See paras. 8, 33-35, 40, 41, 43, 45-49

Case Name:

379107 Ontario Ltd. (c.o.b. TNT Appliance Service) v. Coinamatic Canada Inc.

Between
379107 Ontario Limited carrying on business as TNT Appliance Service and Golden Coin Vending Services Limited, plaintiffs,
and
Coinamatic Canada Inc., defendant

[**2002**] **O.J. No. 2842**

[2002] O.T.C. 516

27 B.L.R. (3d) 238

115 A.C.W.S. (3d) 313

Court File No. 99-CV-170294

Ontario Superior Court of Justice

Jennings J.

Heard: May 27-30, 2002.
Judgment: July 16, 2002.

(52 paras.)

Business law -- Sale of a business -- Contracts -- Formation of contract -- Duty to negotiate in good faith -- Duty of confidentiality.

Action by TNT Appliance Service against its competitor, Coinamatic Canada, alleging that Coinamatic made unauthorized use of confidential business information. Both parties rented space from apartment building landlords, where they placed laundry machines and collected the revenues. Coinamatic entered into negotiations to acquire TNT. To assist with negotiations, TNT provided a list of its leases with the numbers of machines and expiry dates for each lease. The list did not show

the names of the landlords or location of the buildings. Coinamatic entered into negotiations to supply several Goldlist properties, unaware that one of the properties was already supplied by TNT. When one of Coinamatic's officers learned of the possible conflict, he advised his own staff, set up a Chinese wall so that those negotiating with Goldlist were no longer dealing with TNT, and informed TNT that Goldlist was unhappy with its lease and that TNT should address the problem. Coinamatic obtained the Goldlist lease and TNT claimed that it did so by improperly using its confidential information.

HELD: Action dismissed. Coinamatic did not breach any duty of confidentiality. Nothing was done by TNT to obtain an undertaking regarding confidentiality from Coinamatic. There was nothing wrong with Coinamatic attempting to ascertain the likely holders of the leases, and it did not know that the lease in question was with Goldlist until it was already in negotiations with Goldlist itself. In any event, no confidential information was conveyed to those dealing with the Goldlist negotiations.

Counsel:

Fred Tayar, for the plaintiffs.
Michael E. Royce, for the defendant.

JENNINGS J.:--

Introduction

1 The plaintiffs, collectively called "TNT", claimed damages from the defendant for unauthorized use of confidential information. Counsel agreed that if liability is established the quantum of damages may be the subject of reference to the master.

2 At the opening of trial, the defendant elected to abandon its counter-claim.

Overview

3 Both TNT and the defendants supply laundry machines to apartment buildings, paying the building owners a leasing fee for the laundry room and keeping the revenues generated by the use of the machines.

4 There were discussions between the parties to explore the purchase by the defendant of TNT's operations. In the course of those discussions, TNT provided the defendant with a list of its leases, together with the dates of expiration and the number of machines placed under each lease. Names of the building owners and the locations of the buildings in which the machines were placed were not

provided.

5 Subsequently, the defendant entered into a contract with one of the owners ("Goldlist") whose leases were shown on the list as given to the defendant, those leases having expired.

6 This lawsuit followed.

The Law

7 The law pertaining to the use of confidential information is usefully summarized in Lac Minerals Ltd. v. International Corona Resources Ltd. [1989] 2 S.C.R. 574.

8 The question is what was the defendant entitled to do with the confidential information it received? Any use made of the information other than that permitted would constitute a breach of the duty of confidentiality. It is for the defendant to show that the use to which it put the information was not prohibited.

Issues

9 Four issues arise:

1. Was there a duty imposed upon the defendant not to use the information it received to compete with TNT? It is conceded by counsel for the defendant that such a duty existed.
2. Was there a duty imposed on the defendant not to disclose the existence of the negotiations?
3. Was there a breach of the duty in paragraph 1?
4. Was there a breach of the duty in paragraph 2?

Initial Analysis

10 It will be convenient to dispose immediately of issues 2 and 4. For the reasons which follow I find no such duty existed.

