

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *JTT Electronics Ltd. v. Farmer*,  
2014 BCSC 2413

Date: 20141219  
Docket: S145697  
Registry: Vancouver

Between:

**JTT Electronics Ltd. and JTT Energy Management Solution Ltd.**

Plaintiffs

And

**Bruce Farmer, Bruce Farmer doing business as Tanaris Power,  
Tanaris Systems, Tanaris Power USA and Tanaris Connect, Upstart Offices  
and Upstart Corporate Services, Steven VanWerkhoven and Russell Potter**

Defendants

Before: The Honourable Mr. Justice Voith

## **Reasons for Judgment**

Counsel for the Plaintiffs:

David J. Taylor  
Julia R. Wolfe, Articled Student

Counsel for the Defendant Steven  
VanWerkhoven:

Duncan K. Magnus

Counsel for the Defendant Russell Potter

Brent Meckling

Place and Date of Hearing:

Vancouver, B.C.  
October 3, 14, 17, 2014

Place and Date of Judgment:

Vancouver, B.C.  
December 19, 2014

**Overview**

[1] The plaintiffs seek various forms of injunctive relief against two former employees – Messrs. VanWerkhoven and Potter (the “Personal Defendants”).

Broadly stated, the plaintiffs seek:

- i) an interlocutory injunction which prohibits the Personal Defendants from using the confidential information of JTT Electronics Ltd. (“JTT”);
- ii) an interlocutory injunction which prevents the Personal Defendants from soliciting the customers of JTT;
- iii) an interlocutory injunction which prevents the Personal Defendants from competing with JTT; and
- iv) an order requiring the Personal Defendants to deliver up all confidential information of JTT in their possession.

[2] Counsel for the parties raised and argued numerous issues that are, in the normal course, relevant to injunctive relief and to the enforcement of restrictive covenants. I do not consider that I need to address each of these issues. The plaintiffs’ application, on its best footing, suffers from three central difficulties:

- i) the plaintiffs are unable to define what “confidential information” they seek to protect;
- ii) the non-competition and non-solicitation clauses that the plaintiffs seek to enforce are both ambiguous and overly broad; and
- iii) some of the circumstances of the application are inimical with the fundamental nature of interlocutory injunctive relief.

**Facts**

**a) The Parties**

[3] The plaintiff JTT is a British Columbia company, incorporated in 2010, with its head offices in Vancouver, B.C. JTT has, since its inception, invested monies and

effort into developing a general-purpose lithium-ion battery solution. The company has also worked towards the development of battery management systems products and technology. JTT develops and sells custom lithium-ion battery pack solutions and services to assist in the integration of software and battery systems. It develops and sells battery management systems and customizes battery pack services and solutions in North American markets.

[4] The plaintiff JTT Energy Management Solutions Ltd. (“JTT Energy”) is a corporate partner of JTT and has a license agreement for JTT technology and intellectual property rights so that it can develop and promote the sales of products internationally and, in particular, in Asian markets.

[5] The defendant Mr. VanWerkhoven began working as an employee of JTT on or about February 21, 2011. He became a shareholder of JTT on or about July 31, 2012.

[6] The defendant Mr. Potter became an employee of JTT in 2010 and then a shareholder of JTT on August 16, 2010.

[7] The remaining defendants, Bruce Farmer, Bruce Farmer doing business as Tanaris Power, Tanaris Systems, Tanaris Power USA and Tanaris Connect, and Upstart Offices and Upstart Corporate Services are all located or incorporated in the United States. Some of them have not yet been served and no relief is sought against any of these parties on this application.

**b) The General Chronology**

[8] It is clear that JTT has spent some money on its research and development efforts. I say some money because the plaintiffs’ affidavit materials group the monies spent on research and development together with expenditures for ongoing business operations. That global figure exceeds \$1.6 million.

[9] The Personal Defendants held senior positions in JTT. Mr. VanWerkhoven was, after February 26, 2013, the president of the company. Mr. Potter was the company’s director of engineering.

[10] JTT struggled financially. The plaintiffs ascribe at least some of these difficulties to Mr. VanWerkhoven's leadership. Mr. Potter argues that much of the technology developed by JTT was diverted to entities associated with some of the shareholders of JTT.

[11] In or about September 2013, all of the employees of JTT, other than the Personal Defendants, were dismissed.

[12] On or about January 31, 2014, JTT discovered that Mr. VanWerkhoven had retained Mr. Farmer and two of his companies, Upstart Offices and Upstart Corporate Services. A significant part of the plaintiffs' concerns stem from the interactions that the Personal Defendants had with Mr. Farmer and these two companies in December 2013. The exact nature of the interaction between the Personal Defendants and Mr. Farmer is unclear. The plaintiffs suspect, from some of the materials they have uncovered, that the Personal Defendants dealt with Mr. Farmer and his companies in order to set up a new business that would be operated by them and that would compete with JTT. They also believe that the Personal Defendants disclosed confidential information, including pricing information, to Mr. Farmer.

