See para. 74

Case Name:

Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.

Between
Expert Travel Financial Security (E.T.F.S.) Inc. and Special Risks International Accident & Health Underwriting Managers Ltd., respondents (plaintiffs),
and
BMS Harris & Dixon Insurance Brokers Limited and BMS Specialty Risks Underwriting Managers Ltd., appellants (defendants)

[2005] B.C.J. No. 3

2005 BCCA 5

249 D.L.R. (4th) 367

[2005] 4 W.W.R. 434

207 B.C.A.C. 30

36 B.C.L.R. (4th) 254

17 C.C.L.I. (4th) 20

5 C.P.C. (6th) 291

[2005] I.L.R. I-4382

135 A.C.W.S. (3d) 1135

Vancouver Registry No. CA031730

British Columbia Court of Appeal
Vancouver, British Columbia

Southin, Levine and Smith JJ.A.

Heard: October 7, 2004.
Judgment: January 6, 2005.

(82 paras.)

Civil procedure -- Appeals -- Injunctions -- Interlocutory or interim injunctions -- Stay or revocation of interim injunctions -- Considerations affecting grant -- Sufficiency of damages in lieu of injunctions -- Tort law -- Negligence -- Fiduciary duty -- Invasion of privacy -- Breach of confidence.

Appeal by the defendants, BMS Harris & Dixon Insurance Brokers (BMS (London)) and BMS Specialty Risks Underwriting Managers (BMS (Vancouver)), of an interlocutory injunction preventing them from soliciting business from the customers of the plaintiffs, Expert Travel Financial Security and Special Risks International Accident & Health Underwriting Managers (SRI). In the action, the plaintiffs claimed a permanent injunction and accounting of profits for breach of fiduciary duty and breach of confidence. SRI was a wholesale insurance broker authorized until 2003 to sell insurance for Lloyd's of London. The plaintiffs alleged that BMS (London) was their agent for the purpose of dealing with Lloyd's, and that it passed on confidential information to BMS (Vancouver) which was in direct competition with SRI. BMS (London) denied any misuse of information. The injunction had been in place for ten months.

HELD: Appeal allowed. The injunction was dissolved. There was a serious question to be tried. Although fiduciary obligations were rarely found in commercial relationships, the allegation of a fiduciary obligation crossed the frivolous or vexatious threshold. The plaintiffs were not in a position to exercise bargaining power. They had to disclose confidential information to the defendants if they wished to continue to do business with Lloyd's. The chambers judge was entitled to rely on circumstantial evidence, including that BMS (Vancouver) was competing directly with SRI, of misuse of information. However, the interlocutory injunction exceeded what was necessary to do justice in the circumstances. The chambers judge assumed that an injunction until trial was necessary without considering the remedy to which the plaintiffs would be entitled if they succeeded at trial. The remedy at trial lay in damages. Although the plaintiffs claimed a permanent injunction and accounting, these remedies were unlikely to be granted. Misuse of confidential information for profit did not always give rise to an equitable remedy. The dominance shifted over time from the proprietary quality of the confidential information to its commercial value quality. The design and pricing of insurance packages was the sort of information that any broker could develop on the basis of experience. The misuse of information by the defendants, if proven, was more in the nature of unfair

Counsel:

D.P. Church and I. G. Schildt: Counsel for the Appellants

J.J.L. Hunter, Q.C. and J.L. MacAdam: Counsel for the Respondents

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Reasons for judgment were delivered by Smith J.A. (para. 53), concurred in by Levine J.A.. Reasons concurring in the result were delivered by Southin J.A. (para. 1).

1 SOUTHIN J.A.:-- At issue in this appeal by the defendants below is an order pronounced the 19th February, 2004, varied by an order pronounced the 29th June, 2004, leave to appeal having been granted by Saunders J.A. on 16th July, 2004.

Order of 19th February, 2004 -

> THE APPLICATION of the Plaintiffs for an interlocutory injunction ...; and the Plaintiffs having undertaken to this Court that they will abide by any order this Court may make to pay damages in the event that this Court is of the opinion that the Defendants have sustained damages by reason of the making of this Order which the Plaintiffs ought to pay;
>
> AND JUDGMENT BEING RESERVED TO THIS DATE:
>
> THIS COURT ORDERS that:
>
> 1. the Defendants, their successors, officers, agents, and assigns, be enjoined until the trial of this action for further Order of this Court from soliciting or otherwise obtaining business from those persons or corporations who are or were clients of the Plaintiff, Special Risks International Accident & Health Underwriting Managers Ltd., during the period 1999 - 2003 as those clients are listed in the attached Schedule "A"; with the exception that the Defendants may continue to interpret or process claims for existing policies written by the Schedule "B" clients until such time as those individual policies expire; ...

Schedule "A" consists of well over 100 names of clients or past clients of the respondent, Special Risks International Accident & Health Underwriting Managers Ltd. (hereafter "SRI"). Schedule "B" has eight names upon it.

Order of 29th June, 2004 -

THIS COURT ORDERS that the Order pronounced by this Court on February 19, 2004 be varied in the following respects:

(a) the Order of February 19, 2004 does not prohibit the Defendants from obtaining Accidental Death & Disablement business from those persons or corporations who are or were clients of the Plaintiff, Special Risks International Accident & Health Underwriting Managers Ltd., during the period 1999 - 2003 as those clients are listed in the attached Schedule "A";

(b) the Defendants may continue to interpret or process claims for individual policies written by the Schedule "B" clients up until the date of this Order, June 29, 2004, until such time as those individual policies expire.

2 SRI is a wholesale insurance broker which for some years, ending on 1st June, 2003, was authorized to sell insurance for Lloyd's. Retail agents, from whom clients seek insurance, themselves seek that coverage from SRI, which in turn obtains from an insurer (underwriter) the coverage sought. At one point, it was engaged in both travel insurance and accidental death and disablement insurance. It gave up the latter class of insurance either in late 2003 or early 2004. Thus, now we are concerned only with SRI's travel insurance business.

3 The respondent, Expert Travel Financial Security (E.T.F.S.) Inc. (hereafter "E.T.F.S."), is the parent of SRI.

4 BMS Harris & Dixon Insurance Brokers Limited (hereafter "BMS (London)") is a member of Lloyd's of London. BMS Specialty Risks Underwriting Managers Ltd. (hereafter "BMS (Vancouver)"), incorporated in December 2002, if not a wholly owned subsidiary of BMS (London), may be treated as such for the purposes of this application. It is in the same line of business as SRI.

5 The writ in this action was issued the 30th October, 2003, endorsed thus:

The plaintiff's claim is for:

1. Damages for breach of fiduciary duty and breach of confidence;
2. An interlocutory and permanent injunction restraining the Defendants from soliciting business from customers of the Plaintiffs;
3. An accounting of profits made by the Defendants from the Plaintiffs' customers; ...

