender; Veolia was the next-lowest bid. Veolia sued Mr. Brulé and Clean Water Works, seeking the gross profits that Veolia lost as a result of not being awarded the tender. Mr. Brulé counterclaimed for unpaid compensation pursuant to the Agreement.

THE TRIAL JUDGE'S DECISION

13 The trial judge cited *Consolidated Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 for the proposition that where there is confusion or ambiguity in contracts, the court should attempt to determine what the intention of the parties was. He found that the parties "were trying to get a two year non-competition agreement" and "unfortunately, the draftsmanship of the lawyer drafting the agreement did not produce what, in fact, the parties intended" (at pp. 18-19). He concluded that severing the words "commencing on January 1, 2007" where they appeared in the non-competition covenant would produce "exactly" what the parties had intended, and was consistent with the Supreme Court of Canada's test for "blue-pencil severance" in restrictive covenants set out in *KRG Insurance Brokers (Western) Inc. v. Shafron*, [2009] 1 S.C.R. 157. As severing the words "commencing on January 1, 2007" from s. 5.1(c) resulted in Mr. Brulé having a two year non-competition covenant running from January 3, 2005, and such a covenant was, in the trial judge's opinion, reasonable, the trial judge found that Mr. Brulé had breached his non-competition covenant.

14 Mr. Brulé did not dispute that he had owed a fiduciary duty to Veolia, and that he had continuing duties for a reasonable period of time after the end of his employment. The trial judge concluded, at p. 27, that "it would be reasonable that the term for the fiduciary duty would be the same length of time as the non-competition agreement". He then concluded that Mr. Brulé breached his duty to Veolia because he breached his non-competition covenant, he left Veolia with the binder of information with respect to prior bids, which the trial judge described as confidential information, and he did not tell Veolia that he was submitting a bid.

15 The trial judge determined that $465,000 would be reasonable compensation to Veolia for Mr. Brulé's breach of the non-competition covenant and his fiduciary duty and fixed damages in that amount. On this appeal, Veolia seeks damages in the amount of $930,000.

16 The trial judge also determined that Veolia owed Mr. Brulé $90,896.62 pursuant to the Agreement. The parties do not appeal this determination.

ANALYSIS

(1) DID MR. BRULÉ BREACH HIS NON-COMPETITION AGREEMENT?

17 In my view, blue-pencil severance could not be resorted to in this case to remove the words "commencing on January 1, 2007" from the non-competition covenant. Without the deletion of these words, the restrictive covenant, which commences two years after Mr. Brulé ceased to be employed by Veolia, is clearly unreasonable and unenforceable. Moreover, the undisputed evidence was that Mr. Brulé competed with Veolia in the fall of 2005 and not in the two years commencing on January 1, 2007. As a result, even if the non-competition covenant was enforceable, he did not breach it.

18 The principles of general contract interpretation in *Consolidated Bathurst* are subject to the test for blue-pencil severance of restrictive covenants in employment contracts set out in *Shafron*. Restrictive covenants are *prima facie* unenforceable. A restrictive covenant will be upheld only where it is shown to be reasonable by the party seeking to enforce it.

19 In *Shafron*, the Supreme Court of Canada addressed when the doctrine of severance may be invoked to resolve an ambiguous term in a restrictive covenant in an employment contract or render an unreasonable restriction in the covenant reasonable. Rothstein J., writing for the court, stated at para. 2:

> Severance, when permitted, appears to take two forms. "Notional" severance involves reading down a contractual provision so as to make it legal and enforceable. "Blue pencil" severance consists of removing part of a contractual provision. For reasons I set out below, notional severance is not an appropriate mechanism to cure a defective restrictive covenant. As for blue-pencil severance, it may only be resorted to in rare cases where the part being removed is trivial, and not part of the main purport of the restrictive covenant.

