

Court File No. CV-24-00000869-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GULED WARSAME and SHELLI SAREEN on their own behalf and on  
behalf of all members of UNITE HERE Local 75

Plaintiffs

And

DAVID SANDERS, ASHLEY HAYES, RAFUNZEL KORNGUT AND ALLAN PACE on his  
own behalf and on behalf of all members of THE TORONTO HOSPITALITY EMPLOYEES  
UNION – CSN (THEU-CSN)

Defendants

**DEFENDANTS BOOK OF AUTHORITIES**

June 12 2024

**LAURA YOUNG**  
*Barrister & Solicitor*  
36 Toronto Street, Suite 1120  
Toronto, ON M5C 2C5  
**LSO# 39937V**  
**Tel: 416.366.4298**  
**[laura.young@lylaw.ca](mailto:laura.young@lylaw.ca)**

**WADDELL PHILLIPS**  
**PROFESSIONAL CORPORATION**  
36 Toronto Street, Suite 1120  
Toronto, ON M5C 2C5

**John Kingman Phillips (LSA# 8295 / LSO No.:  
46206E)**  
**[john@waddellphillips.ca](mailto:john@waddellphillips.ca)**

**John-Otto Phillips (LSO No.: 70097N)**  
**[otto@waddellphillips.ca](mailto:otto@waddellphillips.ca)**

Lawyers for the Defendants

TO: **CAVALLUZZO LLP**  
474 Bathurst Street, Suite 300  
Toronto ON M5T 2S6

**Stephen J. Moreau, LSO# 48750Q**

smoreau@cavalluzzo.com

**Cole Eisen, LSO# 82209W**

ceisen@cavalluzzo.com

**Ryan White, LSO# 56979C**

rdwhite@cavalluzzo.com

Tel: 416-964-1115

Lawyers for the Plaintiff

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# TAB 1

COURT FILE NO: S 2229/02 (Sarnia)

DATE: 2002/04/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

911887 ONTARIO LIMITED, carrying on  
business as DATATEK SYSTEMS

Plaintiff

- and -

RYAN JOSEPH LeBLANC, JONATHON  
BARRY McILWAINE and SHANNON  
LeBLANC, carrying on business as JSR  
SOLUTIONS

Defendant

) Paul R. Beaudet, for the Plaintiff

) Robert G. Murray, for the Defendants

) HEARD: March 15, 2002 and April  
4,2002

DONNELLY, J.

[1] The Plaintiff, in the business of computer sales and service, moves for an interlocutory injunction under s. 101 of the Courts of Justice Act. It seeks to restrain former employees from soliciting or dealing with customers of the Plaintiff or from using confidential information appropriated from the Plaintiff.

02 214 072

- [2] The defendants, Ryan Joseph LeBlanc (Ryan) and Jonathon Barry McIlwaine (Jonathon) carry on business as J.S.R Solutions. The Defendant Shannon LeBlanc is an employee of J.S.R. Solutions,
- [3] None of the defendants signed a non-competition agreement. Only Ryan had been asked to do so. The Plaintiff's claim is founded on the contention that the defendants, as Senior Managers, breached a fiduciary duty. Canadian Aerospace v. O'Malley (1974) S.C.R. 592.
- [4] The defendants were members of a technical pool of five employees principally engaged in rendering service both in shop and off site for the plaintiff's customers. The defendants, Jonathon and Ryan received specialized training at the Plaintiff's expense as Microsoft Certified Systems Engineers and to qualify for sales and service of a Citrix network operating system. The defendants' skills were not unique to the Plaintiff's workplace.
- [5] Immediately upon leaving the Plaintiff's employment on November 5, 2001, the defendants contacted many of the plaintiff's customers. Within a day or two the Plaintiff knew of these approaches. Within two weeks the plaintiff wrote to its customers advising that the defendants were no longer employees, providing the qualifications of their replacements and furnishing particulars of reduced on-site service charges.
- [6] The customers were free to make their own choice. In some cases customer loyalty was to the person who had been providing hands on service. Justice Trainor recognizes the commercial reality of such allegiance in 309925 Ontario Ltd. v. Tyrrell (1981) 127 D.L.R. (3d) 99 p.7.

*"... employers are, or should be aware, that customers of a business who have the benefit of good advice, skill and attention of an employee such as the defendant, tend to seek out his services as opposed to those of other employees. Where such an employee changes employment and becomes a competitor, it is not unusual to find former satisfied customers bringing their business to his new location. Even a senior management employee has the right, in the absence of agreement, or statutory restriction, to enter business in direct competition with his former employer and to advertise the change, including the availability of his*

services." See also Barton Insurance Brokers Ltd. v. Irwin (1999) B.C.J. No. 220, at para.28 per Hall, J.A. (B.C.C.A.)

[7] Technical skill is not subject to restraint. An employee who leaves employment is entitled to use the ordinary skill and knowledge incidental to his employment, but not trade secrets or confidential information such as customer lists. Leith v. Rosen Fuels Ltd. (1984), 4 C.C.E.L. 184 (Ont. H.C.) at p. 195.

[8] The principles underlying relief by interim injunction are reviewed by Henry, J. as follows:

Firstly

Re Town of Aurora and Anglican Houses (1990), 72 O.R. (2<sup>nd</sup>) 732 (H.C.) at 740:

*"... the Court ought not to lose sight of the principle (which seems often to be ignored) that this remedy is discretionary and extraordinary and ought to be granted sparingly."*

Secondly

Mercury Marine v. Dillon (1986) 11 C.P.C. (2d) 235 (H.C.) at page 237:

*"The issue before me is whether I should grant the injunctive order asked. The statutory test by which I am to be guided is whether it is just and convenient to do so. In deciding this issue it is relevant to consider the following elements:*

- a) strength of the plaintiff's case;*
- b) irreparable harm to the plaintiff or the defendants that cannot be compensated in damages;*
- c) the balance of convenience."*

*The Court is not to adopt a rigid approach in considering these factors but must be flexible, giving full weight to the practical realities of the situation to which the injunction shall apply and in particular the impact of the decision to grant or not to grant it upon the parties respectively."*

[9] Certain material facts remain in serious controversy.

- Were the defendants in management positions of such a nature that a fiduciary duty arose or were they service personnel?
- Did the defendants voluntarily leave the Plaintiffs employment or were they constructively dismissed?