6 The notice of motion for an interlocutory injunction, which was brought the 14th November, 2003, and came on for hearing on 10th February, 2004, sought:

1. that the Defendants, their servants, officers and agents and anyone acting on their behalf be restrained and enjoined until the trial of this action or further order of this Court from soliciting or otherwise obtaining business from any person or corporation who is or was a client of the Plaintiffs or either of them during the period 1999-2003;
2. granting the Plaintiffs leave for the purposes of this application only to refer to certain materials obtaining through the discovery process in Action No. S026708, as further described in Affidavit #2 of Robert Blackwood made in this action;
3. that the Defendants be required to provide to the Plaintiffs an accounting of all business obtained by them to the date of the order of this Court from any person or corporation who is or was a client of the Plaintiffs or either of them during the period 1999-2003.

7 It is regrettable that the respondents, the plaintiffs below, did not deliver a statement of claim before the motion came on for hearing. A statement of claim concentrates the mind of the judge on a critical issue in every application for an interlocutory injunction: If the plaintiff establishes what he alleges to be the material facts, does he have a cause of action? In this case, do the material facts alleged by the plaintiffs give rise to a "fiduciary duty" or an obligation of "confidence", which, if there is a breach, is actionable?

8 On the pleading point, see my dissenting judgment in British Columbia (Attorney General) v. Mount Currie Indian Band (1991), 54 B.C.L.R. (2d) 156 (C.A.).

9 In most applications for interlocutory injunctions, the cause of action is obvious - the plaintiff, in the endorsement on the writ, alleges a trespass, or nuisance, or breach of a non-competition covenant contained in a contract in writing, or an infringement of a patent, or a proposed disposal by a trustee of assets contrary to the terms of the trust, and so forth. All these are causes of action fully developed in our law.

10 That being so, the first thing the judge must do on an application for an interlocutory injunction is ask himself or herself whether the plaintiff, on the plaintiff's evidence, has established a fair question as to the right he or she alleges, i.e. the cause of action. Then the judge must look at the evidence to see whether there is a defence known to the law. Thus, in a case in which an interlocutory injunction is sought against an asserted trespass, the judge would first ask whether the plaintiff has shown a right to possession of the lands in question and then whether the defendant has adduced evidence of a defence such as leave and licence. Then, of course, the judge must do some weighing of the respective convenience of the parties, and so forth.

11 Here, however, we have a writ which claims damages for asserted causes of action which in the law as of today are still amorphous. Whether, in any given case there is a "fiduciary duty" or a duty of "confidence", depends on the exact relationship between the plaintiff and the defendant.

12 I shall have more to say on this point hereafter.

13 Suffice it to say now that I have concluded that the learned judge, no doubt because of the way the matter was argued before him, failed to come to grips with the questions of law to which this case gives rise and that omission entitles the Court to consider the evidence afresh, untrammelled by the usual restraints on appellate review of discretionary interlocutory orders.

14 I am mindful in approaching this matter that we were told by counsel that the trial of this action cannot be heard before the spring of 2006, more than two years after the order now in issue was pronounced. If the trial were scheduled to come on within the next few months, it might be appropriate to leave the questions of law to the trial judge. But, in my opinion, when an interlocutory order in issue is having the same impact on the commercial interests of the parties as a permanent injunction, it is an abdication of this Court's responsibility to skate over such questions of law as arise on the evidence, especially when, as here, the primary facts are reasonably clear. See, to the same effect, Lansing Linde Ltd. v. Kerr, [1991] 1 All E.R. 418 (Eng. C.A.).

THE FACTS

15 The evidence adduced by the respondents was the affidavit of Robert Blackwood, one of the vice-presidents of E.T.F.S., who resides in Lennoxville, Quebec. The evidence adduced by the appellants was that of an officer of BMS (London), Derek Roy Morgan, who resides in London, England.

16 BMS (London), as a member of Lloyd's of London, has access to the Lloyd's underwriting room, which perhaps now is a "virtual" room on a computer system. The Lloyd's method of doing business is sui generis. A Lloyd's syndicate will not undertake a risk except through a Lloyd's "intermediary" such as BMS (London).

17 Whether any intermediary today deals directly with a person seeking insurance for himself, I do not know. For an illustration of such an arrangement on the marine side, see North & South Trust Co. v. Berkeley, [1971] 1 All E.R. 980 (Q.B.D. Donaldson J.), in which the insurance was effected by a local agent of a London intermediary.

18 In some cases, a retail agent, on behalf of his client, will instruct a Lloyd's broker to approach an underwriter to effect such insurance as is required. See, e.g. Pangood Limited v. Barclay Brown & Co. Ltd., [1999] E.W.J. No. 591, [1999] EWCA Civ. 682 (Eng. C.A.).

19 There has also developed, I assume as a matter of commercial convenience and perhaps to enable Lloyd's to compete in the non-marine market (apparently it only began to do so in the 1880's; see Thompson v. Adams (1889), 23 Q.B.D. 361 at 362), a system under which an underwriting syndicate or several underwriting syndicates will authorize someone not a Lloyd's intermediary to accept risks, receive payment of premiums and pay claims. This grant of authority is effected by an instrument known as a "cover note".

20 Such a grant of authority must itself be arranged by a Lloyd's intermediary who is paid by

Lloyd's a commission on all the business written by the wholesale broker acting under that cover note.

21 That is what happened here. This is the cover note in force between SRI and several Lloyd's syndicates for the period 1st June, 2002 to 1st June, 2003:

[Editor's note: In the following quoted text, square brackets indicate where text has been struck through.]

AGREEMENT NUMBER	HD414/02
EXPIRING AGREEMENT NUMBER	HD414/01
CLASS OF BUSINESS	CANADIAN PERSONAL ACCIDENT, MEDICAL/HOSPITAL EXPENSE BINDING AUTHORITY
AUTHORISING	SPECIAL RISKS INTERNATIONAL ACCIDENT & HEALTH UNDERWRITING MANAGERS LTD., Ste. 470 - 171 West Esplanade, North Vancouver, British Columbia V7M 3J9, Canada. the Coverholder to bind for Underwriters account and issue Certificates of insurance on their behalf subject to the terms and conditions contained herein.
LLOYDS BROKER (INTERMEDIARY)	BMS HARRIS & DIXON LIMITED, Latham House, 16 Minories, London. EC3N 1AX
NAMED UNDERWRITERS	The persons authorised to bind and who are responsible for the operation of this Agreement are:

Mr. J. Trevor McLean, Ms. Rose Mary MacLeod, Andrea Dey and Mrs. Gillian Kerr

PERIOD

From 1st June, 2002 12.01 a.m. L.S.T. to 1st June, 2003 12.01 a.m. L.S.T.

Subject to 60 days cancellation notice at any time.