11 The only suggestion of any agreement was in the evidence of Mr. Tanenbaum. He was the ultimate negotiator for TNT. He testified that he told Mr. Birnbaum, a salesperson with the defendant, that there was to be no discussion with anyone that negotiations were taking place. Mr. Birnbaum died two years ago. He was a business acquaintance of Mr. Tanenbaum's and apparently facilitated the introduction of the plaintiff to the defendant. Mr. Tanenbaum negotiated not with Mr. Birnbaum but with the president of the defendant, Mr. Adamson and with the vice-president, Mr. Dainty. Mr. Birnbaum was not present during negotiations. Mr. Tanenbaum was quite unable to say that he ever mentioned to Mr. Adamson or Mr. Dainty that there was to be no disclosure of the fact of negotiations during any of the perhaps seven or eight meetings that took place. Mr. Tanenbaum made no mention of this alleged discussion with Mr. Birnbaum on his examination for discovery,

when he was asked to give details of all discussions he had regarding all the issues of confidentiality.

12 There was no reference to any agreement of non-disclosure in the letter Mr. Tanenbaum instructed his solicitors to write to the defendant immediately prior to instituting these proceedings.

13 No breach of any such duty was originally pleaded in the claim.

14 It is inconceivable that if Mr. Tanenbaum wanted the fact of negotiations to be confidential, he would fail to demand an undertaking from those with whom he was negotiating. There were, I heard, very few players in this business. People in the industry knew pretty much what was happening with their competitors. Mr. Tanenbaum met openly on at least five occasions with Mr. Dainty at the defendant's office where the defendants sales force was housed which does not suggest to me that he entertained any concern for, or expectation of, confidentiality of the fact of negotiations.

Remaining Issues

15 To dispose of the remaining issues it is necessary to review some of the facts as I have found them to be.

16 Beginning in 1992, general discussions took place between the parties to explore any interest the defendant might have in buying TNT. The discussions went nowhere. They were renewed briefly in 1996, with no result.

17 In November 1997, Mr. Zolty and Mr. Tanenbaum, two of TNT's principals, met with Mr. Adamson, the defendant's president. They advised Mr. Adamson that they were thinking of selling TNT to a competitor in the United States but that the defendant could purchase TNT for $12 million. Mr. Adamson left the meeting somewhat bemused and of the opinion that $12 million was simply an absurd price. He did nothing further.

18 Sometime later Mr. Tanenbaum telephoned Mr. Adamson. He said he knew $12 million was a ridiculous price and suggested that he and Mr. Tanenbaum meet with Mr. Adamson without Mr. Zolty being present. Mr. Adamson agreed.

19 For some years, the defendant had been acquiring new businesses at the rate of about one a year. Acquisitions were Mr. Adamson's responsibility and he spent about 50% of his time on them.

20 He sent Mr. Tanenbaum the defendant's standard offer to sell and explained the process that he customarily followed in acquiring new businesses. He said in his experience the process would take about 4-6 weeks to complete.

21 In order that he might come up with the price to be paid, he asked Mr. Tanenbaum for a list of TNT's leases with the numbers of machines and the expiry dates for each. He told Mr. Tanenbaum

that he did not require the names of the landlords or the location of the buildings. He gave what he described as the customary undertaking in situations of prospective purchase; that the information received would not be used to compete, but only in the negotiations to enable the defendant to come up with a price that it was prepared to pay. Otherwise, during the negotiations as between the plaintiff and the defendant it was to be business as usual, that is they would continue to compete against each other.

22 Adamson received the requested list from Tanenbaum on April 3, 1998. (See Exhibit 1-Tab 18). He had the list keyed into a spreadsheet so he could analyze it by order of lease expiry. Subsequently he asked Mr. Tanenbaum to group the leases as to landlords. Mr. Tanenbaum did that on a second copy of Tab 18.

23 Mr. Adamson was concerned that a lease for some 515 machines was soon to expire and it had not yet been renewed. If it was not renewed the lease had no value to the defendant.

24 On May 1, 1998 Adamson had a telephone conversation with the defendant's regional sales manager for Toronto, Rod Wallace. He asked Wallace what he knew of TNT and its operations. Wallace told him that he believed that TNT had machines placed with four landlords in Toronto and he named them, giving Mr. Adamson as well his estimate of the numbers of machines that TNT had with each landlord. Wallace knew that TNT had leases with Goldlist but he vastly underestimated the number of machines covered in the leases. Wallace also gave Adamson his impression of TNT's relationship with landlords.

25 With the information Adamson received from Mr. Wallace, he made assumptions as to the identity of the landlords on the list at Tab 18 of Exhibit 1. He guessed wrongly as to the landlord which was Goldlist. He then worked out the numbers, arriving at a figure that he would be prepared to pay to TNT for the purchase of its business.

