See paras. 12, 34-36, 40

Case Name:

Booty Camp Fitness Inc. v. Jackson

RE: Booty Camp Fitness Inc., Plaintiff/Moving Party, and Laura Jackson, Amanda Quinn and Lajq Enterprises Inc., Defendants

[2009] O.J. No. 3083

61 B.L.R. (4th) 79

2009 CarswellOnt 4354

179 A.C.W.S. (3d) 681

Court File No. CV-09-00375199

Ontario Superior Court of Justice

J.A. Thorburn J.

Heard: April 9 and 28 and May 20, 2009.
Judgment: July 16, 2009.

(56 paras.)

Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Serious issue to be tried or strong prima facie case -- Prohibitive injunctions -- Motion by plaintiff Booty Camp Fitness Inc. seeking an interlocutory injunction stopping the defendants, its former instructors, from using or disclosing allegedly confidential information and from marketing and operating their own boot camp program, dismissed -- All of the information in question was publicly available and none of it was complex or difficult to uncover -- There was no serious issue to be tried regarding the protection of confidential information -- The claim for passing off was rejected.

Employment law -- Implied duties of employee -- Confidential information and privacy -- Motion by plaintiff Booty Camp Fitness Inc. seeking an interlocutory injunction stopping the defendants, its former instructors, from using or disclosing allegedly confidential information and from marketing and operating their own boot camp program, dismissed -- All of the information in question was publicly available and none of it was complex or difficult to uncover -- There was no serious issue

to be tried regarding the protection of confidential information -- The claim for passing off was rejected.

Intellectual property -- Trade-marks -- Passing off and unfair competition -- Get up -- Motion by plaintiff Booty Camp Fitness Inc. seeking an interlocutory injunction stopping the defendants, its former instructors, from using or disclosing allegedly confidential information and from marketing and operating their own boot camp program, dismissed -- There was no serious issue to be tried regarding the protection of confidential information -- The claim for passing off failed as the plaintiff failed to show any of the defendants' materials were likely to lead the public to believe the goods and services were those associated with or authorized by the plaintiff or that they would suffer damage arising therefrom.

Motion by plaintiff Booty Camp Fitness Inc. for an interlocutory injunction stopping the defendants, its former licensees and instructors, from using or disclosing allegedly confidential information and from marketing or operating the defendants' G.I. Jane Bootcamp Program pending the final determination of the action. The defendants had terminated their agreements with the plaintiff, and in the Fall of 2008, they began marketing their own women's only "boot camp" fitness program in direct competition with the plaintiff. The plaintiff claimed that detailed practical information was imparted to the defendants in confidence regarding how to market and operate a successful women's only boot camp fitness program and that such information was not otherwise available from one source. The plaintiff acknowledged on cross-examination that the concept of a fitness boot camp and the use of the words "boot camp" in conjunction with a women's fitness program were not novel concepts in the Toronto area. The issues were: (a) whether there was a serious issue to be tried, including (i) whether there was a breach of confidence, (ii) whether the defendants breached their agreement with the plaintiff, and (iii) whether the defendants passed off their wares and services as those of the plaintiff; (b) whether the plaintiff would be irreparably harmed if injunctive relief was not granted; and (c) whether the balance of convenience favoured the granting of injunctive relief.

HELD: Motion dismissed with partial indemnity costs to the respondents. The defendants signed a non-disclosure agreement, and although the instructor handbook and sheet were not marked confidential, it was arguable they were "marketing plans" within the meaning of the non-disclosure agreement and were disclosed in confidence. However, all of the information in question was publicly available and none of it was complex or difficult to uncover. For example, the use of outdoor posters was common, as was the use of the Internet to market women's fitness programs. Obtaining city permits, insurance and waivers was public information. While this information was found in one place and was collated by the plaintiff, there was little or no skill and ingenuity added to make the compilation any more than the sum of its parts. The compilation of this information would not give the defendants a significant head start as all of the information was easily obtained. Therefore, there was no serious issue to be tried regarding the protection of confidential information. The claim for passing off was rejected, as the plaintiff failed to show any of the defendants' materials led to or were likely to lead the public to believe the goods and services were

those associated with or authorized by the plaintiff or that they had suffered or would suffer damage arising therefrom. The plaintiff had not established irreparable harm or that the balance of convenience lay in its favour.