In the event of cancellation or non-renewal of this Agreement all risks shall remain in force until their natural expiry date unless otherwise mutually agreed. In the event of cancellation or non-renewal, the period shall be automatically extended for a maximum of 30 days to accept new business or renewals hereunder, always provided that the Coverholder has quoted terms prior to the date of Notice of Cancellation being given.

INTEREST AND MAXIMUM LIMITS

Up to CAD 5,000,000 any one person, however this limit of CAD 5,000,000 any one person may be utilised for the Medical Section of a travel package which when included with other ancillary benefits could exceed this CAD 5,000,000 any one person limit.

CAD 10,000,000 any one known accumulation.

Notwithstanding the above Under-writers agree that in the event of an injury resulting in Paraplegia, Quadriplegia or Hemiplegia the Maximum Sum Insured is CAD 4,000,000 any one person.

* * *

TERRITORIAL LIMITATIONS

World-wide in respect of Canadian Domiciled Assureds.

SCHEME CANADA CLAUSES

As per Contract Wording.

SCHEME CANADA SETTLE-MENT

60 Days Premium

30 Days Claims

GROSS PREMIUM INCOME LIMIT

CAD [6,500,000] 5,500,000 (or to be agreed by either 2 Leading Underwriters).

The Coverholder to immediately advise Underwriters if the Gross Premium Income will, or is likely to exceed 80% of this limit.

* * *

BROKERAGE

BMS H&D: 5%

PROFIT COMMISSION

20% calculated as follows:-

Income for the Contract Year

1) Gross Premiums less Return Premiums.

Outgo for the Contract Year

1) Commission and Taxes as provided for herein.
2) Losses and all Loss Expenses less any salvages and/or recoveries.
3) Underwriters management expenses calculated at 12.50% of Income (including Intermediary's brokerage).
4) Deficit (if any) brought forward from the previous Contract Year. 3 Year Deficit Clause.

If Nett Loss Ratio to Underwriters is below 80% Underwriters agree to pay enhanced Profit Commission as follows:-

Loss Ratio	P.C.	Loss Ratio	P.C.
80%	20%	69%	31%
79%	21%	68%	32%
78%	22%	67%	33%
77%	23%	66%	34%
76%	24%	65%	35%
75%	25%	64%	36%
74%	26%	63%	37%
73%	27%	62%	38%
72%	28%	61%	39%
71%	29%	60%	40%
70%	30%		

Profit Commission is payable after all liability has expired and all outstanding claims have been settled. L/U may agree an interim payment.

'Nett' is defined as Gross Premium, Less all Commissions, Intermediary's Brokerage and Taxes.

* * *

CLAIMS AUTHORITY & PRO-CEDURES

All Claims excluding Medical Claims

The Coverholder is authorised, on behalf of Underwriters, to adjust, settle and pay claims and all claims expenses, in accordance with the following Claims Authority and Procedures.

The Coverholder shall notify Under-writers of any claim denied by the Coverholder or one which may or does give rise to litigation, or one which may or does result in a complaint to any regulatory authority, and Underwriters shall have the right, upon notice to the Coverholder, to override the Coverholder in the adjustment and settlement of any such claim.

* * *

Medical Claims Only (including Excess Out of Country Travel Medical, EHB, Expatriate Medical, Visitors Hospital/Medical Insurance):

Underwriters authorize:

Global Excel Management Inc., 73 Queen Street, Lennoxville, Quebec J1M 1T3, Canada

to adjust, settle and pay claims and all claims expenses, in accordance with the following Claims Authority and Procedures.

Global Excel Management shall notify Underwriters of any claim which may or does give rise to litigation, or one which

> may or does result in a complaint to any regulatory authority, and Underwriters shall have the right, upon notice to them to override them in the adjustment and settlement of any such claim.
>
> * * *
>
> In respect of all claims the Coverholder shall keep a register of all losses reported to them and submit to the Leading Underwriter a monthly bordereau of all claims likely to exceed CAD 50,000.

Attached to the instrument were pages containing the signatures of all the underwriters.

22 Also attached to the agreement is a 26 page document entitled "Underwriting Members of Lloyd's Canadian Non-Marine Binding Authority Agreement". Included are these provisions:

> SECTION 22
>
> SCHEME CANADA ENABLING CLAUSES
>
> 22.1 Bordereaux:
>
> The Coverholder shall promptly submit to the office of the Attorney In Fact in Canada for Lloyd's Underwriters full details of all business bound, amendments thereto including cancellations, together with all paid and outstanding claims as required and enumerated in the Attorney Reporting Procedure Manual.
>
> The Attorney's office will prepare promptly on a monthly basis from the documents supplied by the Coverholder the following:-
>
> 22.1.1 A premium bordereau listing all gross premiums and return premiums on risks bound or cancelled. The bordereau shall also show deductions for the Coverholder's commission and tax allowances as permitted by the Underwriters;

22.1.2 A paid loss bordereau in respect of all claims within the Coverholder's settlement authority and claims outside of the Coverholder's settlement authority where payment has been authorised by the Underwriters;

22.1.3 An open claims register listing all the outstanding claims;

The Attorney will send these bordereaux directly to the Coverholder, the Leading Underwriter of the Agreement, Lloyd's Claims Office and the Intermediary together with other management statistics;

* * *

SECTION 27

STATISTICAL AND OTHER INFORMATION

The Coverholder agrees to provide all statistical and other information as to the business bound on behalf of Lloyd's Underwriters as may from time to time be required by the Attorney In Fact in Canada for Lloyd's Underwriters.

23 A bordereau is simply a detailed statement. (I have attempted diligently to find out how it is that a French word is used by Lloyd's, but without success. See Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd. (1987), 11 B.C.L.R. (2d) 319 (S.C.) at 326.)

24 A commercial premium bordereau has, in its upper right hand corner, this:

LONDON BROKER :

LEAD UNDERWRITER :

BROKER NO. :

BORDEREAU DATE :

B.A. CONTRACT :

CONTRACT CODE :

PRINT DATE :

PAGE NO. :

It then has 14 columns which, among other things, list the name of the insured, the effective date of the policy, the expiry date, the gross premium, the commission, expense allowance, and a net balance to London.

25 The example in the appeal book is four and one-half pages of fine print referring to some 200 policies of insurance. It is unclear to me, however, whether the person referred to as "the insured" is the insured or the retail agent. The names would indicate that the persons named are indeed the retail agents.

26 The respondents say the information in such an instrument is "confidential" within the scope of their assertion of a cause of action. I shall return to this point which, as I understand the respondents, is critical to their claim.

27 What is not in these instruments may be thought as important as what is. There is no covenant on the part of any person restraining competition upon termination of the relationship between SRI and Lloyd's and no covenant limiting the use Lloyd's or BMS (London) may make of any information either receives from SRI.

28 After the destruction of the World Trade Center in New York in September 2001, insurance became, for all its participants, a much more difficult trade.