- Was confidential information utilized in identifying, soliciting or servicing the Plaintiff's customers? The defendants contend that the Plaintiff had no definitive customer list and many customer names were in the public domain by reason of posting on the Plaintiff's website.
- Was the customer contact factual notification of competition or was it aggressive solicitation?
- Were all technical manuals and confidential materials returned to the Plaintiff upon termination of employment?
- Was Steeves & Rozema, a maturing business opportunity for the Plaintiff usurped by the defendants in breach of a senior management fiduciary duty? Was Steeves & Rozema a business account assigned by Barry McIlwaine, Systems Manager at Steeves & Rozema to his son, Jonathon, so that since 1997 when Jonathon entered part time employment with Steeves & Rozema that account followed him before, during and after his employment with the Plaintiff?

[10] Where, as in this case, there is a significant dispute over material facts, which remain for resolution at trial, the "strong prima facie case" test is not appropriate. Rather the Court must be satisfied that "there is a serious question to be tried." American Canamid v. Ethicon (1975) H.L. 396; C. Cure v. Olympia & York (1983) 17 C.P.R. (2d) 153 (Ont. Div. Ct.) Yule v. Atlantic Pizza (1977) 17 O.R. (2d) 505.

[11] The central issue is fiduciary capacity. As provided in R.W. Hamilton Ltd. v. Aeroquip Corp. (1988), 65 O.R. (2d) 345 (H.C.) at p. 351, 353.

*"An officer or manager will not be saddled with a fiduciary duty under Canadian Aero Services unless the position he occupies contains the power and the ability to direct and guide the affairs of the company. A title may or may not match reality per se..."*

.....

*"Not all managerial positions should lead to the imposition of the very high duty of a trustee lest the law commit a high proportion of employees in this province to slavery."*



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- [12] The plaintiff supports its claim for senior management responsibility and directing mind status by evidence such as the following:
- the defendants' attendances at management meetings,
  - their participation in pricing and business quotations,
  - their designations to customers by titles such as sales manager with their functions warranting such titles,
  - Ryan's hiring and firing of one employee, and
  - of bonuses paid to the defendants substantially in excess of that paid to other service personnel.
- [13] The Plaintiff supports its claim for breach of fiduciary capacity by evidence such as the following:
- the defendants left employment precipitously with no advance notice,
  - the defendants actions were consistent with advance planning to leave, for example, Jonathon destroyed the contents of his computer folder on October 16, one day prior to a controversial meeting which was the first overt step in the termination process.
  - The defendants, by use of their Palm Pilots, had instant access to the Plaintiff's customer records.
  - The defendants specifically targeted the plaintiff's customers.
  - E-mail and telephone contact with the plaintiff's customers commenced within 24 hours of the defendants' termination. This brief time interval, coupled with Palm Pilot accessibility, is claimed to be consistent with improper use of confidential information.
- [14] Some of this evidence is corroborated by third parties. Some of it, such as e-mail contacts, originates from the defendants. Some of it is directly challenged by the defendants' evidence.

- [15] Issues of credibility, reliability and assessment of the weight of evidence are for resolution at trial. Whether the claimed management status lies at the edge of fiduciary duty or beyond is not for determination here. However, given the corroborative aspects from third parties and from the defendants, this evidence does demonstrate that there is a serious issue to be tried.
- [16] Irreparable Harm  
The evidence does suggest a tinge of hyperbole in the claim for “devastating losses”. Gross revenues for onsite service are down in the range of \$7,000.00 per month over a three month period. Damages will be based on the loss of profit portion of those gross revenues which loss is subject to many forces. Business lost by the Plaintiff and gained by defendants is quantifiable from business records. That loss pending trial is subject to accurate assessment in damages.
- [17] The plaintiff raises the issue of the defendants’ ability to pay damages. The defendants  
• are young, skilled and able to work in the competitive and dynamic computer market. They are claimed to have earning capacity which inflicted substantial losses on the plaintiff’s business.
- [18] Evidence of irreparable harm must be clear, not speculative. Apotex Inc. v. Imperial Chemical (1989) C.P.R. (3<sup>rd</sup>) 345 (Fed. C.A.) The Plaintiff has not demonstrated that irreparable harm would result from failure to grant the injunction.
- [19] Balance of convenience  
This involves comparison of the harm flowing from the granting or refusing of an interim injunction.
- [20] The impact of an injunction would deprive the defendants of elements of their business, some of it under continuing service contracts, and would significantly interfere with their

ability to use their skills and expertise in earning a living. Aristogrraf Graphics v. Northover (1990) 33 C.P.R. (3d) 310 (Ont. H.C.J.)

- [21] The nature of the computer service business demands prompt attention. The defendants' customers are not parties to these proceedings. Their business relationship with the defendants would be seriously disrupted by the order sought.
- [22] The benefit to the Plaintiffs flowing from the granting of an injunction is more uncertain. The Plaintiff currently has the right to compete for this business in a free market. There is no assurance that any lost business would return. This situation is closely reflected by the comments of Henry J. in Mercury Marine v. Dillon (1986), 11 C.P.C. (2d) 235 (Ont. H.C.J.)

*"I have also to take into account that the plaintiff, which already has a dominant share of the market, may be expected to meet the defendant's competitive moves by counter-moves of its own, the business response to new competition which is ordinarily far more effective and in the public interest than intervention by the Court through extraordinary remedies. To forecast that the plaintiff will lose customers or market share is at present speculation only."*

- [23] An injunction is an equitable remedy granted before the legal rights of the parties have been determined. Delay in seeking relief is a relevant consideration in equity and in assessing the balance of convenience. As Pennel, J. stated in Hardee Farms & CAM (1973) 10 C.P.R. (2d) 42.

*"I think however, for guidance in the future, it might not be altogether useless to restate an old rule – "Nothing is more likely to tip the beam of the scales of equity than delay".*

- [24] The importance of delay is also the subject of comment by Cory, J. in Computer Centre v. Zari (1976) 30 C.P.R. (2d) 55:

*"Zari gave notice on March 30<sup>th</sup> and the other defendants a day later, and yet the action was not commenced until June 1<sup>st</sup>. It has been pointed out that delay is much more likely to cause an interlocutory injunction to be withheld from a plaintiff that it would be in a more serious case of a perpetual injunction. I consider the delay in bringing the action and seeking the interim injunction to weigh heavily against the plaintiff."*

- [25] No reason is offered for delay in launching this proceeding from November 5, 2001 to February 26, 2002 with a return date of March 8. The motion was argued March 15<sup>th</sup> and continued on the next available date for the Court – April 4, 2002.
- [26] The peril with a delayed application, and specifically so in this case, is that the injunction may operate as a sword rather than a shield. By the time the claim for interim relief was launched the initial solicitation had been made. Thereafter market forces determine continuing allegiance, or otherwise. There is a real risk that rather than preserving status quo pending trial, the effect of an injunction would be to compel an unwinding of circumstances which have been permitted to develop during the delay period. The greater harm flows from the granting of an injunction pending a decision on the merits. The balance of convenience favours the defendants.
- [27] Through oversight the Plaintiffs in attempting compliance with Rule 40.03 filed personal undertakings relating to damage but no undertaking by the Corporate Plaintiff. Plaintiff's counsel on learning of this deficiency in the course of argument offered immediately to file in compliance with the Rule. Leave to do so is granted.
- [28] The application for an interlocutory injunction is dismissed. Written representations on liability for, and quantum of, costs may be made within ten days.