Counsel:

John Simpson, for the Plaintiff/Moving Party.

Robert W. Wilson, for the Defendants/Responding Parties.

ENDORSEMENT

J.A. THORBURN J.:--

PART I: RELIEF SOUGHT

1 The Plaintiff, Booty Camp Fitness Inc. owns and operates a series of "boot camp" style women's fitness programs designed by a woman for women. Booty Camp licenses instructors to market and operate the Booty Camp program as licensees within a designated geographic area.

2 The Defendants Laura Jackson and Amanda Quinn were licensees and instructors with Booty Camp. In June and August of 2008 Booty Camp provided them with revised terms of license which they did not accept. Instead, they terminated their agreements with Booty Camp. In the Fall of 2008, they began marketing their own women's only "boot camp" fitness program in direct competition with Booty Camp.

3 Booty Camp claims that detailed practical information was imparted to the Defendants in confidence regarding how to market and operate a successful women's only boot camp fitness program and that such information is not otherwise available from one source.

4 Booty Camp seeks an interlocutory injunction to stop the Defendants from using or disclosing information Booty Camp claims is confidential information and from marketing or operating the Defendants' G.I. Jane Bootcamp Program pending the final determination of this action.

PART II: BACKGROUND FACTS Terms of the Agreement

5 The Booty Camp concept was developed in 2007 by Samantha Richards and her husband. Samantha Richards operated her business as a sole proprietorship under the trade mark Bikini Booty Camp. In September 2008, she incorporated the business under the name Booty Camp Fitness Inc.

6 The Defendant Amanda Quinn signed a Non-Disclosure Agreement with Bikini Booty Camp on February 19, 2008 and the Defendant Laura Jackson did so on February 25, 2008. Article 1 of the Non-Disclosure Agreement provides as follows:

> Owner proposes to disclose certain of its confidential and proprietary information to Recipient. Confidential Information shall include all data, materials, products, technology, computer programs, specifications, manuals, business plans, software, marketing plans, financial information, and other information disclosed or submitted, orally or in writing, or by any other media, to Recipient by Owner. Confidential Information disclosed orally shall be identified as such within five business days of disclosure. Nothing herein shall require Owner to disclose any of its information.

7 Article 5 provides that those who sign the NDA may not use this information to develop "a competing or similar product" for two years from the date they last receive Confidential Information from Bikini Booty Camp and that in the event of a breach, Bikini Booty Camp may obtain equitable and other relief.

8 Both Quinn and Jackson signed the Bikini Booty Camp License Agreement on February 25, 2008. The License Agreement provides that Bikini Booty Camp owns certain "trade secrets" defined as know-how, inventions or discoveries.

9 The Defendants were provided with a Bikini Booty Camp Instructors' Manual and a one page licensee presentation package about the Booty Camp business model. Neither document is marked "Confidential." In addition, there were three meetings with the Plaintiff: at the first meeting the Non-Disclosure Agreement was signed; the second consisted of an exercise session at the Plaintiff's home, and the third was a meeting at a trade show. The Plaintiff agrees that no confidential information was disclosed at either the second or third meeting.