29 Whether that was the reason or there was some other reason, in the summer of 2002, SRI, or its parent, decided to sever the business connection between SRI and Lloyd's and form a relationship with a member of the Royal & Sun Alliance Group, announced that intention to the retail agents (its clients) in April 2003, and carried it out upon the expiry in June 2003 of its existing binding authority from Lloyd's.

30 For their part, the appellants say that in late 2002, they were concerned that SRI was going to sever its relationship with Lloyd's underwriters and thereby deprive them of their five per cent "brokerage", and thus determined to take steps to incorporate a BMS British Columbia company, hired some ex-employees of SRI, and began operating on the 1st June, 2003.

31 On the issue of confidential information, Mr. Blackwood deposed, in part:

> 15. Before agreeing to represent the Plaintiffs, BMS Harris subjected the Plaintiffs to full scrutiny, including review of its financial records, as well as history, performance, and licensing reviews, reference checks, office inspections, and review of the resumes of its principals. It is standard practice in the insurance

industry for Lloyd's brokers to require detailed financial information such as the information required of ETFS/SRI by BMS Harris. However, the categories of information disclosed by the Plaintiffs are customarily regarded as confidential.

16. Consequent upon the establishment of the agency relationship between BMS Harris and ETFS/SRI, the Plaintiffs were required to furnish BMS Harris with confidential information necessary for the conduct of their business on both a weekly and a monthly basis. Such information included, but was not limited to, client lists and contact information.

17. Claims and premium reports were issued by the Plaintiffs on a monthly basis. Claims reports list all claims and reserves for each claim and therefore contain, among other things, the names of claimants, the dates of claims, a breakdown of amounts paid and amounts recovered on the loss through other sources, outstanding balances on the claim, and "diagnosis" claimed for. Such information would be critical in getting a clear underwriting picture of our market and how insurance policies need to be written in order to respond to the market.

18. Premium reports contain the client's name, the applicable coverage period, the plan purchased, the premium paid, and the policy number. This information is also critical market information. Some brokers for whom we provide claims assistance refuse to give us this information due to the fact that it offers a clear profiling of their market.

32 To that, Mr. Morgan says:

14. There is a process in place, commonly known as Lloyd's "Approval", by which the Corporation of Lloyd's will investigate a broker which wishes to obtain a Binding Authority. Before the Lloyd's underwriters will consider entering into such an agreement, the broker must be "approved" by the Corporation of Lloyd's, which must be satisfied with the qualifications, business history and financial soundness of the broker in question. The information and documentation necessary to satisfy Lloyd's "Approval" is specified by the Corporation of Lloyd's and will vary depending on the nature of the broker.

15. Once the Binding Authority is in force, the broker and the underwriter have an ongoing relationship which involves the regular exchange of information, often in the form of monthly "bordereaux", and money, in respect of amounts paid on premiums and claims. Generally speaking, the broker is usually required to provide Premium Bordereaux and Claims Bordereaux on a monthly basis. The Premium Bordereaux describe the business which was bound during the specific period, including the names of the insureds, the premiums due and the amount of commission to be taken by the broker. The Claims Bordereaux contain similar information, but in respect of claims to be paid out under the insurance contracts. In addition to the monthly Bordereaux, the parties also typically exchange information concerning such subjects as the administration of the Binding

Authority generally and the settlement of larger claims, which are sometimes dealt with on a case by case basis.

* * *

18. With respect to the process of obtaining the initial Binding Authority, BMS Harris & Dixon would first introduce senior personnel from the broker to various Lloyd's underwriters and assist the brokers in understanding the process. The Corporation of Lloyd's, which is the body tasked with investigating brokers who do not have a previous relationship with the Lloyd's underwriters, would identify the material it required in order to complete its investigation. BMS Harris & Dixon communicated those requirements to the broker and forwarded the broker's response. Often, BMS Harris & Dixon would use its expertise at this stage to assist and advise the broker in the application stage, but the official investigation is actually carried out by the Corporation of Lloyd's, not by BMS Harris & Dixon. It is the Corporation of Lloyd's which sets the requirements and reviews the information provided.

* * *

20. Assuming that the Corporation of Lloyd's approved the broker and one or more Lloyd's underwriters were willing to enter into a Binding Authority, BMS Harris & Dixon then assisted the broker with the ongoing administration under the Binding Authority. The level of involvement of BMS Harris & Dixon would vary, depending on the location of the broker and the nature of the broker's business. Typically, all Premium and Claims Bordereaux would have passed through BMS Harris & Dixon for review prior to being forwarded to the specific Lloyd's underwriters for their review and approval. Similarly, the funds collected in respect of the premiums and claims would also have passed through BMS Harris & Dixon's trust accounts, for distribution either to the broker or to the underwriter.

21. However, the parties did not always exchange information in such a fashion. In Canada, Lloyd's established a program called "Scheme Canada", by which brokers operating in Canada under Binding Authorities would forward information and funds directly to Lloyd's at its office in Montreal. In those circumstances, Lloyd's would review the information directly, prepare the Bordereaux for circulation and make payment to BMS Harris & Dixon in respect of its commission. BMS Harris & Dixon would usually be provided with copies of the Bordereaux by Lloyd's along with payment of its commission.

* * *

27. As set out in Section 22 of Exhibit "B", SRI operated through Scheme Canada

(see paragraph 21, above for a general description of this program). SRI submitted its reports and payments directly to Lloyd's through the Attorney In Fact in Canada for Lloyd's underwriters in Canada. It was the Attorney in Fact in Canada for Lloyd's which prepared the various Bordereaux for distribution to the coverholder (SRI), the underwriters and the intermediary (BMS Harris & Dixon). Further, it was the Attorney in Fact in Canada for Lloyd's which made payment directly to BMS Harris & Dixon in respect of the 5% brokerage fee. Attached as Exhibit "C" to this my Affidavit is an example of a Premium Bordereau prepared by the Attorney in Fact in Canada for Lloyd's, reflecting business bound by SRI in November 2002. This document is typical of the sort of information included on a Premium Bordereau.

* * *

33. However, it is true that ETFS supplied information to BMS Harris & Dixon in the early part of 1999 for presentation to the Corporation of Lloyd's. Attached as Exhibit "E" to this my Affidavit is a copy of a January 18, 1999 letter from ETFS, attaching its response to the Questionnaire which I had forwarded in October 1998 (see Exhibit "D", above). BMS Harris & Dixon has always treated that information as confidential in nature and has never utilized it for any purpose other than what it was intended, ie. presentation to the Corporation of Lloyd's.

* * *

74. In considering issues such as confidentiality, it is important to note that BMS Harris & Dixon (and now BMS Harris) frequently works with, and receives information from, competing brokers. As of the date of this affidavit, BMS Harris & Dixon and BMS Harris are acting as an intermediary for three or four wholesale brokers and approximately 25 retail brokers across Canada and currently act as intermediary for about 10 coverholders in British Columbia. Many of these brokers are in competition with each other and BMS Harris & Dixon, (now BMS Harris) frequently assists different coverholders who offer competing products in the same area. In these circumstances, BMS Harris & Dixon (and now BMS Harris) has standard procedures in place to ensure that its dealings with one broker do not affect its dealings with other, competing, brokers.