Released: April 8, 2002



The Honourable Mr. Justice J.M. Donnelly

SP  
B-1-257

# TAB 2

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ONTARIO COURT OF JUSTICE  
(GENERAL DIVISION)

B E T W E E N:	)	<u>Thomas G. Andrews</u>
	)	for the plaintiff
CLARK DOOR OF CANADA	)	
LTD.	)	
	)	
PLAINTIFF	)	
(Moving Party)	)	
- and -	)	
	)	
INLINE FIBERGLASS LTD.	)	<u>Gordon Capern</u>
	)	for the defendant
DEFENDANT	)	
(Responding Party)	)	

REASONS FOR DECISION

MOLLOY J.

The Motion

This is a motion brought by the plaintiff Clark Door of Canada Ltd. ("Clark Door") for interim recovery of personal property currently in the possession of the defendant, Inline Fiberglass Ltd. ("Inline"). The subject matter of the application is certain pultrusion dies used in making fiberglass door frames.

**Background Facts**

Clark Door sells doors and related products. Inline is a manufacturer of fiberglass doors and windows using a method of fiberglass pultrusion. This is a process whereby fiberglass is injected with resins and pulled through a heated die into a form created by the shape of the die. Inline manufactures the dies used in the pultrusion process but this is as an adjunct to its pultrusion business. It is the pultrusion business itself (i.e. the manufacturing of doors, windows and frames) which Inline looks to as its main profit centre. Also, Inline sells doors and windows directly to builders.

In 1992 Clark Door entered into an agreement with Inline whereby Inline was to manufacture pultrusion dies and thereafter use those dies to manufacture fiberglass door frames for Clark Door. As agreed, Clark Door paid approximately \$75,000 to Inline in respect of the agreement for the manufacture of the dies. Thereafter Clark Doors for a period of years purchased fiberglass products from Inline, including products manufactured using the dies. These transactions were separately invoiced and paid for. The business relationship between Clark Doors and Inline began to deteriorate and ultimately Clark Doors decided to manufacture its own door frames. Clark Door asked Inline to return the dies so that Clark Doors could use them in its own manufacturing process. Inline refused taking the position that although Clark Door had "ownership" of the dies, it was a term of their agreement that only Inline would ever be

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entitled to possession of them. Inline maintains that it used a highly confidential secret technology to manufacture the dies and that this process is unique. Inline asserts that it has spent many years and \$15 million of capital investment developing this technology. Further, Inline says that if others are able to look at and examine the dies they will be able to figure out the process and Inline will thereby have lost its competitive advantage arising from this proprietary technology.

Clark Doors commenced an action against Inline in November of 1995 and served along with the statement of claim a motion for interim relief. On the consent of Inline, an interim injunction was granted by Lissaman J. on November 29, 1995 restraining Inline from disposing of the dies until further order of the court. Inline is prepared to continue that injunction until the final resolution of the action or, alternatively, is prepared to place the dies in the hands of somebody else for safekeeping pending trial. Clark Doors, on the other hand, has brought this motion for interim recovery of the dies. Clark Doors says it has exhausted its supply of fiberglass door frames and wishes to begin immediately to manufacture its own frames using the dies. Clark Doors has already purchased the equipment it needs to do the manufacturing. It objects to being required to purchase new dies and the new dies manufactured and the lost profits resulting from the time that would take.



The Legal Test for Interim Replevin

The authority of a judge to make an order for interim recovery of personal property is set out in s. 104 of the *Court of Justice Act* which provides:

104.-(1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant, the court, on motion, may make an interim order for recovery of possession of the property.

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property.

The essential evidence to be put before the Court on a motion for interim recovery is listed in Rule 44.01(1) as follows:

44.01(1) An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

(a) a description of the property sufficient to make it readily identifiable;

- (b) the value of the property;
- (c) that the plaintiff is the owner or lawfully entitled to possession of the property;
- (d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and
- (e) the facts and circumstances giving rise to the unlawful taking or detention.

The powers of the judge on disposition of the interim recovery motion are set out in Rule 44.03(1) which provides:

44.03(1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

- (a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court direct, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;
- (b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or

(c) make such other order as is just.

It is to be noted that there is a broad residual discretion under Rule 44 to make whatever order is just. However, the Rule specifically contemplates that the party obtaining possession may be required to post security. Whether the security is in fact required and, if so, the amount of the security to be ordered is within the discretion of the judge hearing the motion. However the amount of security suggested by the Rule is twice the value of the property. Further, it is significant that the Rule contemplates the possibility of requiring a defendant to pay security if the defendant is to retain the property pending trial. These provisions are consistent with s. 104(2) of the *Courts of Justice Act* as well as with the general principle that a person obtaining an injunction is generally required to give an undertaking as to damages caused by the injunction if it is subsequently found to have been unwarranted. (As will be referred to below, there are some overlaps in the law relating to interim injunctions and the law on interim replevin).

The classic and oft quoted statement of the test to be applied before making an interim recovery order is that propounded by the Senior Master in *Ryder Truck Rental Ltd. v. Walker* [1960] O.W.N. 70, a case involving the disputed ownership of 20 trucks under the *Replevin Act* R.S.O. 1950, c. 339, s. 2 and Rules 359 and 360 (the precursors of the current legislation and Rules set out above). The Senior Master ruled:

The first matter for consideration is the scope of the enquiry under Rules 359-60. Having regard to the nature of the relief obtainable in a replevin action, which allows a preliminary taking of possession before trial, in my view it is not contemplated that the Court at this stage should embark upon a trial of the issues raised but only require the plaintiff to show the facts upon which it bases its claim, and if these facts afford substantial grounds for the plaintiff's claim, then the order should be granted. ...

Therefore, in my opinion the enquiry is limited to determining whether there are substantial grounds for the plaintiff's allegations, which if proved, bring the case within the statute.

