COURT OF APPEAL FOR ONTARIO

CITATION: Tar Heel Investments Inc. v. H.L. Staebler Company Limited, 2022 ONCA 842
DATE: 20221205
DOCKET: C69771

Huscroft, Nordheimer and Copeland JJ.A.

BETWEEN

Tar Heel Investments Inc.

Plaintiff
(Respondent/Appellant by way of cross-appeal)

and

H.L. Staebler Company Limited, Lisa Arseneau and Debbie Sutton

Defendants
(Appellants/Respondents by way of cross-appeal)

P. A. Neena Gupta and Jeramie Gallichan, for the appellants/respondents by way of cross-appeal

Stephen Gleave and Breanna Needham, for the respondent/appellant by way of cross-appeal

Heard: June 20, 2022

On appeal from the order of Justice Dale Parayeski of the Superior Court of Justice, dated July 19, 2021.

Huscroft J.A.:

[1] The appellants[1] appeal from an order awarding the respondent damages for conversion arising out of the sale of a book of business by Lisa Arseneau to H.L. Staebler Company Limited ("Staebler"). The respondent cross appeals, arguing that damages should also be awarded for the sale of a second book of business by Ms. Arseneau to Staebler.

[2] For the reasons that follow, I would allow the appeal and cross appeal, set aside the decision below, and order a new trial.

BACKGROUND

[3] The appellant Lisa Arseneau works in the transportation insurance industry. She developed a book of business while working at the Kimberly & Associates brokerage. When she joined PDI (the corporate predecessor of the respondent Tar Heel Investments Inc. ("Tar Heel")) in 2009, she brought a number of transportation clients with her (the "Kimberly book"). The basis of her entitlement to take the book of business from the Kimberly & Associates brokerage is not discussed in the trial judge's decision. No findings were made in this regard.

[4] During her tenure at PDI, which lasted several years, Ms. Arseneau developed a book of business as part of PDI's transportation division (the "TRIP book"). The principal of PDI augmented the TRIP book by transferring

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[1] The trial judge found that a third defendant, Debbie Sutton, was not liable for anything arising out of her role in providing administrative assistance to Ms. Arseneau and she took no part in this appeal.

transportation clients and their corresponding premiums into it to help sustain the TRIP book in its initial years. In 2015, PDI was purchased by another firm, Jones Brown. Ms. Arseneau was not happy with the sale to Jones Brown and its ramifications. She sold a combined book of business that included the Kimberly book as well as the TRIP book to the appellant Staebler and, concurrently, commenced employment with it.

[5] PDI brought a claim against Ms. Arseneau and Staebler seeking, amongst other relief, damages for conversion, breach of and inducing breach of contract, breach of confidence, and breach of, inducing breach of, and knowingly assisting in breach of fiduciary duty.

The trial judge's decision

[6] The trial judge began by considering the nature of Ms. Arseneau's relationship with PDI. The trial judge found that Ms. Arseneau never paid expenses at PDI for items such as staff salaries, travel, occupancy, entertainment, licenses, Errors and Omissions insurance, charge backs, and bad debts. He found that these arrangments were inconsistent with operating under a broker support network ("BSN") model, as Ms. Arseneau argued. Ms. Arseneau was paid a guaranteed salary, benefits, and expenses, an arrangement that the trial judge described as speaking more to routine employment than some kind of independent or semi-independent status. The trial judge noted, however, the evidence of the

principal of PDI that even those working under a BSN were required to be employees of PDI due to regulatory requirements.

[7] The trial judge found that an agreement that may have existed between PDI and Ms. Arseneau regarding the Kimberly book was never committed to writing. Although Ms. Arseneau and PDI negotiated over the sale of the Kimberly book prior to her commencing employment with the respondent, they never agreed on a price for the book and no sale of it was completed. PDI believed there was an agreement that it would provide pension rights to Ms. Arseneau on retirement, but when PDI was purchased by Jones Brown, Ms. Arseneau declined PDI's offer to transfer $150,000 worth of shares in that company to her in exchange for pension rights. Instead of accepting the offer from PDI, she sold the entire book of business she had worked on at PDI – the Kimberly book as well as the TRIP book – to the appellant Staebler and commenced working for Staebler.

[8] The trial judge found that Ms. Arseneau was entitled to sell the Kimberly book to Staebler because she had never sold it to PDI, so "[b]y default" she continued to own it, "to the extent that it can be properly identified".[2] He found, however, that she never owned the TRIP book and by selling it she committed the tort of conversion. The trial judge did not address the other causes of action asserted by the respondent, stating that the other claims "come around full circle

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[2] The legal basis for Ms. Arseneau's right to sell the Kimberly book is unexplained.

to the act or omissions making up the conversion". He did say, however, that he was not satisfied that Ms. Arseneau owed the respondent a fiduciary duty, as it was inconsistent with the respondent's position that she was an employee at all times and she was not sufficiently senior in management to have fiduciary duties.