26 Adamson met with Tanenbaum on May 6, 1998. He outlined the methodology he had employed in coming up with his suggested price, breaking it out to $1,750,000 for the existing lease contracts and $875,000 for the contracts pertaining to the 515 machines if those leases were renewed. He was prepared to pay nothing for the leases that had expired.

27 Mr. Tanenbaum wanted more money but regardless, he was in no position to deal because TNT had yet to firm up the leases that were of concern to Mr. Adamson. Mr. Tanenbaum expressed confidence that the leases would be renewed.

28 As a result, nothing was resolved at this meeting and no further meetings were scheduled. Mr. Adamson understood that Mr. Tanenbaum would come back to the table if he obtained the renewals he sought. In Mr. Adamson's words, "Everything went into the drawer" awaiting a response from TNT.

29 During this period of time, Ms. Pat Arnett, Goldlist's regional manager for southwestern

Ontario, contacted the defendant's sales manager. In early 1998, Goldlist purchased a building on Dundas Street in Mississauga to which the defendant was supplying machines pursuant to a lease. She was unhappy with the terms of the lease and wanted to know if the defendant was prepared to re-negotiate it. The defendant agreed and submitted a proposal in February 1998. A follow-up proposal submitted March 13, 1998 was accepted. The agreement provided for a per suite payment of $14.75 to be made by the defendant to Goldlist in return for the revenues to be generated by the laundry machines on the property. This was the defendant's first lease with Goldlist.

30 Arnett was pleased with the revenues that were generated for Goldlist under the new lease at the Dundas building. Because of that, she asked the defendant for proposals for other Goldlist properties in her region. After reviewing those proposals she and her supervisor requested that the defendant submit proposals to include Goldlist's Toronto properties. Arnett made it clear to the defendant that Goldlist expected at least the benchmark level of $14.75 per suite which had been established at the outset of the year for the Dundas property.

31 Negotiations for the Mississauga properties appeared to have begun in October 1998, followed in November by negotiations for the Toronto properties. Throughout the negotiations, Arnett and her superior dealt with Rod Wallace, the defendant's Toronto regional sales manager and Randy Kamula, an account manager.

32 Meanwhile, in October 1998, Mr. Tanenbaum telephoned Ross Dainty, a vice-president of the defendant with a request that the question of the sale of TNT to the defendant be revisited. Mr. Dainty had been with Mr. Adamson at the meetings with Mr. Tanenbaum in April and May. Dainty spoke to Mr. Adamson who had apparently formed the opinion that nothing was going to result from the negotiations with Mr. Tanenbaum. Adamson agreed however that Dainty could meet with Tanenbaum and Dainty did so in November and December 1998. During those meetings, Mr. Adamson's originally-presented figures were reviewed. From the defendant's perspective nothing had changed and accordingly there was still no agreement as to price. On December 16, 1998, Mr. Tanenbaum telephoned Mr. Adamson to tell him that a competitor would pay TNT 3.4 million dollars for its leases. On December 18, 1998 Mr. Adamson re-wroked his earlier calculations to see if such a figure was warranted and concluded that no sane person would offer that amount [See Tabs 40 & 41, Exhibit 1]. At this time, and probably from Mr. Tanenbaum, Mr. Adamson learned that the landlord with 515 machines was Goldlist, not New Style, as he previously believed. Mr. Adamson played no further role in the matter.

33 The negotiations between Ms. Arnett and Wallace/Kamula continued. Progress was made. On February 17, 1999 Wallace reported to his superior, Mr. Dainty, that in his opinion there was a reasonable prospect that Goldlist would be obtained as a customer. Dainty, who was aware of TNT's renewed interest in selling to defendant, but who until then knew nothing of Wallace's negotiations with Arnett, told Wallace to stop his report immediately. He advised Wallace of the TNT negotiations and instructed him to keep Dainty out of any continuing negotiations with Goldlist. Dainty established a Chinese wall to keep Wallace and the members of the sale force isolated from

any continuing negotiations with TNT.

34 I interject here to comment that at the time of trial, Mr. Dainty no longer worked for the defendant. I found him to be a reliable, credible witness who gave his evidence carefully and frankly. I accept his evidence that he was aware of the information Mr. Tanenbaum had provided to Mr. Adamson but that he never told anyone on the sales force about it, nor did he make any use of the information himself. The pricing for TNT had been done by Mr. Adamson and he had nothing to do with that.