The Senior Master's Order was upheld on appeal by Ferguson J. [1960]

O.W.N. 174 (H.C.) who held at p. 114:

The plaintiff had shown *prima facie* that it had a right to possession that it had the legal title of the vehicles. The documents supported the plaintiff's case and they did not support the defendant's case.

The "substantial grounds" test has been consistently applied by the courts since 1960: See e.g. *Businex Business Centres (Canada) Inc. v. TR Services Ltd.* (1992), 17 C.P.C. (3d) 313 (Ont. Gen. Div.); *Thorne Ernst & Whinney Inc. (Receiver and Manager) v. Wong* (1990), 45 C.P.C. 2d 101 (Ont. Master); *Employers Liability Assurance Corporation Ltd. v. Metropolitan Toronto*, [1966] 2 O.R. 485, [1966] 4 C.C.C. 334 (Co.Ct.); *Robert*

*Cooper Productions Inc. v. J.S. Kastner Associates Ltd.* (1982), 24 C.P.C. 269 (Ont. Master);  
*Peco Tool and Die Limited v. 939991 Ontario Ltd.* (1993), 19 C.P.C. (3d) 123 (Ont. Gen.  
Div.).

The defendant Inline concedes that “substantial grounds” is the proper test but argues that when the question of ownership is contested and cannot be foretold and especially when findings as to credibility must be made, the substantial grounds test is not satisfied. Reliance is placed primarily on three cases: *Robert Cooper Productions Inc. v. J.S. Kastner Associates Ltd.*; *Peco Tool & Die Ltd. v. 939991 Ontario Ltd.*; and *Tuffy v. Schloendork*, [1993] O.J. No. 1581 (Gen. Div.). Although in each of those cases the plaintiff’s motion for interim recovery was denied, the reasoning applied does not in my view deviate from the substantial grounds test set down in *Ryder Trucks* and the cases that followed it.

In Robert Cooper Productions the plaintiff a movie producer, entered into a contract with the defendant writers to write a “treatment” for a screen play. The agreement provided that the plaintiff was granted all rights to the products of the writers’ services. The finished product “treatment” was turned over to the plaintiff. The plaintiff also claimed entitlement to the defendant’s tapes and notes of interviews and this was the subject of the replevin action. Master Donkin held at p. 271-272:

In this case we are concerned not with goods which ever were in the possession of the plaintiff but rather goods that were created in the course of doing the work called for by the contract between the parties, and the whole case falls to be determined on the interpretation of the agreement which will be done either by an arbitration under the I.P.A. agreement or as a result of a trial, or other final disposition of this action. It is not a case involving goods in which the title is obviously or apparently or most likely vested in the plaintiff and where the defendant sets up a contrary claim by way of lien or charge, but rather a situation where the whole case will turn on the ownership of the chattels and that in turn will depend on the interpretation of the contract. In my view, the plaintiff has not shown to me that he has any more likelihood of success than the defendant. It is my view that it is not appropriate nor consistent with the whole idea of replevin to make an order at this stage which must be based on the finding that the plaintiff is the owner when that proposition is contested and where the outcome of the contest cannot be foretold.

The defendant relies on this case as supporting its argument that where the whole case turns on the ownership question and the interpretation of a contract, then an interim recovery order should not be made. I do not agree. A great many replevin actions turn on the ownership or right to possession of chattels and the interpretation of the agreement between the parties. That is, indeed, the very nature of replevin actions. I believe Master Donkin's decision in this case really turned on his finding that he could not say that the plaintiff had shown more likelihood of success than the defendant and that therefore the plaintiff did not meet the substantial grounds test.

Likewise, in *Peco Tool & Die* the motions judge accepted the substantial grounds test but found that the test was not met by the plaintiff.

Again, to a similar effect is the decision in *Tuffy v. Schloendorf* in which Carter J. held:

Because of the differing affidavits of the parties as to their intention when the original document was signed, and the several alterations and proposed alterations in terms discussed between the parties, I am satisfied that the question of ownership cannot be determined - or substantial grounds shown - without a full trial, where credibility will certainly play a part.

I agree that if it is not possible because of credibility issues and competing affidavit evidence to find that the plaintiff has shown "substantial grounds" then the plaintiff should not be successful on its motion. However, I do not see *Tuffy v. Schloendorf* as going beyond that. Accordingly, in my opinion the plaintiff is required to show substantial grounds supporting the claims advanced to meet the test required under the Act and Rule 44.01. This test is not altered by the three cases referred to by the defendant as discussed above.

I accept the submission of Mr. Capern that the plaintiff must satisfy all of the elements listed in Rule 44.01(1). In particular, it is not enough for the plaintiff to prove ownership or lawful entitlement to possession (as required by Rule 44.01(1)(c)). The plaintiff must also show that the property was “unlawfully taken” or is “unlawfully detained” (Rule 44.01(1)(d)). These are cumulative. Further, it is not enough for the plaintiff to assert that it is the owner and that the right to possession simply flows from that. Rather, there is a positive onus on the plaintiff to establish substantial grounds for its claim that its property is being unlawfully detained by the defendant.

It is not easy to articulate precisely the degree of proof which is required to meet the “substantial grounds” test. While the case law consistently identifies “substantial grounds” as the proper test, it is not immediately obvious where that test fits into the broad spectrum. Obviously since the order is only for interim recovery pending trial, the degree of proof is less than would be required on a motion for summary judgment. No final disposition of rights is being made. That is not to say, however, that the rights of the parties are not significantly affected even on an interim basis. In many cases, losing possession of goods for the time it takes to bring an action to trial may have serious, and perhaps irreversible consequences. Accordingly, I believe the plaintiff must show more than a probability of success at trial or simply that the



plaintiff is more likely to succeed than the defendant. The test is “substantial” grounds, not reasonable grounds or probable grounds.