[13] Mr. Potter, in turn, has deposed that he and Mr. VanWerkhoven looked to Mr. Farmer and his companies to provide JTT with methods of and approaches to expanding JTT's business and its access to markets in the United States.

[14] On March 14, 2014, each of the Personal Defendants was dismissed. At that time, Mr. Pui officially replaced Mr. VanWerkhoven as the Chief Executive Officer of JTT. Mr. Pui is the deponent for the plaintiffs on this application.

[15] It appears that the Personal Defendants assumed some role with one or more of the Tanaris companies very shortly thereafter. The Internet domain name [www.tanarispower.com](http://www.tanarispower.com) was registered on March 19, 2014. The Tanaris companies sell at least some products that directly compete with the types of products offered by JTT.

[16] Some objective documentary materials indicate that Mr. VanWerkhoven, in particular, was involved with Tanaris in late March and early April 2014. He is described, in different documents, as the Chief Technology Officer of Tanaris Power USA. Another email, sent by Mr. Farmer to a JTT client, describes the assistance that each of the Personal Defendants were providing to Tanaris that would enable Tanaris to provide the “best prices” that it could to that client.

[17] It appears that Mr. VanWerkhoven left Tanaris no later than April 22, 2014. He returned to work for JTT as a consultant in mid-April 2014. Indeed he signed a consulting agreement with JTT on April 17, 2014. He continued to act in that capacity until June 17, 2014. On May 26, 2014, however, he found a full-time position with a natural gas company that is unrelated, in any way, to the battery business and the types of activity that JTT is involved in. He has been employed by that company since that time.

[18] Mr. Potter worked as a consultant with Tanaris until sometime in July 2014. He has since then, I am advised, worked with various battery companies as a consultant but has not found any permanent employment.

### **Analysis**

[19] This is a relatively complicated application in some respects. In it, the plaintiffs seek two categories of relief. One category pertains to JTT’s “confidential information”: JTT seeks to enjoin the Personal Defendants from using that “confidential information” and to compel them to “deliver up” such “confidential information” to JTT. The second category of relief seeks to enjoin the Personal Defendants from competing with JTT or from soliciting the clients of JTT.

[20] The first category of order requires that the plaintiffs establish that there is a fair question to be tried about their legal rights and the alleged breaches of those rights; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348-349; *British Columbia (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 345 (C.A.), *aff’d* [1991] 1 S.C.R. 62. This is a low threshold – the applicant is required to

establish that its claim is neither frivolous nor vexatious. A detailed examination of the merits “is generally neither necessary nor desirable”; *RJR* at 338.

[21] In *RJR*, the Court also recognized, however, that there were limited exceptions to “the general rule that a judge should not engage in an extensive review of the merits”; at 338. One such exception is where “the result of the interlocutory motion will in effect amount to a final determination”; at 338.

[22] In *Belron Canada Inc. v. TCG International Inc.*, 2009 BCSC 596 at paras. 40-49, aff'd 2009 BCCA 577 at para. 5, Ballance J. reviewed a number of authorities and concluded that the higher “strong *prima facie*” standard and a more fulsome review of the evidence was appropriate in cases involving restrictive covenants. Accordingly, different threshold standards are relevant to different portions of the plaintiffs’ application in this case.

[23] Furthermore, the plaintiffs argue that both Personal Defendants were fiduciaries of JTT. While this is clearly the case for Mr. VanWerkhoven, who was a director and officer, it is less clear for Mr. Potter who was, at most, a senior employee and whose affidavit material speaks to the limits that existed on his authority to engage in different types of activities.

[24] Still further, there is a real question about whether JTT would suffer irreparable harm in the event that the relief it seeks is not granted. Mr. Pui has deposed, on behalf of JTT and in aid of arguing that JTT will suffer “irreparable harm”, that he is concerned that, *inter alia*, “[t]here will be no reliable way to calculate or measure the damages” suffered by JTT, that it may be “impossible to practically, or in a timely manner, compel Farmer or Tanaris to track their business activity and produce all of the necessary documents”, and that “[t]he loss of goodwill of JTT cannot be measured in any reliable manner”. However, despite the fact that the Personal Defendants left JTT many months ago, Mr. Pui has not identified a single client that the Company has lost.