75. In my experience, most companies which carry on business as Lloyd's brokers act in the same fashion. It is a necessary component of carrying on business in the Lloyd's insurance market.

33 To my mind, from this evidence, these facts emerge:

1. SRI sought and obtained the "services" of BMS (London) in negotiating an

underwriting authority from a syndicate of Lloyd's underwriters. It had no choice but to engage an intermediary because that is the way the Lloyd's system works. To say, as Mr. Blackwood does in paragraph 15, "Before agreeing to represent the Plaintiffs", is to give, I am sure unintentionally, a false impression. BMS (London) was a go-between. There is no evidence of any contract between BMS (London) and SRI under which BMS (London) agreed to act for SRI.

2. In order to obtain such an authority, SRI was bound to disclose to Lloyd's all manner of information concerning its business and because of the way in which the wholesale broker-intermediary-Lloyd's underwriters system operates, BMS (London) became privy to that information. Obviously, Lloyd's wants a very thorough investigation into the probity, skill and financial strength of any wholesale broker upon whom it is to confer an underwriting authority.
3. Under the Lloyd's SRI contract, SRI was bound to submit its bordereaux, both claims and premiums, through Lloyd's Attorney in Fact in Canada, which is not BMS (London). Nonetheless, as the underwriters under the contract pay BMS (London) five per cent of the premiums, BMS (London) also received copies of the bordereaux.
4. BMS (London) receives no remuneration from SRI at any stage of the proceedings. When SRI left Lloyd's, BMS (London) lost its "brokerage" from SRI business.
5. Neither BMS (London) nor BMS (Vancouver) had anything to do with the determination of the SRI/Lloyd's agreement.
6. BMS (London) did not at any time enter into any direct agreement with SRI in any way restricting BMS (London)'s freedom of commercial action. For instance, it has, and had, every right to be an intermediary for other wholesale brokers in this Province desirous of obtaining Lloyd's underwriting authorities.
7. Even if, by some legal stretch, BMS (London) can be said to be a party to the SRI/Lloyd's agreement, nothing in it in any way restricts BMS (London)'s freedom of commercial action after its expiry. Whether, so long as the SRI/Lloyd's agreement was in force, BMS (London) was in any way restricted in its commercial dealings in this Province by any of Lloyd's rules and regulations (I understand Lloyd's has many rules and regulations concerning the obligations and so forth of its members), I cannot say.
8. The confidentiality observed by BMS (London) in dealing with other brokers as described in paragraphs 74 and 75 of Mr. Morgan's affidavit (relied on by the learned judge) relates to brokers holding cover notes from Lloyd's. SRI no longer is such a broker.

THE JUDGMENT BELOW

34 The learned chambers judge, having set out much of the respondents' Memorandum of Argument, said this (19 February 2004, Vancouver Registry S035863):

> [23] As to the tort of breach of fiduciary duty, the plaintiffs begin by characterizing Ms. Kerr and Ms. McLeod as key employees of SRI. Persons, on the cases, who owe fiduciary duties to their former employer, including a duty not to solicit business from SRI customers.
>
> [24] The plaintiffs of course say that in the circumstances alleged, these individuals, through BMS Speciality, are breaching those duties. But those alleged breaches are added to, in the plaintiffs' submission, the more fundamental breach of fiduciary duty, that by BMS Harris through its instrumentality, BMS Speciality.
>
> [25] Here the plaintiffs say that there was an agency relationship between BMS Harris as agent and SRI, if not as well Expert Travel, as principal and that on the cases that is a per se fiduciary relationship. See amongst others Hodgkinson v. Simms, [1994] 3 S.C.R. 377.
>
> [26] That relationship, say the plaintiffs, precludes the agent, who is armed with confidential business intelligence concerning its principal, from competing with that principal. As to the issue of the defendant BMS Harris being privy to confidential information concerning the plaintiffs, in particular SRI, I refer to the evidence which I earlier extracted from the plaintiffs' submissions.

35 Having quoted from the affidavit of Mr. Morgan, paras. 33, 74 and 75, quoted above, he then said:

> [29] The plaintiffs say that the defendants' denial that they have used confidential information concerning the plaintiffs improperly by, for example, wrongfully disseminating it, misses the point. The point is that the defendant BMS Harris, armed with confidential information concerning the business of the plaintiffs, has, through BMS Speciality, commenced to directly compete with the plaintiffs in British Columbia.
>
> [30] Mr. Hunter for the plaintiffs asks: Can it be doubted that BMS Harris is prohibited from disseminating confidential information concerning the plaintiffs to its competitors in British Columbia? If not, how could BMS Harris itself purport to compete directly with the plaintiffs in British Columbia?
>
> [31] On the first branch, I am satisfied that the plaintiffs have shown that there is

a serious question to be determined. The plaintiffs have indeed demonstrated a strong case for the defendants to answer. I say that not to prejudge the merits, but because it is relevant to the balance of convenience.

36 Counsel for the appellants alleges these errors in judgment:

22. The Chambers Judge erred in principle in concluding that there was a serious question to be tried with respect to the tort of breach of confidence in the absence of any evidence establishing, or even suggesting, the misuse of confidential information.
23. The Chambers Judge erred in principle in concluding that there was a serious question to be tried as to the existence of a fiduciary relationship between the defendant BMS Harris & Dixon and the plaintiff SRI and, further, that such relationship gave rise to a general, indefinite duty on BMS Harris & Dixon to refrain from competing with SRI.
24. Alternatively, the Chambers Judge erred in principle by issuing an injunction which was overly broad in a number of respects, including the following:

(a) it prohibits the defendants from continuing to deal with current clients of BMS Specialty who are former clients of SRI, some of whom have been dealing with BMS Specialty since August 2003;
(b) it prohibits the defendants from dealing not only with clients of SRI, but with former clients of SRI for the period 1999 - 2003;
(c) it goes beyond a non-solicitation order to prevent the defendant BMS Specialty from accepting business from former SRI clients, regardless of the clients' preferences; and
(d) it prohibits the defendants from dealing with the proscribed clients generally, without regard to the nature of SRI's dealings with those clients.

37 I pose the question in this case thus: Is a Lloyd's intermediary, having facilitated a contract between a wholesale broker and a Lloyd's underwriter, and having by virtue of the Lloyd's system become privy to much information concerning the wholesale broker's business, under any duty, upon the relationship between the wholesale broker and Lloyd's having ceased, not to itself obtain a contract of the same order and use the information it has acquired in the course of acting as intermediary for its own commercial purposes?