The nature of a replevin order is in many ways similar to that of an injunction. Accordingly, I find the standard of proof applied in interlocutory injunctions to be useful for comparative purposes. Since *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd.* (1977), 17 O.R. (2d) 205, 35 C.P.R. (2d) 273, 80 D.L.R. (3d) 725 (Div. Ct.) our courts have required that a party seeking an interlocutory injunction establish a “substantial issue to be tried”. This is the threshold question and if it is answered in the affirmative a number of other issues must then be considered before relief should be granted (e.g. whether there would be irreparable harm unless an injunction is granted and the balance of convenience). *Yule v. Atlantic Pizza Delight* specifically rejected the “strong *prima facie* case” test which had formerly been applied in injunction cases and instead adopted the “substantial issue test” established by the English House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396. The reasoning in *American Cyanamid* was essentially adopted by the Supreme Court of Canada in *R.J. R. MacDonald Inc. v. Canada (Attorney General)* (1994) 111 D.L.R. (4th) 385. The “substantial issue” test for general interlocutory injunctions is not a difficult one to meet. In *R.J.R. MacDonald* the Supreme Court of Canada observed at p. 402:

What then are the indicators of “a serious question to be tried”? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claims is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: See *Metropolitan Stores, supra*, at p. 350. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of a leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

The “strong *prima facie* test continues to be applied, however, in Mareva injunction cases which, of course, are much more draconian than other forms of interlocutory injunctions. (*Chitel v. Rothbart* (1982), 39 O.R. (2d) 513, 141 D.L.R. (3d) 268, 69 C.P.R. (2d) 62 (C.A.).)

The impact of an interim replevin order seems to me to fall somewhere between the general interlocutory injunction and the Mareva injunction. It goes further than the interlocutory injunction in that it does not simply restrain the defendant from using the asset but requires delivery up of the asset to the plaintiff. On the other hand,

it does not go as far as the Mareva injunction because it extends only to particular assets to which the plaintiff is asserting a proprietary claim. In terms of effect, a replevin order directing the delivery up of property is more like a mandatory injunction than other forms of injunctive relief.

Courts have traditionally required a higher standard of proof for mandatory injunctions than for prohibitive injunctions and have therefore not applied the *American Cyanamid* test in those situations (Sharpe, Robert, *Injunctions and Specific Performance*, 2nd ed. Canada Law Book Inc., 1995 at p. 2.19 and 2.38-2.39). The test for an interlocutory mandatory injunction has been described as requiring a “high degree of assurance that at trial it will appear that the injunction was rightly granted” (*Ticketnet Corp. v. Air Canada* (1987), 21 C.P.C. (2d) 38 at 43 (Ont. H.C.))

Clearly, the test for whether a replevin order should be made is not going to be exactly the same as the test for any type of injunction. However, the term “substantial grounds” is somewhat vague and it helps, in my opinion, to put it in a contextual framework. As I have said earlier, it is obvious that the substantial grounds test is a lesser standard than the test for summary judgment. Similarly, I consider the Mareva injunction “strong *prima facie* case” requirement to be too high a standard for replevin orders which are much less draconian and far reaching. On the other hand, the

“substantial issue” test (not frivolous or vexatious) applied generally in prohibitive injunction cases is, in my view, too low a standard for a replevin order which requires one party to actually deliver up possession of property to the other. It must be remembered that before obtaining a prohibitive injunction, a party must satisfy other requirements not imposed on applicants for replevin (eg. the requirement of demonstrating irreparable harm which damages cannot remedy). As the replevin order is more in the nature of a mandatory injunction and is a greater interference with responding parties’ rights than a prohibitive injunction, a stronger standard is required. Accordingly, I am of the view that the “substantial grounds” test for interim recovery of property requires a high degree of assurance that the plaintiff will be successful at trial.

Cases in which there is clear documentation supporting the plaintiff are more likely to meet the substantial grounds test. Cases in which straight issues of credibility will determine the action are less likely to meet the test. However, that is not to say that the presence of a credibility issue is fatal to the plaintiff’s success or that a solid “paper trail” is un rebuttable by a defendant. Most cases will fall somewhere in the middle with some but not perfect, documentation and some issues of credibility. The case before me falls into that category.

Has the Plaintiff Clark Door Met the Substantial Grounds Test?

It is recognized by the parties that the plaintiff has met the requirements of Rule 44.01(a)(b)(c) and (e). The main dispute between them is with respect to subparagraph (d) dealing with whether the defendant is unlawfully detaining the dies. The defendant Inline concedes that it was agreed between the parties that Clark Door would be the owner of the dies. However, Inline insists that ownership did not include a right to possession and that it was orally agreed between the principal of Inline (Mr. Rokicki) and the principal of Clark Door (Mr. Zafir) that possession of the dies would rest forever with Inline. Inline maintains that Clark Door's ownership rights in the dies extends only to prevent Inline from using the dies for any customers other than Clark Door. Mr. Rokicki's version of this oral agreement is flatly contradicted by Mr. Zafir. More significantly, Mr. Rokicki's characterization of the agreement is also contradicted by the documentary evidence.

The first document relating to the agreement between the parties is a price quotation given by Inline to Clark Door. Prices are quoted for dies, followed by the statement, "Delivery of the first die from the date of the orders is 6-8 weeks". Prices are then quoted on a per foot basis for the production of fiberglass products using the dies. The payment terms are stated to be 50% upon placing the order and 50% upon receiving

goods. The plaintiff argues that the references to "delivery" and "receiving goods" are consistent with the plaintiff's claim to possession. I agree that these references are suggestive. However, since it was common ground that the dies were in fact manufactured at Inline's plant and were intended to be used there immediately in the manufacturing of door frames, rather than delivered to Clark Door, the reference to "delivery" and "receiving" could equally apply to delivery into the manufacturing process. Therefore, in my view this document is of little assistance in resolving the right to possession issue.

The dies which are the subject matter of this action were ordered by Clark Door under two purchase orders -- one dated April 22, 1992 for die profile #130 and the other dated October 15, 1992 for die profile #125. The April purchase order specified:

"Tooling will be the property of Clark Door Ltd.  
Maintenance of Tooling is the responsibility of Inline  
Fiberglass Ld."

The October purchase order contained virtually identical provisions as follows:

"Tooling is property of Clark Door Co.  
Die maintenance is the responsibility of Inline".

(It was accepted by both counsel before me that the words "tooling" and "dies" are used interchangeably).

A letter from Mr. Rokicki at Inline to Mr. Zafir at Clark Door dated July 27, 1992 (after the first purchase order but before the second) confirms Clark Door's property interest in the dies. He wrote:

As per our discussion, Inline Fiberglass Ltd. confirms being paid in full \$17,449.60 + G.S.T. Inline Fiberglass Ltd. verifies that we will hold the tool on our premises, and that the die is the property of Clark Door. Furthermore, Inline Fiberglass Ltd. would like to bring to your attention that this tooling is proprietary technology, which can't be transferred to anyone else. Inline Fiberglass Ltd. will be the custom pultruder for your profiles.