[25] The case law on whether such broad assertions constitute harm that is irreparable in nature is not entirely consistent. Both *Hermes Canada Inc. v. Henry*

*High Class Kelly Retail Store*, 2004 BCSC 1694 at para.44, and *CPC International Inc. v. Seaforth Creamery Inc.* (1996), 69 C.P.R. (3d) 297 at 308 (Ont. C.J.), confirm that a plaintiff's inability to quantify its losses is a form of irreparable harm. *CPC International* at 308, and *RJR* at 341, further confirm that a loss of goodwill or reputation can be a form of irreparable harm. Finally, the inability of a defendant to pay the damages award which a plaintiff may obtain constitutes a further relevant consideration: *RJR* at 341.

[26] Conversely, there are numerous cases that have not accepted that the categories or types of harm that are foreshadowed by Mr. Pui, without more, constitute irreparable harm. Thus, in *Belron*, Ballance J. said:

[102] Difficulties posed in the assessment of damages for breach of contract do not render the harm giving rise to such damages irreparable. The court regularly conducts complicated assessments of business losses in commercial cases, including losses that are based on uncertain future events, and unknown and fluctuating market conditions: *Music Waves Productions Ltd. v. WIC Television Ltd.*, [1997] B.C.J. No. 2240 (S.C.); *Kosub v. Cultus Lake Park Board*, 2006 BCSC 1410.

[27] There are numerous further authorities which establish that evidence relevant to an assertion of irreparable harm must be clear and not speculative, that damages due to lost sales are usually quantifiable, and that a loss of goodwill can also be quantified; *Corporate Images Holdings Partnership v. Satchell*, 2008 BCSC 525 at para. 47; *Future Shop Ltd. v. Northwest-Atlantic (B.C.) Broker Inc.*, 2000 BCSC 1797 at paras. 79-81; *RBC Dominion Sec. v. Merrill Lynch*, 2000 BCSC 1750 at para. 12.

[28] The matter is further complicated by evidence which suggests that JTT is currently engaged in little, if any, business activity. Mr. Potter has deposed that the company had no line of credit and that it appears to be inactive with no employees. Mr. VanWerkhoven has also deposed that during the period that he returned to work for JTT, from mid-April 2014 to mid-June 2014, JTT had no other employees. JTT clearly had financial difficulties before the events in question. There is no evidence that after JTT terminated its last two employees, the Personal Defendants, in March 2014, they were ever replaced by anyone. JTT has not updated its webpage and other Internet media feeds for nearly one year. Indeed each of the Personal

Defendants remain on the JTT website as part of its “Team” though each of them left JTT some eight months prior to the hearing of this application. Though Mr. Pui responded, at length, to many of the issues raised by Mr. Potter, he has not addressed the state of JTT’s current activities – a matter that is relevant to both its claim of “irreparable harm” and to its ability to pay an undertaking.

[29] Though each of the foregoing matters is legally relevant, I do not consider that I need address these various matters expressly. This is because the plaintiffs’ application suffers from various basic or core deficiencies. Those deficiencies render all other issues academic. Thus, even if the plaintiffs could satisfy the various components of the injunction analysis, three separate matters foreclose their success.

**a) Inability to Identify What is Confidential Information**

[30] Both aspects of the first category of relief sought by the plaintiffs, that is enjoining the use of and compelling the delivery of “confidential information”, require that the plaintiffs do more than establish a “serious question” that they possess some form of confidential information and that the conduct of the Personal Defendants indicates that this information may be lost or misused. It is also necessary that the plaintiffs identify, with some reasonable degree of precision, what they say that confidential information is. This is so regardless of whether the plaintiffs seek to protect JTT’s confidential information in contract or as a breach of confidence or on the basis that the Personal Defendants were fiduciaries or on the basis that they owed JTT a duty of good faith as employees.

[31] The plaintiffs are unable to do so. The relief sought in the notice of application is entirely generic:

1. An interlocutory injunction prohibiting and enjoining the Defendants VanWerkhoven and Potter, and each of them, until the hearing of the trial of this action, from dealing with, using, reproducing, enabling access to or commercializing for any purpose, in any way, sort or otherwise, confidential information and proprietary information, including copyrights, patent rights and other intellectual property rights, which are owned exclusively by the Plaintiff JTT Electronics Ltd. (“JTT”);

...

4. An Order requiring the Defendants VanWerkhoven and Potter, and each of them, to deliver up to JTT all confidential information and proprietary information of JTT, directly or indirectly within their possession or control, including intellectual property rights and technology assets.