38 In this formulation, I have said "the relationship having ceased" because, as I see the matter at present, these Lloyd's contracts being only for one year, it matters not whether SRI decided to leave Lloyd's or Lloyd's decided to dispense with SRI, for whatever reason in either case. Nonetheless, I do not discount the possibility that a wholesale broker such as SRI might have a cause of action against its Lloyd's intermediary if that intermediary persuaded the Lloyd's underwriters not to renew a contract in order to get the business itself.

39 I have posed the question as I have because, in my opinion, the use of such words as "fiduciary duty" and "breach of confidence" is fraught with danger, as Lord Browne-Wilkinson remarked in Henderson v. Merrett Syndicates Ltd., [1994] 3 All E.R. 506 (H.L.) at 543:

> The phrase 'fiduciary duties' is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. Thus, in the case of an agent employed under a contract, the scope of his fiduciary duties is determined by the terms of the underlying contract. Although an agent is, in the absence of contractual provision, in breach of his fiduciary duties if he acts for another who is in competition with his principal, if the contract under which he is acting authorises him so to do, the normal fiduciary duties are modified accordingly: see Kelly v. Cooper [1993] AC 205 and the cases there cited. The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise.

and see also the judgment of Sopinka J. in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574. In my opinion it is simply wrong to suggest that there is any fiduciary duty as such arising from the task which a Lloyd's intermediary carries out in facilitating the making of a contract between Lloyd's underwriters and a wholesale broker.

40 I turn then to the claim in the endorsement on the writ for breach of confidence.

41 This is not a case of a "trade secret" in the sense that term was used in the early part of the last century and Mr. Hunter disclaims any assertion that it is.

42 In Lansing Linde Ltd. v. Kerr, supra, in which the issue was whether an interlocutory injunction should be granted to enforce a non-competition covenant, Staughton L.J. commented at 425:

> In Faccenda Chicken Ltd. v. Fowler [1985] 1 All ER 724 Goulding J. at first instance had defined three classes of information, as follows: (i) 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; (ii) information which the servant must treat as confidential but which once learned necessarily remains in the servant's head and becomes part of his skill and knowledge; (iii) 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. There the dispute was as to the second class so defined. Goulding J. expressed the view that it could be protected by an express covenant; this court was of the contrary opinion (see [1986] 1 All ER 617, [1987] Ch. 117). Subsequently other judges have touched on the topic in Balston Ltd. v. Headline Filters Ltd. [1987] FSR 330 and Lock International plc v. Beswick [1989] 3 All ER 373, [1989] 1 WLR 1268.
>
> It appears to me that the problem is one of definition: what are trade secrets, and how do they differ (if at all) from confidential information? Mr. Poulton suggested that a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.
>
> That is my preferred view of the meaning of trade secret in this context. It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy. But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret.

43 Here, of course, there is no covenant. The question then becomes whether there is any other foundation for the present claim.

44 The respondents rely on Lac Minerals Ltd. v. International Corona Resources Ltd., supra. The head note sets out the facts and the analysis of La Forest J.:

> International Corona Resources Ltd., a junior mining company, carried out an extensive exploration program and made arrangements to attempt to acquire the Williams property. Representatives from a senior mining company, Lac Minerals, read of the test results in a public newsletter and arranged to visit the Corona property. Corona showed the Lac representatives confidential geological findings and disclosed the geological theory of the site and the importance of the Williams property. Detailed private information was left with Lac officials during further discussions about development and financing options. Corona was advised by Lac to aggressively pursue the Williams property. The matter of

confidentiality was not raised.

The Lac representatives, after their visit to Corona's site, instructed their personnel to gather information on the area in question and to stake favourable claims east of the Corona property. Lac acquired the Williams property but never informed Corona at any time of its intention of acquiring that property. Later negotiations between Lac and Corona for the Williams property to be turned over to Corona failed.

Corona, after its relationship with Lac had ended, concluded various agreements with Teck Corporation. These agreements provided for a joint venture in developing a mine on the Corona property and purported to give Teck a 50 per cent interest in the fruits of Corona's lawsuit against Lac, with Teck agreeing to pay certain costs.

* * *

Per La Forest J.: Lac breached a duty of confidence owed to Corona. The test for whether there has been a breach of confidence involves establishing three elements: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. Corona had communicated private, unpublished information and, although the matter of confidence had not been raised, there was a mutual understanding between the parties that they were working towards a joint venture and that valuable information was communicated to Lac under circumstances giving rise to an obligation of confidence. The information provided by Corona was the springboard that led to Lac's acquisition of the Williams property. This use had not been authorized by Corona.

The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. The relevant question to be asked is what is the confidee entitled to do with the information, not what is the confidee prohibited from doing with it, and the onus falls on the confidee to show that the use of the confidential information was not prohibited. If the information is used for such a prohibited purpose, the confider is entitled to a remedy to the extent of the detriment suffered.

Lac acted to Corona's detriment when it used the confidential information

> to acquire the Williams property which Corona would have otherwise acquired. Lac was uniquely disabled from pursuing property in the area for a period of time; this was not an unacceptable result. It could have either negotiated a relationship with Corona based on the disclosure of confidential information or it could have pursued property in the area for itself on the basis of publicly available information. Lac could not have the best of both worlds.

45 On the facts of that case, one can pose this question: Would Corona have communicated their geographical findings and so forth to Lac if it had known Lac would itself go out and acquire the Williams property to Corona's exclusion? The answer is patently "no".

46 When the answer to such a question is "no", the information can fairly be called "confidential".

47 But here, if SRI wished to be the holder of a Lloyd's cover note, it had no choice but to communicate the information which it now asserts to be "confidential".

48 The question of what constitutes "confidential information" within the Lac formulation could also be put this way: If an honourable man in Lac's position, upon being asked before receiving the information, "If we cannot make a deal, will you use without our consent what we tell you to enrich yourself?" would answer, "Of course not, the information is confidential," the information fairly falls under the rubric "confidential".

49 We have in the law the reasonable man test. I see no reason why we cannot in some rare circumstances have an honourable man test.

50 In the case at bar, I am quite unable to see a single shred of dishonourable conduct on the part of the appellants in using what they know in order that Lloyd's shall have the business which the respondents wish to place with the Royal & Sun Alliance Group. The information here, if it could be said to belong to anyone, belongs as much to Lloyd's and BMS (London) as it does to the respondents.

51 Having so concluded, I need not address the appellants' third point.

52 I would allow the appeal with costs.

SOUTHIN J.A.

The following is the judgment of

53 SMITH J.A.:-- I have had the privilege of reading in draft form the reasons of Madam Justice Southin. I agree with her that the appeal must be allowed but for different reasons.