This letter is the closest Inline can come to any corroboration of its position that Clark Door would never be entitled to possession of the dies. However, in my view, the statement that the tooling is proprietary and cannot be transferred to anyone else is a far cry from saying that Clark Door cannot itself use the dies for its own purposes. Furthermore, the language of this sentence is to be contrasted to the beginning sentences which purport to confirm prior discussions. The term "would like to bring to your attention" suggests that this condition is being raised after the fact and

is not consistent with this provision having been a term of the agreement between the parties from the outset.

The right to possess goods is a normal incident of ownership. Indeed, counsel were unable to give me any example of a situation where the owner of property (free and clear from any charge, pledge or lien interest) could be prohibited from *ever* being in possession of it. If, the defendant was requiring as a term of its agreement that the plaintiff, although owner of the dies, would never actually get them even upon termination of the manufacturing agreement, then it was incumbent upon the defendant to express that clearly. This is a condition so inconsistent with ownership that it could not be presumed or imposed in the absence of clear language. Verification by Inline that it "will hold the tool on our premises" cannot be seen as a clear condition that all possessory rights of Clark Door to its own property were relinquished for all time.

Inline claims that it has \$15 million tied up in research and development costs, the benefit of which will be lost if it is forced to give up possession of these dies and thereby give access to others to its proprietary technology. If this is an issue of such magnitude to Inline it is incomprehensible to me that it would not have protected its rights by strong language in its contracts. At the very least, it is difficult to accept that



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in this situation Inline would simply agree that the dies were the "property of Clark Door" without stipulating protection for its trade secrets.

Further, even if Inline gave Clark Door a substantial price reduction on the dies (as alleged by Mr. Rokicki) I am not persuaded that this could have any affect on rights of possession. There were good business reasons to cut the price on the dies because Inline's main source of profit was in the pultrusion manufacturing process and this was the business it wanted to attract from Clark Door. The documentation relating to pricing is consistent with price reductions having been given by Inline to Clark Door. However, it is clear that Clark Door was the purchaser. This was not a shared cost venture.

The only evidence supporting the defendant's position is the evidence of Mr. Rokicki who says that he made it clear to Mr. Zafir that Inline would always retain possession of the dies. It may be the case that Mr. Rokicki's evidence will be accepted at trial. I am obviously not in nearly as good a position to assess credibility as a trial judge would be. However, I cannot ignore the fact that Mr. Rokicki swore in his affidavit dated January 5, 1996 that he had never told Zafir that he would destroy the dies before he would give them to Clark Door. However, when confronted on cross examination with a transcript of a conversation he had with Mr. Zafir Mr. Rokicki

admitted that he had made such a remark on two occasions. The plaintiff also pointed out other contradictions in his evidence. His credibility is therefore seriously in question.

Counsel for Inline argued that the failure of the documents to clearly set out the agreement with respect to possession rights can be attributed to the fact that English is not Mr. Rokicki's first language. I do not accept that this is a plausible explanation. Mr. Rokicki is obviously intelligent and well educated. He has a Master's degree in Mechanical Engineering from the Polytechnical Institute in Poznan, Poland and has lived in Canada since 1962. The letters which he has written in connection with this matter are well constructed and literate and show a fluent command of the English language.

In my opinion the documentary evidence is consistent with the plaintiff's position and inconsistent with the defendant's position. Accordingly, since all of the documentation as well as logic and common sense favour the plaintiff, and since the only evidence substantially contradicting the plaintiff is that of Mr. Rokicki whose reliability is suspect, I find that the plaintiff has demonstrated a high degree of likelihood that it will be successful at trial or, to use the words of Master Donkin in *Robert Cooper*, title is apparently or most likely vested in the plaintiff". Thus, the plaintiff has satisfied the substantial grounds test required for an interim recovery order.

Balance of Convenience

Having found that the plaintiff has substantial grounds for its claim to ownership of the dies and that the defendant is wrongfully detaining them, I must now consider whether or not to order that the dies be turned over to the plaintiff. It does not automatically follow that the plaintiff will be awarded possession. Indeed, the Rules specifically contemplate that the order can require that the defendant keep possession. The posting of security can be required of either party.

If possession is awarded to the plaintiff, the defendant argues that it will have lost control of its proprietary technology and its trade secrets will be lost for all time. Although I have found that the plaintiff has established substantial grounds for its claim, I would not have been prepared to award summary judgment to the plaintiff in this situation. I believe that the defendant has raised a genuine issue for trial. The difficulty for the defendant is that if the plaintiff obtains possession, any success which the defendant might have at trial would be illusory. The trade secrets would no longer be secret and the consequent damages would be extremely difficult, if not impossible, to calculate.

On the other hand, if the defendant retains possession, the plaintiff will also clearly incur costs in that it will have to pay for the manufacture of new dies, costs

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which essentially will have been thrown away if in fact the plaintiff is entitled to possession of the dies now held by the defendant. Further, there will be a delay of some months while the new dies are being manufactured during which time the plaintiff will have lost profits and potentially lost customers and/or business share. For the most part, these are damages which can be readily calculated and for which monetary compensation can be awarded. However, the plaintiff is concerned that any damages awarded in its favour in the future might not be recoverable from the defendant.

Regardless of which party is awarded possession, therefore, it is appropriate that security be posted. The defendant has vigorously challenged the plaintiff's motives and argues that the plaintiff is really trying to use the defendant's technology to set itself up in direct competition to the defendant. There is no evidence that this is indeed Clark Door's motivation. However Clark Doors has agreed readily that as a condition to obtaining possession of the dies, it will abide by an injunction restraining it from showing the dies or communicating information about the dies to anybody outside its own related companies and from using the dies for any purpose other than the manufacture of its own fiberglass products previously manufactured for it by Inline. Clark Doors also will undertake not to manufacture any dies similar in nature to those which are the subject of this action. The plaintiff is also prepared to post security of \$150,000 or such other amount ordered by the Court. Although these terms are

objected to by the defendant as not adequate to safeguard its interest, in my opinion they go a very long way to protecting the defendant's confidential information.

The defendant on the other hand offers to continue the existing interim injunction until trial or to place the dies in the hands of a neutral party for safekeeping. This does not solve the plaintiff's problem at all. When I asked counsel for Inline whether his client would be prepared to post security if given possession, I was told that Inline was prepared to post security of \$100,000.00 but could not do so until the end of March because it was now in the process of refinancing. This is not acceptable security for the plaintiff.