[32] After I expressed some concern with the foregoing description of confidential information, I was provided with a further draft order. That draft order proposed the following language:

1. The Defendants VanWerkhoven and Potter, and each of them are prohibited and enjoined, until the hearing of the trial of this Action or March 15, 2016, whichever date comes first, from directly or indirectly dealing with, using, reproducing, enabling access to or commercializing for any purpose, in any way, sort or otherwise, confidential information and proprietary information, including copyrights, patent rights and other intellectual property rights, which are owned exclusively by the Plaintiff JTT Electronics Ltd. (“JTT”);

...

3. An Order requiring the Defendants VanWerkhoven and Potter, and each of them, to deliver up to JTT all confidential information and proprietary information of JTT, directly or indirectly within their possession or control, including but not limited to intellectual property rights and technology assets.
4. For the purpose of this Order, confidential information and proprietary information means any information of JTT disclosed to or acquired by the Defendants Potter or VanWerkhoven while employed by JTT, whether as an employee, officer, or serving as director, in tangible or intangible form which, by the nature of the circumstances surrounding disclosure ought, in good faith, to be understood to be treated as confidential. Confidential Information includes: (i) non-public information concerning the Intellectual Property Rights of JTT, including any ideas, improvements, know how, research, inventions, innovations, products, services, scientific or other formulae, patterns, processes, methods, compositions, processes, procedures, tests, treatments, developments, technical data, designs, devices, patterns, concepts, computer code or programs, that relate to the business or affairs of JTT or its subsidiary or affiliated companies, or that result from its marketing, research and/or development activities; (ii) the fact that JTT is working on any given project or business endeavour; (iii) non-public information concerning the business or finances of JTT; (iv) any other non-public information the disclosure of which might harm or destroy a competitive advantage of JTT; or (v) trade secrets of JTT which are the expression, tangible or otherwise, of unique ideas or specialised compilations of information or data, whether patentable or not, that are not generally known, that are useful or capable of use in the trade or business of JTT, or that have economic value to JTT as a result of not being known generally (“Trade Secrets”), and which may be embodied in computer software source code, know-how, show-how, written documents, patterns, charts,

drawings, specifications, sources of inputs, procedures, compilations, techniques, processes, methodologies, formulas, and similar information.

[33] I do not consider that the foregoing language advances matters in any appreciable way.

[34] The plaintiffs argue that each of the various agreements signed by the Personal Defendants throughout their dealings with JTT was directed, in part, to the protection of JTT's confidential information. I do not question this is so. These agreements included, *inter alia*, a Shareholders' Agreement, an Assignment of Intellectual Property Agreement, a Non-Disclosure and Confidentiality Agreement, and a Consulting Agreement. These various agreements, and the broad language within them, do not, however, advance matters in the present context. Two examples will suffice.

[35] The Shareholders' Agreement that bound the Personal Defendants from the time that they became shareholders provided:

9.2 Confidential Information

In this Section, "Confidential Information" will mean confidential or proprietary information of the Company, including information in respect of the business, work, inventions, patents, designs, methods, improvements, trade secrets, know-how, and information in respect of any other confidential or proprietary matters, but excluding information which:

- (a) was in or comes into the public domain other than as a result of a breach of this Agreement;
- (b) is disclosed with the permission of the Company
- (c) was in possession of the Shareholder prior to its receipt thereof from the Company; or
- (d) is required to be disclosed pursuant to applicable laws or policies or regulations of any government or regulatory authority.

[36] The Share Purchase Agreement signed by the Personal Defendants upon their dismissal provided:

8.1 *Definitions.*

...

"*Confidential Information*" means any Company information disclosed to or acquired by the Seller while employed by the Company, whether as an

employee, officer, or serving as a director, in tangible or intangible form which, by the nature of the circumstances surrounding disclosure ought, in good faith, to be understood to be treated as confidential. Confidential Information includes (i) non-public information concerning the Intellectual Property Rights of the Company; (ii) the fact that the Company is working on any given project or business endeavour; (iii) non-public information concerning the business or finances of the Company; or (iv) any other non-public information the disclosure of which might harm or destroy a competitive advantage of the Company. Confidential Information includes trade secrets which are the expression, tangible or otherwise, of unique ideas or specialised compilations of information or data, whether patentable or not, that are not generally known, that are useful or capable of use in trade or business, or that have economic value as a result of not being known generally ("*Trade Secrets*"). Trade Secrets are embodied in computer software source code, know-how, show-how, written documents, patterns, charts, drawings, specifications, sources of inputs, procedures, compilations, techniques, processes, methodologies, formulas, and similar information.

[37] Nowhere in the pleadings, the notice of application, the draft order, either of the foregoing agreements, or any other agreement signed by the Personal Defendants is there an adequate description of what the plaintiffs say is confidential to JTT or to its business. Mr. Pui's lengthy affidavit similarly does not assist. He too, overwhelmingly, uses generic language on an ongoing basis to describe JTT's "confidential and proprietary" information. To the extent that there are some limited expressions of what is ostensibly confidential to JTT, such as its pricing information, those descriptions are lost in the morass of other generic language. Still further, it is not this Court's role or function to try to construct a sensible order from the breadth of language it has been given.