54 The test for the granting of an interlocutory injunction has been expressed as both a three-part

test (see RJR-MacDonald Inc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311 at [paragraph] 77) and a two-part test (see A.G. British Columbia v. Wale (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 345, aff'd [1991] 1 S.C.R. 62). As Madam Justice Saunders said in Coburn v. Nagra (2001), 96 B.C.L.R. (3d) 327, 159 B.C.A.C. 299, 2001 BCCA 607:

> [7] Whether the criteria for an injunction is two part or three may be a topic of debate for scholars. In British Columbia the common test for injunctions has been two-pronged since British Columbia (Attorney General) v. Wale (1986), 9 B.C.L.R. (2d) 333 (B.C.C.A.), with the issue of irreparable harm being subsumed into the discussion of balance of convenience (or inconvenience). As Madam Justice McLachlin (now C.J.C.) noted in Wale, the distinction is likely without practical effect. The question in most cases is the relative weight of the convenience and inconvenience of the order sought, always considering the paramount measure, the interests of justice.

55 The test set out in A.G. British Columbia v. Wale, supra, was described in Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd. (1992), 64 B.C.L.R. (2d) 96 (C.A.) at p. 101:

> The two-pronged test is this: "First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

56 The burden on the applicant to show a fair question to be tried is a low one; generally, unless the case can be said to be frivolous or vexatious, this part of the test will be satisfied: see RJR-MacDonald Inc. v. Canada (Attorney-General), supra, at [paragraph] 49, 50, 78.

57 Here, the claim for breach of fiduciary duty is put on two bases. First, the respondents contend that BMS (London) was their agent for purposes of dealing with Lloyd's and that the case therefore falls within the traditional categories of per se fiduciary relationships. Second, they rely on a de facto fiduciary relationship based on trust and vulnerability. In this submission, they contend that they trusted and confided in BMS (London) and, as a result, were vulnerable to that firm's unauthorized use of the confidential information.

58 The claims and premium bordereaux contained detailed information identifying SRI's clients, the premiums they paid, the coverage period purchased, the claims they made, and so forth. Mr. Blackwood deposed that this information "would be critical in getting a clear underwriting picture of our market and how insurance policies need to be written in order to respond to the market". As well, he said, some brokers for whom SRI provides claims assistance "refuse to give us this information due to the fact that it offers a clear profiling of their market". He adverted to assurances given by Mr. Morgan that BMS (London) had systems in place to ensure that information concerning product design and pricing obtained from brokers was not used by anyone else to gain a competitive advantage over those brokers. Mr. Morgan agreed that BMS (London) has systems to

ensure that confidentiality is maintained as between brokers and, although he did not remember the particular assurance mentioned by Mr. Blackwood, he did not deny that he gave it; rather, he said, he has had many such conversations with brokers over the years.

59 The information in the bordereaux is arguably confidential because the purpose of its communication to BMS (London) and Lloyd's was to advance the common object of selling Lloyd's insurance policies: see Coco v. A.N. Clark (Engineers) Ltd., [1969] R.P.C. 41 (Ch.) per Megarry J. at 48, quoted with approval by La Forest J. in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 at 642:

> In particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other, I would regard the recipient as carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence.

60 The appellant BMS (London) admits that it received the information in question in confidence. However, it denies using the information for any unauthorized purpose and asserts that the respondents have produced no evidence that it has done so. In particular, BMS (London) says there is no evidence that it communicated the information to BMS (Vancouver). Thus, the appeal focuses on the breach of duty aspect of the respondents' claims. I will return to this issue after discussing the question whether there was an arguable case for the existence of a fiduciary obligation.

61 As Madam Justice Southin points out, at paragraph 11 above, the causes of action for breach of fiduciary duty and breach of confidence are evolving. In recent years, the boundaries of fiduciary duty have been expanding this action from its traditional territory of trusts and equitable obligations into the ground formerly reserved for torts: see, for example, Frame v. Smith, [1987] 2 S.C.R. 99; Lac Minerals Ltd. v. International Corona Resources Ltd., supra; Norberg v. Wynrib, [1992] 2 S.C.R. 226; and M.(K.) v. M.(H.), [1992] 3 S.C.R. 6.

62 However, fiduciary obligations will rarely be found to exist in commercial relationships. In Frame v. Smith, [1987] 2 S.C.R. 99, Wilson J. (dissenting) explained, at 137:

> Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, Jirna Ltd. v. Mister Donut of Canada Ltd. (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are

> adequate in such a case.

63 This passage was quoted by Binnie J., writing for the court, in Cadbury Schweppes Inc. v. FBI Foods Inc., [1999] 1 S.C.R. 142 at [paragraph] 30. He added:

> ... To the same effect, see Lac Minerals per Sopinka J. at p. 595, Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 414, per La Forest J., and the comment of Professor Davies that "[s]trong evidence should be required before a breach of confidential information situation is metamorphosed into one of fiduciary relationship" [Davies, J.D. "Duties of Confidence and Loyalty", [1990] Lloyd's Mar. & Com L.Q. 4 at p. 7)].

64 Nevertheless, he continued:

> ... Despite these warnings, a majority of this Court in Hodgkinson v. Simms, supra, held that <u>where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context. The vulnerability</u> of clients to their professional advisors <u>invoked traditional fiduciary principles</u> ....

[Emphasis added]

65 Arguably, in this case the respondents were not in a position to exercise any bargaining power so as to prevent or limit their vulnerability; they had to disclose the confidential information to the appellants if they wished to continue to do business with Lloyd's and this disclosure made them vulnerable to the information's unauthorized use. Accordingly, I cannot say that the Chambers judge erred in concluding that the allegation of a fiduciary obligation of confidence crossed the frivolous-or-vexatious threshold.

66 The alleged breach of confidentiality is the central point raised by the appellants in the appeal on the issue of whether there is a serious question to be tried in both causes of action asserted.

67 The appellants deny any unauthorized use of the information and, as I have already noted, contend that the respondents led no evidence of any misuse of the information by BMS (London) nor any evidence that BMS (London) communicated any of the confidential information to BMS (Vancouver).

68 It is true that the respondents led no direct evidence of unauthorized use of the information. However, there was circumstantial evidence of misuse upon which the Chambers judge was entitled to rely. The respondents identify evidence of the following circumstances:

1. Notwithstanding that BMS (London) had never before competed in the retail market, although it has been a wholesale broker for Lloyd's for more than two hundred years, it created BMS (Vancouver) with the specific intention of competing with SRI in the retail market in British Columbia.
2. Mr. Morgan, the managing director of BMS (London), arranged the incorporation of BMS (Vancouver) before SRI terminated its relationship with BMS (London) and Lloyd's. As well, Mr. Morgan hired a former, allegedly-key employee of SRI in late 2002. In December 2002, that person approached one of SRI's clients and attempted to solicit its business. In January 2003, Mr. Morgan hired another former senior manager of SRI. These two persons are the only full-time employees of BMS (Vancouver).
3. Between September 2002 and January 2003 BMS (Vancouver) began to do business with eight of SRI's most substantial clients.