In my view, a benefits vs harm analysis and the balance of convenience favour permitting the defendant to retain possession of the dies, all other things being equal. The potential harm which the defendant would sustain if it is successful at trial and if the plaintiff has had possession of the dies in the interim is greater and more difficult to compensate than if the situation is reversed. However, when the security offered by each party is entered into the equation, quite a different picture emerges. The plaintiff offers substantial and immediate security whereas the defendant vacillates. Accordingly, I am only prepared to permit the defendant to retain possession if adequate security is posted to protect the plaintiff's claim. If the defendant fails to post the security as required, possession shall be transferred to the plaintiff subject to the plaintiff

posting security and subject to an injunction protecting the confidentiality claimed for the defendant's trade secrets.

Delay

I have considered the defendant's argument that the plaintiff should be disentitled to relief because of its delay in commencing this action. In the circumstances of this case, I do not consider the delay to have been inordinate. Further, the delay is largely explainable because of the plaintiff's need to reflect on its options and get its own manufacturing machinery and because of the defendant's threats to destroy the dies rather than give them to the plaintiff. Accordingly, I do not consider the complaint of delay to have any impact on the plaintiff's rights to relief.

Disposition

For the foregoing reasons, an order shall issue on the following terms:

1. Inline shall pay into court or post security in the amount of \$150,000.00 within 14 days of the date of this Order, and upon doing so shall be entitled to retain possession of the subject property pending trial or further order of the Court;

2. If Inline does not post security as required under paragraph 1, the plaintiff Clark Door shall pay into court or post security in the amount of \$150,000.00 and upon doing so, the subject property shall be taken from the defendant and given to the plaintiff to be held pending trial or further order of the Court;

3. Upon obtaining possession of the property, the plaintiff shall be bound by the following terms pending trial or further order of the court;

(i) the plaintiff is restrained from showing the property or communicating information about the property to anybody outside its own related companies

(ii) the plaintiff is restrained from using the dies for any purpose other than the manufacture of its own products

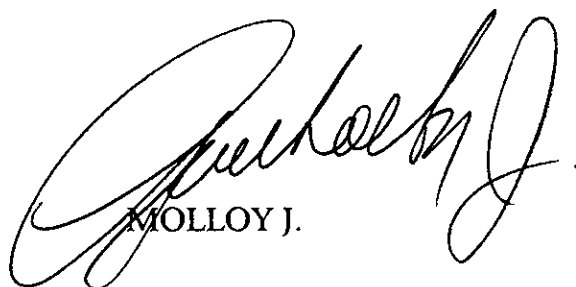
(iii) the plaintiff is restrained from reproducing or copying the dies or manufacturing or causing to be manufactured any dies of a similar nature.

4. The party with possession of the dies shall strictly comply with all time limits set out in the Rules and shall cooperate with the other party to expedite the trial of the action.

5. Costs of this motion are reserved to the trial judge.

The wording I have set out above is not meant to be definitive as to the wording of the final Order. If counsel are not able to agree on the appropriate wording of the Order, each counsel shall submit a draft Order to me for approval.

Released: January 29, 1996



MOLLOY J.



Court File No. 95-CU-94298

ONTARIO COURT OF JUSTICE  
(GENERAL DIVISION)

B E T W E E N:

CLARK DOOR OF CANADA LTD.

Plaintiff  
(Moving Party)

- and -

INLINE FIBERGLASS LTD.

Defendant  
(Responding Party)

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REASONS FOR DECISION

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MOLLOY J.

Released: January 29, 1996

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# TAB 3

No. 17659/87

SUPREME COURT OF ONTARIO

89230 009

	)	
	)	
B E T W E E N:	)	
	)	
DYLEX LIMITED	)	<u>A. I. Schein</u> for the
	)	plaintiff
Plaintiff	)	
	)	
-and-	)	
	)	
FACTORY CARPET CORPORATION,	)	<u>R. D. Manes</u> for the
CARPITA CORPORATION and WILLIAM	)	defendants
LAWRENCE ALLAN	)	
	)	
Defendants	)	
	)	<u>Heard:</u> July 14, 1989
	)	
	)	
	)	

GRAY J.:

This hearing involved two motions. The first motion, which was originally returnable April 27, 1987, sought an interlocutory injunction restraining the defendants and each of them, directly or indirectly, by themselves, their servants, agents or whosoever, until the trial or other final disposition of this action, from:

- (a) soliciting employees of the plaintiff to terminate their contracts of employment with the plaintiff;
- (b) inducing employees of the plaintiff to breach their contracts of employment with the plaintiff;
- (c) in any other manner interfering with the plaintiff's economic relations with its own employees or customers.

The second motion is a motion by the defendants pursuant to Rule 21.01, or alternatively Rule 20.01(3), for an order striking out the statement of claim and dismissing the action against them on the basis that no reasonable cause of action is disclosed.

The statement of claim in this motion was dated February 17, 1987 and the statement of defence was dated April 15, 1987. Correspondence between the solicitors indicates that the conduct which is the subject of the plaintiff's complaints commenced prior to July 17, 1986 with a reply from the defendants' solicitors on August 5, 1986. On April 27, 1987, White J. adjourned the plaintiff's motion sine die but granted an injunction until the two motions have been heard. The supporting affidavit filed initially on the plaintiff's behalf was that of Mr. Donald John Evans, the General Manager of Tip Top Tailors, a division of the plaintiff. He was the deponent because the employees involved were those of Tip Top Tailors ("Tip Top"), a division of the plaintiff as I have mentioned.

It is alleged by the defendants that there is unexplained and unexcused delay with respect to the first motion, although it is the fact that Mr. Evans suffered a heart attack so that the first time he could have been examined would have been October 26, 1987. In the event, Austin J. dissolved the injunction aforesaid on November 5, 1987, due to the plaintiff's failure to produce Mr. Evans for cross-examination. Mr. Evans

was cross-examined on June 20 and 22, 1988, and R. E. Holland J. conducted a status hearing on June 19, 1989 and ordered the action be listed for trial by January 1, 1990. I was advised that to date no examinations for discovery have been held or arranged.

The material facts with respect to the first motion are not very complicated. The gist of the plaintiff's complaint is that the defendants are engaged in a systematic campaign of raiding the plaintiff with respect to its employees at all levels, so as to staff their own head office and retail outlets with trained personnel. It is also suggested that this started after the defendant, Allan, left Tip Top to become a senior employee of the corporate defendant in 1983.

The plaintiff claims that in its chain of 178 retail outlets in the Tip Top division, middle and senior management personnel come from promotion from the lower ranks. Regional and store managers obtain careful training at an estimated cost of \$225,000 to \$250,000 per year. It is also claimed that Tip Top had a low turnover of senior sales people and that in the last three years those who left to go to another retail industry company were those I will now mention, who "were stolen by Factory Carpet".