[38] The language I have identified in the plaintiffs' notice of application, in the draft order, and in either of the agreements I referred to is language that could pertain to virtually any business that made virtually any product. The fact that further or more numerous generic descriptions of confidential information are added does not add either precision or detail. Some parts of these agreements do little more than define, at law, what may constitute confidential information. Thus, subparagraphs (a) to (d) of the Shareholders' Agreement roughly align with what a plaintiff must prove in order to establish that information is confidential. Furthermore, aspects of these agreements, as well as of the notice of application, and the proposed draft order are meaningless. Thus, for example, it is conceded that JTT

has no trademarks or patents or any other type of information that is protected through some form of registration or filing.

[39] The need to identify with some reasonable degree of specificity what a plaintiff asserts is confidential or proprietary serves three important and related functions. First, it enables a defendant to respond to an application and the relief sought in the application, and to bring into question whether the purported confidential information is in fact confidential or whether it is information that is in the public domain. Certainly that is a relevant issue in this case. Mr. Potter deposes that much of JTT's information or processes are broadly used in the battery industry. That assertion is not really questioned by JTT.

[40] Second, if a plaintiff can establish that specific information in its possession is confidential, and the remaining elements of an injunction are made out, the defendant is put on notice, in the form of an order, of what it is that he or she can or cannot do.

[41] Third, in the event that there is an allegation that a defendant has not complied with the terms of an order restraining the use of specific confidential information, the court is in a position to address the alleged breach. Absent some reasonable level of precision or definition, the issue of enforcement is rendered either more difficult or impossible.

[42] In Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Canada Law Book, 2013) at para. 1.390, under the heading "Problems of definition", the author states:

Quite clearly, in formulating injunction orders, the courts should avoid vague or ambiguous language which fails to give the defendant proper guidance or which in effect postpones determination of what actually constitutes a violation of the plaintiff's rights. As the Supreme Court of Canada stated:

The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.

It is unfair to the defendant to do nothing more than give a warning not to do anything wrong and resolve the important questions of detail on a contempt application and the terms of the injunction should be no wider than is required to protect the plaintiff's right. When an issue is "ripe for decision between the parties" the courts should decide then and there.

[Footnotes omitted.]

[43] The requirement that the terms of an injunction be "clear and specific" often arises when an injunction is being enforced, but it is clear that the requirement also constitutes a prerequisite to granting an injunction. In *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, the Court refused to enforce a US contempt order due to, *inter alia*, its vagueness. Deschamps J., for the majority, said:

23 ... equitable orders are crafted in accordance with the specific circumstances of each case. The most relevant equitable remedies for the purposes of the present case are specific performance, that is, an order by the court to a party to perform its contractual obligations, and the injunction, that is, an order to a party to do or refrain from doing a particular act.

24 Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.

[44] In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652 at 666 (U.K.H.L.), Lord Upjohn, in overturning a mandatory injunction, for which I accept the need for precision is even more acute, accepted as "well settled":

If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact ...

[45] Similar language can be found in decisions of both this Court and of the British Columbia Court of Appeal. In *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at paras. 19-20, 32, 37, Garson J.A., after citing *Redland* and *Pro Swing*, held that parts of the proposed interim preservation order, which was in the nature of an injunction, were too vague to be enforceable. In *Hope (District of) v. L-156 Holdings Ltd.*, [1995] B.C.J. No. 1335 at para. 4 (S.C.), Scarth J. endorsed as

“undoubtedly sound” counsel’s submission that “an injunction must be certain and definite in its terms and clear to the person against whom it is made as to what he is required to do or refrain from doing”. In *Le Soleil Hospitality Inc. v. Louie*, 2008 BCSC 943, Dickson J. said:

[39] If injunctive relief is granted, clear language as to its scope and application is essential. Vague or ambiguous language should be strictly avoided: *Sonoco Ltd. v. Local 433*, [1970] 13 D.L.R. (3d) 617 (B.C.C.A.).

[46] Further guidance, to similar effect, is found in *Kraus Group Inc. v. McCarroll* (1995), 105 Man. R. (2d) 270 at paras. 21–24 (Q.B.) and *United Technologies Corp. v. Platform Computing Corp.* (1998), 83 C.P.R. (3d) 350 at paras. 46, 52 (Ont. C.J.), rev’d on other grounds 127 O.A.C. 172. In each of these cases, the plaintiff’s inability to fix with some precision what it asserted was confidential or proprietary was an impediment to obtaining the injunctive relief that was sought.