20 The Supreme Court's application of the test for blue-pencil severance in *Shafron* is instructive. In that case, the employee agreed not to compete within the "Metropolitan City of Vancouver" - a term with no legal or judicial definition. The British Columbia Court of Appeal determined that the parties intended to prevent the employee from competing in the City of Vancouver and in an area beyond the City, and that what likely was in the reasonable contemplation of the parties when they made their agreement was the City of Vancouver, the University of British Columbia Endowment Lands, Richmond and Burnaby, [2007] B.C.J. No. 261. The Supreme Court held, at para. 47, that the British Columbia Court of Appeal erred in trying "to resolve the ambiguity in the term "Metropolitan City of Vancouver" by reading down the covenant according to its notion of

reasonableness and what it thought the parties might have intended".

21 Further, in the circumstances, blue-pencil severance was not available to delete the word "Metropolitan" and thereby reduce the geographical scope of the covenant to the "City of Vancouver." The Supreme Court referred to Canadian *American Financial Corp. (Canada) Ltd. v. King* (1989), 60 D.L.R. (4th) 293 (B.C.C.A.), at pp. 305-306:

> The courts will only [apply blue pencil severance to] sever the covenant and expunge a part of it if the obligation that remains can fairly be said to be a sensible and reasonable obligation in itself and such that the parties would unquestionably have agreed to it without varying any other terms of the contract or otherwise changing the bargain. ... It is in that context that reference is made in the cases severing and expunging merely trivial or technical parts of an invalid covenant, which are not part of the main purport of the clause, in order to make it valid.

22 The Court of Appeal had concluded that the parties intended a geographic reach that included the City of Vancouver and something more. Blue-pencil severance was not available because there was "no evidence that the parties would have "unquestionably" agreed to remove the word "Metropolitan" "without varying any other terms of the contract or otherwise changing the bargain".

23 In this case, there was evidence, not referenced by the trial judge in his reasons, that the parties would not have agreed to remove the words "commencing on January 1, 2007" without varying other terms of the contract. Blue-pencil severance was therefore not available.

24 The Agreement went through numerous drafts. Initially, Mr. Brulé's obligation not to compete extended beyond the period of his employment only if he was terminated for cause. On October 29, 2003, Mr. Vasseur of Veolia sent a memorandum to Mr. Brulé proposing the following addition:

> 5.1(a) Or for the termination of the Executive's employment without cause, two years starting from January 1, 2007.

25 In his memorandum, he explained: "Salaire payé jusqu'a la fin du terme ... employé jusqu'a la fin du terme ..." (Salary paid until the end of the term ... employed until the end of the term ...)

26 Mr. Vasseur did not testify. The evidence of Daniel Marc-Aurèle, for Veolia, was that he was aware that Mr. Vasseur's proposal was being sent and that "starting from January 1, 2007" was added to create a "sunset clause". Veolia wanted to make clear that if Mr. Brulé continued in employment beyond the three-year term of the Agreement, and Veolia terminated Mr. Brulé without cause, he would in no event be bound by a non-competition covenant beyond December 31, 2008. In Mr. Marc-Aurèle's words, Mr. Brulé "would never have accepted it [the Agreement] otherwise."

27 The evidence of Veolia's own witness indicates the parties would not "unquestionably" have

agreed to remove the words "commencing on January 1, 2007" without varying any other terms of the contract or otherwise changing the bargain.

28 Mr. Vasseur's memorandum to Mr. Brulé, in my view, suggests a more obvious rationale for the addition of the words "commencing January 1, 2007". To terminate Mr. Brulé's employment without cause, Veolia had to immediately pay Mr. Brulé his salary until the end of the three-year term of the Agreement. Given this, it is logical that Veolia would seek to have Mr. Brulé treated as if he continued to be employed until the end of the three-year term for the purpose of determining his non-competition obligation and have his non-competition obligation end two years after the end of that three-year term, and not two years after he ceased to be employed by Veolia. Removing the words "commencing on January 1, 2007" without varying any other terms of the contract would have left Mr. Brulé free to compete with Veolia during a period in respect of which he may have been paid by Veolia. It cannot fairly be said that the parties would "unquestionably" have agreed to remove the words "commencing on January 1, 2007" without varying any other terms of the contract or otherwise changing the bargain.