The Information Claimed to be Confidential

10 Booty Camp maintains that its confidential information consists of the following:

(a) the use of outdoor posters featuring military-type faces and camouflage on clothing to market the boot camp fitness program,
(b) use of the internet (such as Kijiji and Craigslist) and word of mouth to market a boot camp program;
(c) the fact that such fitness programs should be located in public parks near public transit systems;
(d) how to obtain city permits to operate programs in parks;
(e) how to obtain insurance, safety and waivers for outdoor women's fitness programs, by referring instructors to a third party website;
(f) how to arrange and conduct fitness assessments;

(g) specific means of staying in contact with customers such as the use of recipes and nutritional tips sent over the internet, a telephone hotline, online registration, group discounts, motivational challenges and prizes; and

(h) a business model that recruits high achieving participants to become instructors and future licensees.

Booty Camp further notes that the Defendants require their own licensees to agree not to use the information obtained about the program to launch a competing outdoor fitness program.

Agreed Facts

11 The Plaintiff acknowledged on cross-examination that the concept of a fitness boot camp and use of the words "boot camp" in conjunction with a women's fitness program are not novel concepts in the Toronto area.[1]

12 None of the individual elements set out at paragraphs 10 (a) to (h) is confidential information unavailable from a public source or that is unique to the Plaintiff.

13 The Plaintiff's advertising and promotional poster is different from the posters created by the Defendants. The Plaintiff's poster is pink while the Defendants' is yellow; the women depicted on the Plaintiff's poster are in pink camouflage T-shirts and ball caps. The only camouflage worn in the Defendants' poster is a hair band worn by one of the three women and the camouflage worn is not pink. The look is not strikingly similar.

14 The logos, general graphic design and website designs are distinctly different and the Plaintiff has a cancellation hotline which the Defendants do not.

15 Both boot camps offer online registration, group discounts, nutritional and fitness tips to participants by email and both motivate participants through challenges and prizes.

PART III: THE PARTIES' POSITIONS The Plaintiff's Position

16 Booty Camp claims that the above information was imparted in confidence and should be protected by the courts because use of this package of information involved skill and effort and gave the Defendants a head start over others who have to seek out and compile it themselves.

17 Booty Camp claims the Defendants used this information as a springboard to create their own competing boot camp fitness programs in breach of the Non-Disclosure Agreement the Defendants signed and their duty of confidence.

18 Booty Camp claims the information to be protected is found in a one page licensee presentation package about the Booty Camp business model entitled Licensee Second Interview, the Bikini Booty Camp Instructor Handbook and information derived from oral discussions.

19 Booty Camp also claims that the Defendants' use of key distinctive elements from the Booty Camp program is leading Booty Camp's existing and prospective participants to believe that Booty Camp operates the Defendants' programs.

The Defendants' Position

20 The Defendants response is as follows:

a) None of the information identified above by Booty Camp is confidential information. It is all in the public domain and/or is part of the general skill and knowledge of the Defendants who have education diplomas and acquired knowledge and skill in marketing and have worked as fitness instructors;
b) Booty Camp did not acquire any rights from the sole proprietorship other than the right to the trademark Booty Camp, until March 2009. As such Booty Camp has no standing to assert rights to proprietary information belonging to the sole proprietorship; and
c) Equitable relief is not available because the parties restricted their rights to those set out in the written Non-Disclosure Agreement and License Agreement.

21 The Defendants received the Booty Camp Instructor Handbook, a 14 page handbook that outlines how to pick locations, licensee responsibilities, issues to contend with such as insurance, safety and waivers, communication with clients, dress codes and other issues.[2] However, the Defendants say this information is all in the public domain.

22 The Defendants both have experience and training in marketing. Ms. Jackson has a diploma in business administration and a major in marketing and has since worked as a marketing manager. Ms. Quinn has a diploma in small business management and a diploma in event management.

23 The Defendants contend that the process of using outdoor venues near public transportation, getting insurance and permits for the program and marketing ideas like group discounts, use of technology to market, and use of posters to market, are just common sense. At best, information such as choosing park locations, obtaining permits and insurance and conducting fitness assessments were all things the Booty Camp instructors were expected to do and thus became part of their general skill and knowledge acquired as Booty Camp instructors.