[47] Let me turn to a related point. There are obvious differences between an application for particulars and an application for injunctive relief. There are, however, some similarities in terms of the purpose served by particulars and those served, for example, by an order that restrains a defendant from the use of confidential information. The former allows a defendant to know what case he/she must meet. The latter allows a defendant to know what conduct he/she may or may not engage in.

[48] In *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 143 at para. 63, Wedge J. said “[i]n breach of confidence cases, the plaintiff ought to specifically identify the information over which it claims a proprietary right”. *Blue Line* referred to and relied on *Napier Environmental v. Vitomir*, 2001 BCSC 1704, another breach of confidence case in which an application for particulars was brought. In *Napier*, Loo J. quoted from several relevant English authorities:

[26] In *G.D. Searle & Co. Ltd. v. Celltech Ltd.*, [1982] F.S.R. 92 (S.C.J. - C.A.), on an appeal from an interlocutory injunction to restrain an ex-employee from using confidential information,

...

[28] Brightman L.J. concluded at p. 109:

... if an employer seeks to restrain his ex-employee from making use of know-how acquired by him during the course of his employment, the employer's evidence should specifically identify the secret which he claims to be his property, and explain exactly how knowledge of that secret came into the possession of the employee in such circumstances that the conscience of the employee was affected so that it would be unconscionable of the employee to make use of the information for his own purposes.

...

[30] In *Ixora Trading Inc. v. Jones*, [1990] 1 F.S.R. 251 (H.C.J. -Ch. Div.), the plaintiff brought an action against its' former employees alleging that they had used confidential information, procured breaches of contract, and wrongly interfered with the plaintiff's business. Mummery J., at pp. 261-262, stated:

... I have concluded that the claim made against the defendants for breach of the duty of fidelity and good faith is speculative and harassing in character. This is so whether it is framed simply as a case of breach of duty or as a case for conspiracy, procuring breach of contract or wrongful interference with business as pleaded in paragraph 34 of the re-amended statement of claim. It is all so general that the defendants cannot possibly tell what knowledge or experience they can or cannot use after they left their employment. All that they can know with any certainty is that the plaintiffs do not on any account wish either of the defendants to be engaged in the bureau de change business. This is not something which the plaintiffs are entitled to achieve under the cloak of a vaguely pleaded case for breach of duty or breach of confidence.

[49] Whether a lack of clarity in the terms of the injunctive relief a plaintiff seeks is a matter which goes to the balance of convenience or whether it gives rise to a stand-alone issue is not clear.

[50] In *Janssen-Ortho Inc. v. Amgen Canada Inc.* (2003), 26 C.P.R. (4th) 93 (Ont. S.C.J.), a case which dealt with a dispute between two prescription drug manufacturers, Nordheimer J. considered the language of the proposed injunction when addressing the balance of convenience and said:

[77] There is another problem which is appropriately addressed under this factor [the balance of convenience] and that is the vague and overbroad language used in the relief sought by Janssen. Were an injunction to be granted in the terms sought by Janssen, its enforcement would become extremely problematic. Further, the existence of the injunction would make it extremely difficult, if not impossible, for anyone affected by it to gauge their proposed conduct against its terms. If the court is to grant such extraordinary relief, then it must be in terms which others can easily determine whether their conduct, if taken, will or will not offend the order.

[51] On the other hand, in *Airco Aircraft Charters Ltd. v. Edmonton Regional Airports Authority*, 2010 ABQB 397 at paras. 101 -107, aff'd 2010 ABCA 364 at para. 33, Topolniski J. addressed the question of "certainty of terms" apart from the balance of convenience and considered that most of the terms being advanced were too vague to be enforceable. That difficulty constituted one of several reasons why the application for an injunction was dismissed.

[52] In this case, I am satisfied that the form of order being proposed by the plaintiffs lacks the clarity and specificity which is required and which would enable the Personal Defendants to regulate their future conduct. Accordingly, I decline to grant the plaintiffs the relief which seeks to restrain the Personal Defendants from using "confidential information" as well as the relief which would compel them to deliver up all "confidential information" in their possession.

**b) The Non-Solicitation and Non-Compete Clauses**

[53] The Shareholders' Agreement, within its "definition" section, provides:

1.1 Interpretation

...