29 The words "commencing on January 1, 2007" are not trivial. They go to the duration of the restriction and are part of the main purport of the clause. This is not one of those rare cases where blue-pencil severance may be resorted to.

30 I do not accept Veolia's argument that, in any event, a case for severance is made out based on the doctrine of rectification. In *Shafron*, at para. 53, the Supreme Court stated that rectification is to be used with great caution and set out three requirements: (1) an inconsistent prior oral agreement; (2) that the party seeking to uphold the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and (3) "the precise form" in which the written instrument can be made to express the prior intention.

31 In this case, Veolia has shown no prior oral agreement, let alone the content of one. There do not even appear to have been oral discussions about the non-competition agreement. Mr. Marc-Aurèle's evidence was that Veolia never received any response from Mr. Brulé pertaining to its drafts of the non-competition provisions and Veolia merely assumed that he understood its interpretation.

(2) DID MR. BRULÉ BREACH HIS FIDUCIARY DUTY TO VEOLIA?

32 It is clear that certain of a fiduciary employee's duties to his employer may survive his employment: *Can. Aero v. O'Malley*, [1974] S.C.R. 592.

33 Without disclosure and consent, a fiduciary cannot compete with his employer during the course of his employment. After his employment ends, the fiduciary employee generally cannot directly solicit the employer's customers for a reasonable period of time: *Mountjoy v. Alberts* (1977), 16 O.R. (2d) 682 (H.C.J.) at paras. 21-26. The parties agree that the fiduciary is free to

otherwise compete once his employment ends, provided that he does not do so unfairly: *Cygnal Technologies Corp. v. Taylor*, [2005] O.J. No. 3093, (S.C.) at para. 16; *Sanford Evans List Brokerage v. Trauzzi*, [2000] O.J. No. 1394 (S.C.) at para. 49.

34 In my view, Mr. Brulé did not compete unfairly with Veolia, and in the result did not breach his fiduciary duty, as a result of Clean Water Works submitting its bid to the City of Ottawa.

35 The trial judge's conclusion that Mr. Brulé breached his fiduciary duty to Veolia by competing is anchored by his finding that Mr. Brulé was subject to an enforceable non-competition covenant and breached that covenant. The "unfairness" aspect of the competition was the breach of contract. As there was no breach of contract, this basis of liability falls away.

36 Nor, in my view, do the other bases identified by the trial judge - that Mr. Brulé left Veolia with the binder of information with respect to prior bids and did not tell Veolia that Clean Water Works was going to bid - amount to unfair competition.

37 I will address the issue of the binder first.

38 Counsel for Veolia argues that this case is on all fours with *Cygnal*. In that case, the former fiduciary employee took sales reports that set out significant detailed information about his employer's contracts with various customers. Five months after leaving his employment, he bid against his former employer on several tenders. His evidence was that he did not use the information in bidding. McMahon J. found that by keeping this "sensitive information", which could have been beneficial to someone competing for tendered contracts, and then competing directly five months later, the employee had competed in an unfair manner.

39 The trial judge did not find that Mr. Brulé used the information in the binder in making his bid, and the evidence is that he did not. If he did not use the information, mere possession of it cannot make the competition unfair. In this regard, I respectfully differ from the view of McMahon J. in *Cygnal*.

40 Moreover, in my view the trial judge made a palpable error in inferring from the evidence that the information in the binder was "confidential". No witness testified that the information in the binder was confidential. At the time, Veolia was known as SARP Sewer-Matic. The only evidence with respect to the contents of the binder was that of Mr. Brulé:

> Q: when you left SARP Sewer-Matic, certain documents left with you --
>
> A: Yes
>
> Q: --that had been there before?

A: That's right

Q: Okay. What were they sir?

A: I believe I took the tender document book. It was a three-inch binder with 30, 40, 50 different municipality tenders in them. Either we bid it or we did it with the total numbers of the competitors and who won them.

Q: Did you use those binders at all with this job?

A: No.

Q: And was this a public tender sir?

A: Yes, it was.