35 Mr. Dainty then set up a meeting with Mr. Tanenbaum in early March 1999. At the meeting, Mr. Dainty advised Mr. Tanenbaum that the defendant was bidding for Goldlist buildings, along with what he understood were three or four other suppliers. He advised Mr. Tanenbaum that he had been made aware that there was apparent dissatisfaction on Goldlist's part with TNT's services and recommended that Mr. Tanenbaum meet quickly with TNT to address the problem. He also advised Mr. Tanenbaum of the creation of the Chinese wall.

36 I accept Mr. Dainty's evidence that Tanenbaum made no comment and left the meeting. A second meeting had been scheduled but was cancelled by Mr. Tanenbaum. A solicitor's letter and these proceedings, followed quickly thereafter.

37 The negotiations between Arnett and Wallace/Kamula continued. I accept Arnett's evidence that she insisted that the defendant would have to improve its $14.75 per suite benchmark if it wished to be the successful bidder. Ultimately, in April 1999, Wallace agreed to increase the bid to $14.90 per suite.

38 Arnett thereafter reported to Goldlist's president recommending acceptance of the defendant's bid over the other offers received, including one from TNT. She understood that a decision in favour of the defendant was to be made but before that was done she heard from Kamula that the defendant was going to buy TNT. Kamula had apparently heard a rumour to that effect from a competitor. Ms. Arnett was upset at learning the information conveyed by Kamula, believing that it would throw suspicion on her recommendation. I accept her evidence that the information she received from Kamula played no part in Goldlist's subsequent decision to accept the defendant's bid.

Analysis

39 Against those findings of fact, I must consider whether the defendant used the confidential information it received for any purpose other than to assist it in arriving at a price it would pay for TNT.

40 The plaintiff alleges that in the words of Mr. Tanenbaum, the defendant "was using our information against us" to get a contract with Goldlist. Mr. Tanenbaum added that, "I can't tell you what happened. I believe they used the information, although I don't have any direct evidence that they did."

41 As I have said it is not for the plaintiff to lead direct evidence of a breach of the obligation of confidentiality; rather it is for the defendant to show that there was no improper use made of the information.

42 The plaintiff's position is that the very act of Mr. Adamson in attempting to put names to the groupings of the landlords provided to him, was an improper use leading to an inference that the information was used to obtain the Goldlist contract. The plaintiff relies heavily upon the statement made by Mr. Dainty on his examination for discovery and again at trial that in his opinion it would be inappropriate to attempt to identify the landlords in the list Mr. Tanenbaum provided.

43 Mr. Dainty's responsibilities were in sales. He was never involved in acquisitions and had nothing to do with pricing TNT's business. As a result, obviously, he was not involved in discussions about the use to which the information could be put.

44 I am unable to accept Mr. Dainty's opinion about the propriety of guestimating the identity of the landlords. The evidence before me was that in the tightly knit community in which the parties operated, it was generally known who was doing what with whom. Under those circumstances, it seems to me that a perspective purchaser such as the defendant would inevitably attempt to ascertain the likely landlords to enable an assessment to be made of the worth of the business under consideration. In my opinion, in doing that and nothing more (which I find is precisely what Mr. Adamson did) no breach of the obligation of confidentiality occurred.

45 I am unable to draw the inference requested of me.

46 In my opinion the real difficulty confronting the plaintiff is the evidence of Ms. Arnett. The minimum price Goldlist would accept for the contracts which the defendant ultimately obtained was set in February 1998 in the re-negotiation of the defendant's existing contract for the Dundas Mississauga property purchased by Goldlist. The confidential information was not provided to Mr. Adamson until April 1998.

47 Throughout the negotiations in late 1998 and early 1999 carried on by Ms. Arnett and Wallace/Kamula, the focus was upon increasing the price the defendant had already agreed to pay for Dundas. That is what drove the process, together with Arnett's unhappiness with Goldlist's existing suppliers (TNT), not the information provided to Adamson.

48 Further I accept the evidence of Adamson and Dainty that none of the information given to Adamson and subsequently seen by Dainty was conveyed to Wallace or Kamula or any member of the sales staff.

Conclusions

49 The defendant has satisfied me that it did not use the information provided for any purpose other than pricing for a buyout.

50 Accordingly the action must be dismissed with costs to the defendant.

51 The counter-claim is dismissed with costs to the plaintiff, defendant by counter-claim.

52 If counsel cannot agree on costs they may arrange for a costs hearing with the trial coordinator, Ms. Whittle.

JENNINGS J.

cp/e/nc/qlrme