PART IV: THE ISSUES

24 On a motion for injunctive relief, a preliminary assessment of the merits of the case is required. An extensive review is necessary only where the result of the motion will have the practical effect of putting an end to the action because the harm will have been already caused to the losing party.[3] Secondly, the moving party must establish that it would suffer irreparable harm which

is not compensable in damages. Irreparable harm must be established because, except in these highly unusual circumstances, judgment cannot be obtained prior to trial and execution cannot be obtained prior to judgment.[4] Finally, the court must make an assessment as to which of the two parties would suffer greater harm from the grant or refusal of injunctive relief prior to trial.[5]

25 In this case therefore, the following issues must be determined:

a) Is there a serious issue or issues to be tried?

(i) Was there a breach of confidence?
(ii) Did the Defendants breach their agreement with the Plaintiff?
(iii) Did the Defendants pass off their wares and services as those of the Plaintiff?

b) Will the moving party be irreparably harmed if injunctive relief is not granted?
c) Does the balance of convenience favour the granting of injunctive relief?

PART V: ANALYSIS OF THE LAW AND CONCLUSIONS

A. Serious Issue to be Tried

Is the Information in Question Confidential Information?

26 The question is whether the information over which the Plaintiff claims protection was imparted in confidence and if so, whether it represents confidential information worthy of protection.

27 The Defendants signed a non-disclosure agreement and as such, notwithstanding that the Instructor handbook and sheet were not marked confidential, it is arguable that they are "marketing plans" within the meaning of the Non-Disclosure Agreement and that they were disclosed in confidence. The information in question must therefore be examined to determine whether it is the type of information the courts will protect as "confidential information."

28 In *Future Shop v. North-West Atlantic*,[6] Parrett J. quoted from the leading case, *Faccenda Chicken*[7] which identified three types of information:

> First there is information which, because of its trivial character or its easy accessibility from public sources of information cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his services or afterwards to anyone he pleases, even his master's competitor....

> Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master ...[8]
>
> Third, however, there are ... specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's.

29 However, in *Coco v. A. N. Clark (Engineers) Ltd.*,[9] Megarry J. held that:

> Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of skill and ingenuity of the human brain.

In such case, the end product must not be generally known to the public.[10]

30 A person who has obtained valuable information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication, even when all the features have been published or can be ascertained by actual inspection by any member of the public.[11]

31 The case of *Seager v. Copydex Ltd.*[12] provides a useful illustration of the concept of the use of information imparted in confidence to get a head start. Lord Denning states at pages 931-32:

> When information is mixed, being partly public and partly private, then the recipient must take special care to use only the material which is in the public domain. He should go to the public source and get it: or, at any rate, not be in a better position than if he had gone to the public source. He should not get a head start over others by using the information which he received in confidence. At any rate, he should not get a start without paying for it.

32 In Canada, the Supreme Court of Canada has also adopted the "springboard principle." In *LAC Minerals*[13] Sopinka J. described the springboard principle as follows:

> I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.[14]

33 The Plaintiff claims that the confidential information it provided to the Defendants gave them a ready-made business platform from which to launch their program. The Plaintiff says that, but for the appropriation of its confidential information, the Defendants would have been unable to begin marketing and operating a directly competing program in the Fall of 2008.[15]

34 The Defendants say this information was never disclosed in confidence and in any event, is publicly available. Even when considered as a whole, the information is easily accessible. Moreover, it is part of the general knowledge and skill acquired by the Defendants in obtaining their marketing diplomas and through their experience as fitness instructors with Booty Camp.

35 In order to invoke the protection of the court on the basis of the "springboard principle" the moving party must satisfy the court that the information, assuming it was disclosed in confidence, is not easily accessible from public sources and that the new compilation of confidential information as a whole was the product of the Plaintiff's skill and ingenuity. On this basis, the motion fails.