41 In Mr. Brulé's cross examination he was asked again about the contents of the binder:

Q: Yeah. And the file you took had all of the tender results for Sewer-Matic for the whole period of time--

A: No, I did not have the whole period of time.

Q: Let me finish the question.

A; I'm sorry.

Q: Thank you. It had all of the file, the tender results that Sewer-Matic was involved in, including the competitors' per meter prices for at least the period of time since SARP bought your business, correct?

> A: I disagree. I didn't think it went back from the day they bought me. There was one binder, and I would have to see it.
>
> Q: All right. But the point is it was a binder that was kept by SARP because it was useful for the tender process?
>
> A: That binder was not kept by SARP. I asked the girl at SARP Sewer-Matic to make it before I left.
>
> Q: Yeah.
>
> A: There were no other binders before that. I deliberately asked the girl to make a binder for me, and I took that binder with me.
>
> Q: Right.
>
> A: But what Sewer-Matic had before that is that we had every tender and each file for the last 20 years.

42 Municipal tenders are publically issued and inherently not confidential. Information about what Veolia's competitors bid could not amount to Veolia's confidential information, unless, perhaps, Veolia had acquired the information subject to the terms of a confidentiality agreement. There was no evidence that this was the case. In fact, Mr. Brulé testified that after the tender at issue closed, he obtained information from the City of Ottawa with respect to the bids submitted by all the competitors, including the prices per metre. Based on the record, the type of information in the binder was publically available. It was neither confidential nor sensitive.

43 Does the fact that Mr. Brulé did not tell Veolia that Clean Water Works was submitting a bid make his competition unfair? In the trial judge's view, the fact that Mr. Brulé knew that Veolia was bidding, but Veolia did not know that Clean Water was bidding meant that, "[t]hey were not playing on a level playing field" and that Mr. Brulé "clearly had an unfair advantage". Counsel for Veolia submits that had Veolia known that Clean Water Works was bidding it would have adjusted its bidding strategy to factor in this additional competition. In my view, a former fiduciary employee who is free to compete is not required to tell his former employer that he is about to do so. It must be kept in mind that the restrictive covenant on which Veolia was relying was *prima facie* unenforceable. It should also be noted that Veolia was aware that Mr. Brulé had obtained a bid package.

44 No other factors which would render Mr. Brulé's competition unfair were drawn to our attention. Clean Water Works' bid was submitted in response to a public tender; it did not solicit the City of Ottawa. The tender was issued by the City of Ottawa well after Mr. Brulé had left Veolia. Mr. Brulé did not take advantage of a business opportunity developed during his employment. He did not improperly solicit and hire Veolia's employees in order to be in a position to compete. Although Mr. Brulé had taught Mr. Peori, who compiled Veolia's bid, how to put together estimates for sewer work, Mr. Brulé did not know what Veolia would bid. Mr. Brulé and Mr. Peori's evidence describing how they determine the amount to bid suggests something akin to an "art rather than a science." Mr. Brulé was guessing what Veolia would bid some 15 months after he had ceased to be involved with Veolia. There was no evidence that Veolia's method of conducting the sewer work was, at the time, unique or proprietary. Mr. Brulé did not make preparations to compete, on company time or at Veolia's premises while still an employee. Nor was there evidence that Mr. Brulé used or disclosed any confidential information of Veolia in competing.

45 Veolia argues that the fact that Mr. Brulé contacted a known third party competitor to ascertain if it was also putting a bid in amounts to unfair competition. Veolia submits that Mr. Brule knew the third party as a result of his employment. Veolia also contacted that third party. The fact that the third party was among the universe of potential competitors could be ascertained from publically available documents.

COSTS

46 If the parties are unable to agree on the issue of costs at trial and on appeal, Mr. Brulé should provide brief written submissions within 14 days, and Veolia should provide its brief written submissions in response within 10 days thereafter. No reply submissions shall be provided without leave.

A. HOY J.A.
D.H. DOHERTY J.A.:-- I agree.
M. ROSENBERG J.A.:-- I agree.