- (u) "*Restricted Period*" means in the case of any Shareholder the time during which that Shareholder owns any Shares, and the period that is 24 months after that Shareholder ceases to own any Shares;

[54] The Shareholders' Agreement then goes on to provide:

7.2 Non-Competition

Each Shareholder covenants and agrees with the Company that the Shareholder shall not for the Restricted Period either alone or in partnership or in conjunction with any person, firm, association, syndicate, corporation, joint venture, partnership, limited partnership or entity other than the Company, as principal, agent, general partner, limited partner, director, officer, trustee, investor, shareholder, consultant, employee or in any other manner whatsoever, directly or indirectly:

- (a) carry on, be engaged in, be interested in, be concerned with, advise, consult, lend money to, or guarantee the debts or obligations of or permit the Shareholder's name or any part thereof to be used or employed by any business within British Columbia which is the same as or substantially similar to, or competitive to any material extent with, the business of the Company;

- (b) assist any person, whether in a financial, managerial, employment, advisory, as shareholder, owner, partner, providing information to or in any other capacity or manner, to engage in a business substantially similar to all or any material part of the business carried on by the Company;
- (c) divert, take, solicitor, accept or attempt to divert or take, on behalf of the Shareholder or any other person, any customer or supplier of the Company as of the date of this Agreement, the twelve month period prior to the date of this Agreement or during the Restricted Period;
- (d) induce, influence or attempt to induce or influence, on behalf of the Shareholder or any other person, any person' who is an employee of the Company as of the date of this Agreement, the twelve month period prior to the date of this Agreement or during the Restricted Period, to terminate his or her employment with the Company;

provided that the Shareholder may own, directly or indirectly, solely as an investment, securities of any corporation that are publicly traded on a recognized stock exchange or traded in an over-the-counter market in Canada or the United States, as long as the Shareholder does not own more than 5% of the issued equity shares of the corporation or is not a member of a group that controls the corporation.

[55] As determined in the leading case *Elsley v. J.G. Collins Insurance Agencies*, [1978] 2 S.C.R. 916 at 923-929, and as recently summarized in *Rhebergen v. Creston Veterinary Clinic Ltd.*, 2014 BCCA 97 at para. 10, a restrictive covenant will be held void as a restraint against trade unless the person seeking to uphold it can establish the following requirements:

- (a) The employer has a judicially recognized legitimate proprietary interest deserving of protection;
- (b) The restrictive covenant is reasonable in terms of duration, geographical location and fairness having regard to the nature of the proprietary interest;
- (c) The terms of the restraint are not ambiguous. Any ambiguity in the language of a restrictive covenant will render the term *prima facie* unenforceable; and
- (d) The restrictive covenant is not otherwise contrary to the public interest.

[56] In addition, the courts will not apply severance to cure defective covenants. To do so would encourage employers to draft overly broad covenants in the hope that courts would read them down; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at para. 33. The difficulties with the restrictive covenant contained in s. 7.2 of the Shareholders' Agreement are many and varied.

[57] Mr. Pui does not articulate any proprietary interest of JTT that ought to be protected by a two-year world-wide ban on either of the Personal Defendants working for a competitive business. The combination of ss. 7.2(a) and 7.2(b), one of which relates to British Columbia and one of which does not, appears to create a blanket prohibition of unlimited geographic scope on any post-employment competition.

[58] Section 7.2(c) is to similar effect. This prohibition appears to be worldwide. It also extends beyond customers to include suppliers of JTT. Mr. Pui does not seek to articulate a legitimate rationale for preventing the Personal Defendants from contacting a supplier. Moreover, it is not just former or current customers and suppliers who are off limits. Instead, remarkably, the prohibition purports to include parties who may become customers or suppliers of JTT while the 2-year prohibition is running. JTT offers no justification for such a restriction.

[59] The term "business within British Columbia" in s. 7.2(a) is ambiguous. Does it mean a business based in British Columbia (Tanaris is based in Las Vegas) or a business selling products in British Columbia? If it is the latter, can the Personal Defendants work for a business so long as it does not sell products in British Columbia? In this regard, there is no evidence, for example, that Tanaris sells its products in British Columbia.

[60] The terms "business of the Company" used in s. 7.2(a) and "business carried on by the Company" used in s. 7.2(b) are undefined and ambiguous. "Business" is defined in s. 1.1(f) of the Shareholders' Agreement and is used in this capitalized form elsewhere in the Shareholders' Agreement (see s. 3.6(a)(8)); however, that capitalized term is not employed in s. 7.2.

[61] The terms “substantially similar to” and “competitive to any material extent” utilized in ss. 7.2(a) and 7.2(b) also seek to expand the scope of the prohibition upon the Personal Defendants in an ambiguous and unpredictable manner.

[62] These various difficulties, in combination, render the restricted covenants in the Shareholders’ Agreement unenforceable. They prevent the plaintiffs from obtaining the injunctive relief they seek — to prevent the Personal Defendants, in contract, from competing with JTT or from soliciting its clients.

