

SLING-CHOKER MANUFACTURING LTD. V ANDERSEN (INTERIM INJUNCTION RULING)

Sling-Choker Manufacturing Ltd. v Andersen (interim injunction ruling)

[2006] O.J. No. 2955

No. C-9594/06

Ontario Superior Court of Justice

Sudbury, Ontario

M.R. Meehan J.

Civil procedure – Applications and motions – Conduct of hearing – Adjournments – Motion by the defendant for an adjournment of an action – The plaintiff sought an adjournment on the grounds that there also be an injunction preventing the defendant from contacting the plaintiff's customers or from disclosing confidential information – Motion for adjournment granted with the injunction – The plaintiff claimed that the defendant, who was a senior employee at the plaintiff, breached his duty of good faith to the employer by acting in conflict of interest.

Civil procedure – Injunctions – Motion by the defendant for an adjournment of an action – The plaintiff sought an adjournment on the grounds that there also be an injunction preventing the defendant from contacting the plaintiff's customers or from disclosing confidential information – Motion for adjournment granted with the injunction – The plaintiff claimed that the defendant, who was a senior employee at the plaintiff, breached his duty of good faith to the employer by acting in conflict of interest.

Motion by the defendant, Anderson, for an adjournment of an action – Anderson was a senior employee of the plaintiff, Sling-Choker – Sling-Choker claimed that Anderson acted in conflict of interest of his obligations as a senior employee – Anderson argued for an adjournment on the basis that documentation was just served in June – Sling-Choker sought an injunction during the adjournment to prevent Anderson from approaching existing customers and from disclosing confidential information – HELD: Motion for adjournment allowed but with an injunction in place – The balance of the equities favoured Sling-Choker and the injunction.

Counsel:

D.P. Best, Esq. Counsel for the Plaintiff/Applicant

N. Stoner, Esq. Counsel for the Defendants/Respondents

M.R. MEEHAN J. (orally):- This matter comes before me as a contested adjournment as a result of an action brought by the applicant Sling-Choker against Mark Marenus Andersen noted as carrying on business under the firm name and style of Andersen Associates Inc., Delta VOD Corporation and 1072892 Ontario Limited.

The defendant Mark Marenus Andersen was a senior employee of Sling-Choker Manufacturing. He was described in various terms but without any doubt he was a senior employee. There seems to be an attempt made by him to indicate that somehow his business was incorporated, but I am advised by counsel for the applicant that searches both of the Province and the Federal Government show no such name as Andersen Associates Inc., and that is why the style of cause reads in that fashion.

Sling-Choker had a relationship with a number of companies from overseas dealing with various items which were employed in mines primarily for ventilation. They had concentrated on products sold by Protan, Delta, Norway and Cogemacoustic.

Part of the defendant Andersen's duties was to promote these products and to particularly see that the relationships continued. In one of these cases it appears that they had a five year contract.

During the course of his employment, Mr. Andersen entered into arrangements with the proprietors of at least some of these European companies and became a shareholder in the numbered company and Delta VOD.

His attempts to further his own interests were discovered when he indicated he had gone sailing and it came to the attention of the applicant that he really was in Europe at the time seeing these European corporations.

During the time he was employed by the company, there is no doubt that he directed work to the corporation Delta VOD, which had a head office at a local law firm here, and particularly according to tab 13, a ventilation audit at Falconbridge Nickel Mines which noted a proposal of January the 3rd, 2006, when he of course was still employed by the applicant.

There was a discussion apparently as far back as October 7, 2005, of the entering into a global marketing company to develop and service a proprietary ventilation on demand system which was in the process of being implemented.

His actions in furthering his own financial interests over that of his employer and dealing with those suppliers with which the applicant had a relationship placed him in an obvious conflict of interest and without any doubt on the material before me breached his duty to his employer.

Not unreasonably, counsel for all of the respondents requests an adjournment because the documentation was just finally served at the end of June this year. Much of the evidence which I am not going to deal with consists of emails of the defendant Andersen made on a computer owned by the applicant while Andersen was employed by the applicant.

Two versions of an order dealing with the question of an adjournment and the terms thereto were presented by counsel. That of the applicant deals with the issuance of an interlocutory injunction preventing the defendants from approaching any existing customers of the plaintiff, and more specifically, eight of them as set out in schedule 'A' disclosing any confidential or proprietary information – I should pause to note that the defendant Mark Marenus Andersen did sign a document agreeing not to disclose any information – and stopping them from submitting a quotation to any customer of the plaintiff for whom the defendants Mark Marenus Andersen or Delta VOD prepared or participated in the preparation of any quotations, submissions, or solicitations for business on behalf of the plaintiff within eighteen months prior to June 19th, stopping them from competing with the plaintiff in the business of distribution of mine ventilation products in Canada which products include tunnelling and mine fans, ventilation ducting and the Delta VOD system.

The document, or draft order, prepared by counsel for the respondents is a somewhat more limited document and does not contain the same broad terms as that of the documents submitted by Mr. Best.

It is obvious that it will now be some time before the matter is dealt with by way of injunction as there must be material filed by the respondents, then there will be a full argument on the basis of whether a permanent injunction should issue over a certain time period. There are problems according to Mr. Stoner with communication for some of the owners of the defendants who are off shore and so on.

So the question is, how best to deal with this matter and balance the rights of the plaintiff to carry on its business and the rights of the defendants to carry on business.

It is submitted strongly by Mr. Stoner that the plaintiffs' draft order is too restrictive.

The evidence put forth by the plaintiff, which at the time of this hearing is of course naturally un-rebutted shows a course of conduct over an extended time period, shows breach of any ordinary duties owing by an employee to his employer, and shows dealings with long-term customers of the plaintiff by the new corporation Delta VOD.

A second submission of the respondents is that the VOD new technology is not yet sufficiently approved so that it may be put on the market. I understand it to be a prospective computerized air delivery system which will work in multi-level mines. Apparently there are difficulties with such a system and such a system may work on one level of a mine or tunnel but there are difficulties in having it work on different levels.

Whatever the case, it is my view that that technology was on the material before me within the contemplation of the applicant, of Mr. Andersen, and of the purported inventor of the technology overseas. There were discussions before Mr. Andersen's termination in relation to the possibility of obtaining that technology if and when it was approved.

It is always difficult to balance rights if you like, in the air, however Mr. Justice Cameron in *Gill v. McIntosh Limousine Service* to be found at [2000] O.J. No. 1143, indicated on his assessment, "*There was a serious issue to be tried, loss of business to the Gills amounted to irreparable harm and the balance of convenience favoured maintaining the status quo.*"

When I assessed the equities here, it is obvious in my mind at least, that if the defendants led by Mr. Andersen are allowed to continue unchecked there will be a risk of serious economic harm to the applicant.

In the circumstances, and keeping in mind that much of the preliminary arrangements for the new companies were entered into while the respondent, Mr. Andersen, was an employee of the applicant, I am satisfied that the equities favour the applicant on the material before me, and I am satisfied that the broader order for an interim injunction setting forth the restrictions upon the defendants is the proper order.

I am grateful to counsel for preparing the orders which has simplified to a certain extent a quite complicated matter.

The motion will be adjourned on injunctive terms set out in Mr. Best's draft order.