I am not going to deal with the names or employment records of the persons concerned except to note that the plaintiff's position is that one Regional Manager and six Store Managers resigned from the plaintiff's employment on notice of two or three weeks respectively. This is alleged to be insufficient notice and some left during the peak Christmas period. The defendants are alleged to have caused these resignations by encouragement and interference. There were also said to be numerous other unsuccessful attempts to have other Tip Top employees leave the division together with four instances involving store managers in the province of Quebec. Business cards were left around with invitations to communicate with the defendants. Many of these efforts were said to have caused the Tip Top employees to be distracted from their work to the detriment of the plaintiff.

The defendants' position, so far as the facts are concerned, is that there was no vendetta between Mr. Evans and Mr. Allan, both of whom were senior employees of Tip Top before Mr. Allan left in 1983 and was employed by the Bata organization until 1985-1986. It is also said that companies other than the plaintiff were approached and that the employees mentioned were employees on contracts of indefinite hiring. Some of the named employees were said to have left on their own accord to better themselves and that when the employees who did indicate their intention to leave Tip Top, they were immediately severed so that they could not work out any period of notice.

The "view" of Mr. Evans as to appropriate notice of three and eight weeks was not said to have been communicated to the store and regional managers involved and my attention was specifically directed to evidence from Mr. Evans, himself, to the effect that there is nothing improper in a company approaching employees of another company with a view to hiring them. Tip Top was said to have recruited from other companies like the T. Eaton Co. Ltd.

The plaintiff's action is said to be based on the tort of interference with contractual relations and as stated in Fleming, The Law of Torts (6th ed., 1983), at p. 651: "The expansive promotion of the tort by English Courts has brought an increasing range of activities within its fold". The matter is succinctly stated in 45 Halsbury's Laws of England (4th ed.), para. 15:

Liability for inducing a breach of contract by an employee. (Emphasis added).

Since it is a violation of legal right to interfere with contractual relations recognized by law if there is not sufficient justification for the interference, an action lies at the suit of an employer against any person who knowingly and intentionally, and without justification, induces the employee to commit a breach of the contract of service and leave his employer before the time fixed for the lawful termination of his service.

The action is based on the claim that the defendants induced certain employees of the plaintiff to breach their respective contracts of employment with the plaintiff by resigning without providing the plaintiff with reasonable prior notice.

The plaintiff submits in paragraph 20 of its factum:

In the alternative, even if the defendants can ultimately establish that they did not and currently do not seek to cause employees of the plaintiff to resign without providing the plaintiff with reasonable prior notice, they are liable for interference in the execution of these contracts of employment, even if such interference falls short of inducing a breach.

Three authorities are relied upon: Torquay Hotel Co. Ltd. v. Cousins, [1969] 2 Ch. 106 per Lord Denning at 138; Einhorn v. Westmount Investments Ltd. (1969), 6 D.L.R. (3d) 71 at 75; affirmed 11 D.L.R. (3d) 509; and McKenzie v. Peel County Board of Education (1974), 5 O.R. (2d) 549 at 561-562.

So far as the defendant Allan is concerned, the submission is that he is personally liable for damages for inducing breach of contract and intentional interference with economic relations, since he is the actual tortfeasor.

The conclusion I have reached with respect to the first motion is that it should be dismissed. In my view, it is possible for me to make a reasonable determination of what facts are likely to be proved at trial and, that being the case, the



moving party must demonstrate on the motion for injunctive relief a "strong prima facie case" rather than "a serious question to be tried". The authority I rely on is C-Cure Chemical Co. v. Olympia & York Developments Ltd. (1983), 33 C.P.C. 192. The facts at trial will not, in my opinion, differ from those set forth in the affidavit material before me.

Can the plaintiff, on this motion, demonstrate "a strong prima facie case"? I answer this question in the negative because on either tort the application fails because of a lack of evidence at this point in time. The evidence thus far does not sustain the allegations that (1) there was a vendetta by Mr. Allan against Mr. Evans; (2) the corporate defendants singled out the plaintiff or its Tip Top division; (3) the defendants caused any employee to leave on unreasonable notice; and (4) it is legally improper to recruit employees, a practice carried on by the plaintiff in the past and by means of recruiting agencies.

So far as the personal liability of the defendant Allan is concerned, it is debatable because there is no allegation of a breach of fiduciary obligation or a lack of bona fides. It may be argued that mala fides must be shown as in the case of Einhorn v. Westmount Investments Ltd., supra, or Kepic v. M.B.L. International Contractors Inc.--Ontario Court of Appeal, (April 7-8, 1987, unreported.) The plaintiff may succeed at trial on the basis of one or both of the torts alleged but that is not to say that "a strong prima facie case" has been demonstrated.

It is conceded that mere delay is not fatal in an application for equitable relief. The authority for this proposition is Spry--The Principles of Equitable Remedies, 3rd Ed. (1984), p. 418. Delay, however, is a factor to be considered when it is remembered that this motion, heard on July 14, 1989, concerns events which were the subject of complaint by the plaintiff in July, 1986. This brings into argument the subject of irreparable harm so far as the plaintiff's motion for injunctive relief is concerned. One is driven to the conclusion that if the plaintiff was suffering irreparable harm, it would have moved expeditiously. The defendants have been prejudiced by reason of the proceedings before White, Austin, and R. E. Holland JJ. as well as the other proceedings before Reid, J. Holland and McKeown JJ. The plaintiff has failed to adduce sufficient evidence to demonstrate irreparable harm. If the plaintiff has suffered damages, such damages are easily quantifiable and may be adequately compensated by an award of damages.

The first motion is therefore dismissed for the reasons aforesaid. The second motion is likewise dismissed. While I have held that the plaintiff has failed to demonstrate "a strong prima facie case", I am not prepared to strike out the statement of claim and dismiss the action on the basis that no reasonable cause of action is disclosed. (Chatelaine Homes Ltd. v. Miller (1982), 39 O.R. (2d) 611). The plaintiff may succeed at trial on one of the two tortious claims although this is arguable.

It was agreed that costs would be spoken to after the release of these reasons for judgment.

Released: August 10, 1989

*W. Gibson Gray*  
*J.*

No. 17659/87

SUPREME COURT OF ONTARIO

B E T W E E N:

DYLEX LIMITED

Plaintiff

-and-

FACTORY CARPET CORPORATION,  
CARPITA CORPORATION and WILLIAM  
LAWRENCE ALLAN

Defendants

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REASONS FOR JUDGMENT

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GRAY J.

Released: August 10, 1989

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