**c) The Plaintiffs’ Application is Misconceived**

[63] Two introductory points are important. An interlocutory injunction is described in Sharpe at para. 2.10, as a “drastic” remedy. It is also often referred to as an “extraordinary remedy”; *Belron* at para. 29; *Future Shop* at para. 74; *Tele-Mobile Company, a Partnership v. Bell Mobility Inc.*, 2006 BCSC 161 at para. 25.

[64] In *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 6 at para. 4 (C.J.), Saunders J. said, “[w]hether an injunction is termed interim or interlocutory, the effect is the same. The court is exercising its civil power to restrain the activities of its citizens.”

[65] The conceptual justification for ordering such extraordinary relief lies in the risk that a plaintiff faces, in the form of apprehended and irreparable harm, if the remedy is not granted. Sharpe describes this risk in his text at para. 2.60, “[t]he risk to the plaintiff is that if an immediate remedy is not granted, his or her rights will be so impaired by the time of trial and judgment that it will be simply too late to afford an adequate remedy.”

[66] In *Aetna Financial Services v. Feigelman*, [1985] 1 S.C.R. 2 at 10, Estey J., for the Court, addressed the special nature of *Mareva* injunctions, but he also commented on interlocutory injunctions generally:

As a general proposition, it can be fairly stated that in the scheme of litigation in this country, orders other than purely procedural ones are difficult to obtain from the Court prior to trial. Where the injunction maintains the *status quo* in a way which is fair to both sides, the order is attainable; but, simply because the order would not injure the defendant is not sufficient reason to move the Court to grant what is generally regarded as an extraordinary intervention. In

*Law Society of Upper Canada v. MacNaughton*, [1942] O.W.N. 551, Rose C.J.H.C. stated at p. 551:

I have always understood the rule to be that the question is not whether the injunction will harm the defendant, but whether it is probable that unless the defendant is restrained, wrongful acts will be done which will do the plaintiff irreparable injury.

[67] Leaving aside a *quia timet* injunction, whose focus is on apprehended harm, an interlocutory injunction is generally based on some form of ongoing or imminent activity that is improper, giving rise to harm that is irreparable in nature. In this case, that core requirement is simply absent. The plaintiffs' focus in this application is on the Personal Defendants' activities in the few months before and the few months after March 2014, when they were let go from JTT.

[68] Mr. VanWerkhoven was with or at Tanaris for perhaps a month or so. He appears to have left Tanaris of his own accord no later than April 22, 2014. Mr. Pui has deposed that in early April, a Mr. Kaplan, the CEO of Harlan, an important JTT client, contacted Mr. Pui to tell him that that Messrs. VanWerkhoven and Farmer met with Mr. Kaplan near the end of March 2014 and that they tried to persuade Mr. Kaplan to transfer Harlan's business from JTT to Tanaris. Mr. Pui has further deposed that in or about April 2014, in further correspondence with Mr. Kaplan, he became aware that Messrs. VanWerkhoven and Farmer were promoting new products through the "Tanaris Group" and that they were attempting to solicit Harlan's business.

[69] JTT did not sue Mr. VanWerkhoven at that time nor seek injunctive relief at that time. Instead it rehired him, with knowledge of his conduct, as a consultant in mid-April 2014. In June 2014 and over the objections of JTT, Mr. VanWerkhoven left JTT for full-time employment in an industry that is entirely outside of, or apart from, the battery industry. He has remained employed in that capacity since that time. It was thereafter, on July 23, 2014, that the plaintiffs' action was commenced. This application was then not filed until September 15, 2014. The matter has still not been set for trial.

[70] The same is true of Mr. Potter. He was not sued by the plaintiff in April of this year. Mr. Potter left Tamaris of his own accord in July. He is presently seeking employment. He is 30 years old and has always been employed in the battery field. The relief the plaintiffs seek would effectively prevent him from any employment in his chosen field, with no evidence that he is presently engaged in any wrongdoing.

[71] These facts go beyond the issue of delay – a factor that is relevant to the balance of convenience. Instead, they identify a more fundamental deficiency: there is simply no evidence of any ongoing or imminent wrong by either Messrs. VanWerkhoven or Potter. There is presently no objective basis for the proposition that either is engaging, or will engage, in any activity that would cause the plaintiffs irreparable harm. I do not consider that some proof of some potential wrongdoing many months ago adequately grounds the present application. If the Personal Defendants did act improperly in the past, it is open to the plaintiffs to pursue that past wrongdoing. If it becomes apparent that they act wrongfully in the future, that too may be actionable.

[72] I do not consider, however, that the plaintiffs are entitled to any of the extraordinary relief that they seek against either of the Personal Defendants.

[73] The Personal Defendants are to have their costs of this application.

“Voith J.”