36 All of the information in question is publicly available and none of it is complex or difficult to uncover.

37 The use of outdoor posters itself is common to many businesses and the posters themselves are distinctly different from the Booty Camp posters. Similarly, the Plaintiff conceded in oral submissions that the use of the internet to market is common to most women's fitness programs.

38 Obtaining city permits, insurance, and waivers is public information and in any event, was information the Defendants used as Booty Camp instructors as it was their responsibility to obtain these items. As such it became part of their general skill and knowledge.

39 Finally, staying in contact with customers using recipes and nutritional tips is common in this and many other industries.

40 While this information was found in one place and was collated by the Plaintiff, in my view there was little or no skill and ingenuity added to make the compilation any more than the sum of its parts. I do not believe that the compilation of this information would give the Defendants a

significant head start as all of the information is easily obtained. Very little detail was provided regarding insurance, waivers, or other aspects of this business, and the marketing information was basic.

41 For the above reasons, there is no serious issue to be tried regarding the protection of confidential information.

Is there Passing-Off?

42 Passing-off occurs where the Defendant names, packages, or markets its goods or services in a manner likely to mislead the public into the false belief that they are the goods or services of the Plaintiff, or that they are approved, authorized, or endorsed by the Plaintiff.[16]

43 In order to succeed in a passing-off action, the Plaintiff must establish:

a) the existence of goodwill or reputation in the goods or services in the mind of the public, such that the name or get-up is identified with the Plaintiff's goods or services;
b) a misrepresentation by the Defendant, whether or not intentional, leading or likely to lead the public to believe that the goods or services are those associated with or authorized by the Plaintiff; and
c) actual or potential damage to the Plaintiff.[17]

44 Goodwill in the context of passing-off has been described as "the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in customers."[18]

45 The test to be applied in determining whether goodwill exists in a particular trader or product is not the reaction of an informed observer but the reaction of the "unwary purchaser" with "an imperfect recollection."[19]

46 The Plaintiff states that it has acquired a valuable reputation for running outdoor fitness programs for women using a 'boot camp' style and that the Defendants' use of distinctive elements of their marketing and operational style is likely to lead existing and prospective customers to believe that the Plaintiff operates the programs.

47 There is very little similarity between the uniforms, website, posters and other information offered to the public by the Plaintiff and the uniforms, website, posters and other information offered to the public by the Defendants. Furthermore, similarities such as group discounts, incentives offered to clients and choosing outdoor venues close to public transportation and parks are common to many outdoor fitness organizations and the parties agree they are not unique to the Plaintiff. There is no evidence that any Booty Camp customers were confused, believing the Defendants' operation to be that of Booty Camp.

48 The Plaintiff has therefore failed to demonstrate that any of the Defendants' materials, whether or not intentional, lead or are likely to lead the public to believe that the goods or services are those associated with or authorized by the Plaintiff or that they have suffered or will suffer damage arising therefrom.[20]

B. Irreparable Harm

49 In this case, the Plaintiff's contention of harm is generally based on the "head start" the Defendants have obtained by using their information and the existence or probability of confusion in the market and the loss through diffusion and other such undefined concepts of its goodwill.

50 Irreparable refers to the nature of the harm rather than its magnitude.[21]

51 No evidence was adduced as to the financial situation of the corporate appellants to assess the impact that the award of damages would have on their viability. At best, the assertions made by the affiant are speculative. Moreover, there is no objective and direct evidence of confusion or likelihood of confusion.[22]

52 The only evidence of harm is that of the Plaintiff's principal affiant, who largely repeats the allegations of loss contained in the Statement of Claim. The Plaintiff has put forward no evidence as to the strength of its brand or its public presence.

53 To satisfy the test for irreparable harm, there must be specific evidence that links the misuse of confidential information and or confusion to a loss that is not compensable by damages. There is no such link or loss established on this motion.