69 In concluding that the respondents had established a serious question to be tried as to the unauthorized use of the confidential information, the Chambers judge said:

> [29] The plaintiffs say that the defendants' denial that they have used confidential information concerning the plaintiffs improperly by, for example, wrongfully disseminating it, misses the point. The point is that the defendants BMS Harris [London], armed with confidential information concerning the business of the plaintiffs, has, through BMS Specialty [Vancouver], commenced to directly compete with the plaintiffs in British Columbia.
>
> [30] Mr. Hunter for the plaintiffs asks: Can it be doubted that BMS Harris [London] is prohibited from disseminating confidential information concerning the plaintiffs to its competitors in British Columbia? If not, how could BMS Harris [London itself purport to compete directly with the plaintiffs in British Columbia?
>
> [31] On the first branch, I am satisfied that the plaintiffs have shown that there is a serious question to be determined ....

70 Thus, from the circumstance that BMS (Vancouver) is competing directly with SRI in British Columbia, the Chambers judge inferred that the respondents had established a serious question to be tried on the issue of unauthorized use. Given the circumstantial evidence I have outlined above, I am unable to say that he erred in his conclusion that the respondents had met the low threshold on the first branch of the test.

71 The appellants submit that the injunction was overly broad in several respects. I take this to be an argument that the Chambers judge erred in weighing the balance of convenience. While the

injunction is broadly worded in that it prohibits the appellants from dealing with former customers of SRI with whom they have an established business relationship, including some who would prefer to obtain their insurance from Lloyd's, I am not persuaded that the Chambers judge failed to exercise his discretion judicially in this respect.

72 However, I agree with the appellants that, in the circumstances, the injunction should be dissolved.

73 The chambers judge assumed that an injunction until trial was necessary to protect the respondents' interests without considering the remedy to which they will be entitled should they succeed at trial. He granted the injunction because, in his view, it would "maintain the status quo that existed before the creation of BMS Specialty [Vancouver]" ([paragraph] 36). However, he was not advised, as we were, that the trial cannot be heard until at least May 2006. Consequently, he did not consider whether the interests of justice require the status quo to be maintained for so long. In my view, the respondents' remedy at trial lies in damages and the interlocutory injunction granted exceeded what was necessary to do justice in the circumstances.

74 The respondents claim a permanent injunction and an accounting of profits made by the appellants from their customers. However, the misuse of confidential information for profit will not always give rise to an equitable remedy. Binnie J. explained in Cadbury Schweppes Inc. v. FBI Foods Inc., supra:

> [20] The equitable doctrine [breach of confidence], which is the basis on which the courts below granted relief, potentially runs alongside a number of other causes of action for unauthorized use or disclosure of confidential information, including actions sounding in contract, tort and property law. In Lac Minerals, supra, it was suggested that the action for breach of confidence should be characterized as a sui generis hybrid that springs from multiple roots in equity and the common law, per Sopinka J., dissenting, at p. 615:
>
> > The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is sui generis relying on all three to enforce the policy of the law that confidences be respected.

75 As Binnie J. pointed out at [paragraph] 21-22, again quoting Sopinka J. in Lac Minerals, supra, at 615, the jurisdictional basis for the claim of breach of confidence is relevant to the choice of appropriate remedies from a broad array. Thus, he continued:

> [26] ... whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the appropriateness of a particular equitable remedy but does not limit the court's jurisdiction to grant it.

and:

> [32] In some sense, disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse. Such vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of a contractual term, express or implied (Pre-Cam Exploration & Development Ltd. v. McTavish, [1966] S.C.R. 551, per Judson J., at p. 555).

76 In Cadbury Schweppes, the confidential recipe for a commercially-sold juice was misused to manufacture and sell a competing product. In setting aside a permanent injunction against continued use of the information and an award of damages equal to the profits improperly earned by the defendant for a period of one year, the court rejected the submission that a proprietary remedy was appropriate. Binnie J. explained:

> [48] Breach of confidentiality is the gravamen of the complaint. When it comes to a remedy, however, I do not think a proprietary remedy should automatically follow. There are cases (as in Lac Minerals) where it is appropriate. But equity, with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label ("property") rather than a case-by-case balancing of the equities. In some cases, as Lord Denning showed in Seager v. Copydex Ltd. (No. 2) [[1969] 2 All E.R. 718], the relevance of the specific quality of the information to a remedy will not be its property status but its commercial value. In other cases, as in Lac Minerals, the key to the remedy will not be the "property" status of the confidence but the course of events that would likely have occurred "but for" the breach. In the present case, the trial judge considered the confidential information to be nothing very special, and that "but for" the breach the respondents would in any event have faced a merchantable version of Caesar Cocktail in the market place within 12 months. On these facts, a "proprietary" remedy is inappropriate.

77 In the result, the court concluded that damages for loss of profits was the proper remedy and remitted the case to the trial court for the assessment of damages.

78 Here, the dominance shifted over time from the proprietary quality of the confidential information to its commercial-value quality. The design and pricing of insurance packages is the sort of information that any broker writing Lloyd's business could develop on the basis of experience. It is not a trade secret. The misuse of the information by the appellants, if proven, is more in the nature of unfair competition than of misappropriation of property. It, perhaps, gave the appellants a transitory advantage in the market, a "springboard", as respondents' counsel put it during oral submissions.

79 There is a strong public interest in the maintenance of commercial competition. For that reason, restrictive covenants will be enforceable only if they are reasonable as between the parties and reasonable with regard to the public interest; whether they will be considered reasonable will depend on whether the temporal and spatial restrictions in the covenant are no wider than reasonably required to adequately protect the proprietary interest asserted: see generally J.G. Collins Insurance Agencies v. Elsley, [1978] 2 S.C.R. 916, at 923-928.

80 When the trial is heard in May 2006 or later, the injunction will have been in effect for more than two years. There is no restrictive covenant in this case but, if there were, a covenant prohibiting the appellants from soliciting or otherwise obtaining the respondents' customers for a period in excess of two years would likely be unenforceable as unreasonable in the circumstances and contrary to the public interest. An injunction with the same effect is no less offensive.

81 Permanent injunctive relief and an accounting of profits are unlikely to be granted at trial if the respondents should succeed in their action. The protection of their proprietary interests in their particular design and pricing of insurance packages for their customers should have been limited to a period of time that strikes a reasonable balance between their interests, the public interest, and the interests of the appellants in asserting their right to do business in competition with them. The injunction has been in effect for about ten months. The relevant quality of the information has passed from the proprietary end of the spectrum to the commercial-value end. The "springboard" effect has been dampened and the respondents have had an opportunity to solidify relationships with their customers. Damages are now an adequate remedy.

82 Accordingly, I would allow the appeal and dissolve the injunction. I would award costs of the appeal to the appellants. However, since an injunction for a short period of time was not unwarranted, I would not interfere with the award of costs below.

SMITH J.A.
LEVINE J.A.:-- I agree.