[9] The trial judge stated that 90 percent of the clients listed in the books of business followed Ms. Arseneau to Staebler within two years of her joining that firm, but he also said that it was not clear how much of this movement was attributable to the sale of the books as opposed to client loyalty to Ms. Arseneau. No findings were made in this regard. The trial judge acknowledged that the books, which he treated separately for the purpose of the conversion analysis, were comingled at the respondent's firm and it was not easy to separate them for the purpose of calculating damages. He calculated damages based on the value of the TRIP book at the time of the conversion. Ms. Arseneau and Staebler were held jointly and severally liable for those damages.

DISCUSSION

The parties' positions

[10] The appellants argue that Ms. Arseneau was entitled to sell the TRIP book and that the trial judge erred in finding that the sale constituted the tort of conversion. The trial judge wrongly imposed an agreement on the parties and ignored evidence that Ms. Arseneau owned her book of business – the TRIP book

as well as the Kimberly book. Ms. Arseneau renews her argument that she joined the respondent under the BSN model, but says that an employment structure did not support the assumption that the book of business belonged to PDI and there was never any agreement to amend the agreement with respect to the book of business. Ms. Arseneau argues that she had the right to solicit clients on her departure, as there was no restrictive covenant, and the law of conversion did not apply.

[11] The respondent argues that the trial judge properly concluded that Ms. Arseneau committed the tort of conversion by selling the TRIP book and in its cross appeal argues that Ms. Arseneau converted the Kimberly book as well. The respondent argues that an employer presumptively owns the book of business in the absence of an agreement to the contrary. The respondent argues that it paid for the Kimberly book in the context of a retirement plan, the value of which was to be determined objectively based on the value of the clients. The respondent argues that Ms. Arseneau had a fiduciary duty, but even if she did not, she owed a duty of loyalty and good faith to the respondent and breached that duty when she sold the entire book of business. Her ability to compete with the respondent, as a former employer, did not extend to using confidential information acquired while employed with the respondent. Ms. Arseneau's actions in selling the book and using it in her subsequent employment with Staebler also constituted a breach of confidence and the tort of unlawful means conspiracy.

The focus on ownership

[12] The trial judge's conclusion that the Kimberly book belonged to Ms. Arseneau – "[b]y default" – led him to conclude that she was entitled to sell the Kimberly book to Staebler. There are several difficulties with this conclusion.

[13] The basis of Ms. Arseneau's ownership of the book in the first place is not addressed. It appears to have been assumed that she owned the book when she joined PDI.

[14] Nor does the trial judge make any findings concerning the nature of the book – what it included when Ms. Arseneau commenced working for PDI and what it included several years later when she sold it to Staebler. The trial judge discusses the concept of a book of business in general terms as "an organic thing", with some clients dropping off while others are gained, and some clients who leave may return. Moreover, clients' needs may change, resulting in increased or decreased premiums and commissions paid to the broker. At the same time, the trial judge suggested that the Kimberly book had become comingled with the TRIP book and had to separate the books for the purpose of assessing damages for conversion of the TRIP book.

[15] The finding that Ms. Arseneau owned the Kimberly book is problematic in the absence of findings as to the former Kimberly clients' relationship with PDI. The finding that Ms. Arseneau did not work under the BSN model suggests that

the former Kimberly clients had a client relationship with PDI rather than Ms. Arseneau, but there are no specific findings in this regard. This case is unlike *King v. Merrill Lynch Canada Inc.*, 2005 CanLII 43679 (Ont. S.C.), which the respondent proffers as authority for its position that it owned the clients in the Kimberly book in the absence of an agreement to the contrary. In that case, R. Smith J. found, at para. 67, that the clients were clients of the employer and not the employees for many reasons, including evidence as to the nature of the clients' relationship with the broker as opposed to the employees who serviced the accounts. No similar findings were made in this case.

[16] There is also the problem of the evolving nature of the Kimberly book: additions and changes were made to the book over the years once Ms. Arseneau joined PDI. The trial judge states that Ms. Arseneau "owned" the Kimberly book at the time of the sale to Staebler, but qualifies this by saying "to the extent that it can be properly identified". By the time of the sale, the information in the Kimberly book appears to have been comingled with the information in the TRIP book.

Conversion not established

[17] The trial judge's focus on ownership of the book of business caused him to view the case through the lens of the tort of conversion, despite the nature of the property in question.