C. Balance of Convenience

54 There is no evidence that the Plaintiff has lost business in any of its Ontario market areas as a result of the Defendants' activities.

PART VI: CONCLUSION

55 For the reasons set out above, the motion for interlocutory injunctive relief is dismissed with partial indemnity costs payable to the responding party. As a result, I need not address the issues raised by the Defendants that Booty Camp has no standing to assert rights to proprietary information belonging to the sole proprietorship and that equitable relief is not available to the Plaintiff because the parties restricted their rights to those set out in the written Non-Disclosure Agreement and License Agreement.

56 If the parties cannot agree on the quantum of costs, submissions on costs no more than three pages in length along with a Bill of Costs may be provided to me for consideration within the next 14 days.

J.A. THORBURN J.

cp/e/qlafr/qlmxb/qlaxw/qlced/qlmlt

1 Cross-examination of Samantha Richards, p. 33.

2 Cross-examination of Samantha Richards, p. 59.

3 *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 333 [*R.J.R.*]; *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 at 1307.

4 *R.J.R.*, *supra* note 3; and *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 at 54 (F.C.A.).

5 *R.J.R.*, *supra* note 3 at 334.

6 2 C.P.C. (5th) 358, [2000] B.C.J. 2659 at para. 59 (B.C.S.C.).

7 *Faccenda Chicken Ltd. v. Fowler*, [1985] 1 All. E.R. 724 (Ch. Div.), aff'd [1986] 1 All. E.R. 617 at 731 (C.A.).

8 See also *Stevenson Jordan and Harrison Ltd. v. Macdonald and Evans*, [1952] 1 T.L.R. 101 at 104 (C.A.).

9 [1969] R.P.C. 41 at 47 (Ch. Div.).

10 *Saltman Engineering Co. v. Campbell Engineering Co.*, [1948] 65 R.P.C. 203 at 215 (C.A.); *CPC International v. Seaforth Creamery Inc*. (1996), 69 C.P.R. (3d) 297 at 304 (Ont. Ct. Gen. Div.)..

11 *Terrapin Limited et al. v. Tecton Structures Limited*, [1967] B.C.J. No. 102 (B.C.S.C.), Roxburgh J.

12 [1967] 2 All E.R. 415.

13 *LAC Minerals Limited v. International Corona Resources Limited* (1989), 61 D.L.R. (4th) 14 at 69-70 (S.C.C.), Sopinka J.

14 *Cadbury Schweppes Inc. v. FBI Foods Ltd*., [1999] 1 S.C.R. 142 at para. 62. See also *Ken Graham Consumer Products Ltd. v. Sunbeam Corp. (Canada) Ltd*., [1989] O.J. No. 387

(H.C.J.) where the court protected information although it was partly available to the public, because the confidant receiving the information was precluded from sharing it, and because it enjoyed a "long start" over the public by misusing the information.

15 Plaintiff's Factum, para. 43.

16 Frank Zaid, *Franchise Law* (Toronto: Irwin Law, 2005) at 99.

17 *Ciba-Geigy Canada Ltd. v. Apotex Inc*., [1992] 3 S.C.R. 120 [*Ciba-Geigy*]; *Kirkbi AG and Lego Canada Inc. v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302 [*Kirkbi AG*].

18 *Inland Revenue Commissioner v. Muller & Co.'s Margarine Ltd.*, [1901] A.C. 217 at 223-24.

19 See *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15 (H.L.); *241 Pizza Ltd. v. Panzerotti & Pizza Ltd*., [1992] O.J. No. 3041 (Gen. Div.).

20 *Ciba-Geigy*, *supra* note 17; *Kirkbi AG*, *supra* note 17.

21 *Centre Ice (supra*) (1994), 53 CPR (3d) 34 (F.C.A.) at p. 52-54.

22 *ITV Technologies, Inc. v. WIC Television Ltd.* (2005), 38 C.P.R. (4th) 481 (F.C.A.).

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