[18] The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at p. 746. It is a tort of strict liability and it is no defence that the wrongdoer did not intend to convert the goods: *Boma*, at p. 746.

[19] It is not settled whether intangible property such as the information in a book of business can be the subject of a conversion claim. Some trial courts have held that the tort does not apply to intangible property: see e.g., *Del Giudice v. Thompson*, 2021 ONSC 5379, at para. 172; appeal transferred to Ont. C.A., C70175; *Mann Engineering Ltd. v. Desai*, 2021 ONSC 7580, 22 B.L.R. (6th) 165, at para. 126; *Utilebill Credit Corporation v. Exit It Contract Consulting Inc.*, 2022 ONSC 2307, at paras. 22-24. Other trial courts have held that it can apply: see e.g., *Brant Avenue Manor Ltd. Partnership v. Transamerica Life Insurance Co. of Canada* (2000), 48 O.R. (3d) 363 (S.C.), at para. 13; *Canivate Growing Systems Ltd. v. Brazier*, 2020 BCSC 232, at para. 71. There is no authoritative guidance from this court on the issue.

[20] The trial judge does not address the matter and this court cannot do so given the state of the record. Even assuming that the tort of conversion could apply to intangible things, such as a book of business, the trial judge did not make the findings necessary to support the application of the tort in this case: see *Boma*, at

p. 746. He stated simply that "[s]elling that which one does not own constitutes the tort of conversion." The difficulty is that information is unlike chattel property. In the normal sort of case involving conversion, an owner is deprived of the use of a chattel because it is taken by another. In this case, the information found to have been converted remained in the respondent's possession; it was copied and provided to Staebler. Use of the information by Staebler may well have had the effect of harming the respondent's business, but the information remained with the respondent while Staebler used it. In short, the trial judge's findings are not adequate to support the conclusion that conversion of the TRIP book had occurred.

The fiduciary claim

[21] The trial judge gave relatively few reasons for finding that Ms. Arseneau did not owe a fiduciary duty to the respondent. He stated that the respondent's claim that she was a fiduciary was inconsistent with its position that she was a mere employee, and that neither managerial responsibilities nor titles were sufficient to establish a fiduciary duty. He also noted that Ms. Arseneau was not so senior in management as to have been consulted during PDI's negotiations with Jones Brown.

[22] The respondent contests this finding. In my view, there are difficulties with the trial judge's analysis that led to this finding. As I propose to send this matter

back for a new trial, I would leave it up to the judge at that trial to determine whether a fiduciary duty was owed by Ms. Arseneau or not.

The other causes of action

[23] The trial judge stated that the other causes of action "[u]ltimately … come around full circle to the act or omissions making up the conversion", and so declined to address the other causes of action advanced by the respondent – breach of contract, breach of loyalty and good faith, breach of confidence, and conspiracy.

[24] This conclusion was in error. The other causes of action did not depend on the conversion claim. They required separate findings in accordance with the law that governed each of them.

[25] In essence, the respondent's claim is that the appellants stole its clients and destroyed its transportation insurance business. The trial judge's finding that 90 percent of PDI's clients listed in the books of business followed Ms. Arseneau to the appellant Staebler appears to support this claim, but the trial judge makes no findings as to whether or to what extent the loss was attributable to any of the other causes of action.

[26] The components of the other causes of action demonstrate the need for findings unique to them. For example, in *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 635-636, La Forest J. set out the three

elements of a breach of confidence as follows: 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. No findings were made in regard to these elements, and it is possible that different findings may be made in respect of the Kimberly and TRIP books. This is complicated both by the extent to which the information in the Kimberly book evolved and the extent to which the information in both books was comingled.

CONCLUSION

[27] The trial judge observed that "[t]his case is an object lesson in the perils of parties working together without quite getting around to finalizing the actual terms of their business agreement." He noted the difficulties presented by the evidentiary record and noted that the parties' submissions had been less than helpful.

[28] Unfortunately, the trial judge's decision not to make findings on the various causes of action leaves this court in a difficult position on appeal. It is not possible to make the findings required on the state of the record in this case. In these circumstances, there is no alternative but to order a new trial.

[29] Accordingly, both the appeal and the cross-appeal must be allowed and the judgment below set aside.

[30] I would order a new trial on all of the causes of action.

[31] I would reserve the costs of the first trial to the judge hearing the second trial. The parties shall bear their own costs on the appeal.

Released: December 5, 2022 “G.H.”

“Grant Huscroft J.A.”
“I agree. I.V.B. Nordheimer J.A.”
“I agree. Copeland J.A.”