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(Winnipeg Centre)
Indexed as: dB Noise Reduction Inc. v. Letkemann et al.
Cited as: 2022 MBKB 208

COURT OF QUEEN'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

dB NOISE REDUCTION INC.,	)	Appearances:
	)	
	)	Troy P. Harwood-Jones and
plaintiff,	)	Jeffrey D.H. King
	)	for the plaintiff
- and -	)	
	)	Wayne M. Onchulenko,
TIM LETKEMANN AND VAW SYSTEMS LTD.,	)	for Tim Letkemann
	)	
defendants.	)	Lynda K. Troup,
	)	for VAW Systems Ltd.
	)	
	)	JUDGMENT DELIVERED:
	)	November 7, 2022

McCARTHY J.

INTRODUCTION

[1] The defendant, Tim Letkemann ("Letkemann"), was an employee of the plaintiff, dB Noise Reduction Inc. ("dB"). Letkemann left his employment with dB to work with the defendant, VAW Systems Ltd. ("VAW"), a company he had worked for previously.

[2] The plaintiff alleges that Letkemann has breached the restrictive covenants in his employment agreement. Alternatively, they allege that Letkemann owed a fiduciary duty to the plaintiff and has breached that duty.

[3] The plaintiff has also claimed against VAW for interference with the employment agreement between Letkemann and the plaintiff, and/or interference with the economic interests of the plaintiff.

[4] At the outset of the motion for summary judgment the plaintiff sought to have portions of the affidavit of Tim Letkemann, affirmed August 4, 2021, expunged.

BACKGROUND FACTS

[5] The plaintiff carries on business designing and providing custom acoustic control silencers, devices and equipment for commercial and industrial customers in Canada and the United States. The company was incorporated in Ontario and is registered to carry on business in Manitoba.

[6] On October 2, 2009, Letkemann executed an employment agreement with dB. The contract contained a two-year non-solicitation clause, a two-year non-competition clause and a non-disclosure/confidentiality covenant.

[7] At the time of commencing his employment with dB all negotiations occurred between Letkemann and John Praskey ("Praskey"), the founder and President of dB. Letkemann had a prior existing relationship with Praskey.

[8] Praskey provided Letkemann with a proposed employment agreement which Letkemann reviewed with independent legal advice prior to executing same.

[9] It was agreed that Letkemann would work out of his home in Manitoba as an employee of dB. His title was Vice-President of Sales.

[10] Initially Letkemann reported to Praskey only. In 2014, Richard Zipplinger ("Zipplinger") became a Director of dB and assisted Praskey in the day-to-day operations of the company. In July of 2016 Praskey stepped down as President of dB and Zipplinger took over. By early 2016 the defendant Letkemann reported that he was becoming unhappy with the work environment under the new management.

[11] Letkemann deposed that in 2016 when Zipplinger was taking over, another dB employee Mehrzad Salkhordeh ("Salkhordeh") tried to pressure Letkemann into accepting a pay decrease of $64,000 per year.

[12] As a result of the change in management and the income issue, in January 2016 Letkemann began exchanging emails with Dan Sierens ("Sierens") at VAW regarding possible employment there.

[13] Letkemann had worked for VAW prior to working at dB.

[14] As part of their discussions, Letkemann and Sierens discussed the terms of Letkemann's employment agreement with dB. More detail of these discussions will be set out in the analysis portion below.

[15] In June 7, 2016, Letkemann signed an employment agreement with VAW and on June 9, 2016, Letkemann resigned from his employment with dB.

[16] On July 4, 2016, Letkemann commenced employment at VAW as VAW's Senior Applications Manager.

[17] Letkemann's education and experience is as an applications engineer.

[18] The plaintiff alleges that Letkemann's position at VAW is the same position that he held at dB. Letkemann and VAW dispute this characterization stating that Letkemann was primarily involved in sales and application engineering at dB and is carrying out only application engineering functions at VAW.

SUMMARY JUDGMENT

[19] The parties to this matter were all of the view that the evidence and issues were such that matters could likely be determined by way of summary judgment.

[20] Having reviewed the materials filed, and considered the submissions of counsel, I am satisfied that there are no genuine issues in this case that require a trial. I am therefore deciding this matter by way of summary judgment as follows.

ISSUES

1. **Should any paragraphs of the defendant Letkemann's affidavit be struck?**
2. **Are the restrictive covenants in the employment agreement valid and enforceable?**
3. **If so, did Letkemann breach the covenants?**
4. **Does Letkemann owe the plaintiff a fiduciary duty?**
5. **If so, was the fiduciary duty breached?**
6. **Is the confidentiality clause valid and, if so, did Letkemann breach the confidentiality clause?**
7. **Did Letkemann or VAW intentionally interfere with the contract and/or the economic interests of the plaintiff?**

ANALYSIS

Should any paragraphs of the defendant Letkemann's affidavit be struck?

[21] With respect to the affidavit material in question the plaintiff's argument for striking portions of the defendant Letkemann's affidavit fall broadly into two categories.

[22] The first is that Letkemann improperly includes hearsay in his affidavit evidence.

[23] The plaintiff relies upon King's Bench Rule 25.11 which allows for material to be struck where it is scandalous, frivolous or vexatious.

[24] The plaintiff also relies upon ***Ridout v. Ridout***, 2001 MBQB 48, 154 Man.R. (2d) 178, a decision of this court for the proposition that hearsay and opinion evidence may be struck from affidavit material.

[25] None of the parties referred to section 39.01(4) of the King's Bench Rules which states that with respect to motions, including summary judgment motions, a deponent may rely upon information and belief provided he or she cites the source of the information.

[26] In my view, given the wording of that section, and the more recent emphasis on courts employing considerations of proportionality in how they make decisions, the issue in most cases will be one of what weight will be attributed to such evidence.

[27] In summary judgment matters the parties are expected to put their best evidence forward to allow the court to make a final determination of matters where

appropriate. If the evidence is not first hand, and better or other evidence is available, or the evidence is shown to be incredible or unreliable, it will be given little or sometimes no weight.

[28] The exchange of affidavit evidence in advance of the right of cross-examination, and the requirement that the original source of the information be disclosed, provides the opposing party the opportunity to test or contradict the evidence in a way that will be proportionate in many cases to the issues before the court.

[29] In this case the plaintiff has sought to have several paragraphs struck on the basis that they constitute hearsay evidence. With respect to the portions of paragraphs 41, 43, 45, 46, 68, 69 and 70(a) 70(b) and 70(c) outlined at pages 57, 58 and 61 of the plaintiff's Brief, I agree that the evidence identified should be struck because the evidence is hearsay, and because the source of the information is not identified in compliance with King's Bench Rule 39.01(4).

[30] With respect to the remaining paragraphs which the plaintiff sought to have struck, I find that the information contained therein is information that the defendants are entitled to rely upon. With respect to the evidence which the plaintiff describes as opinion evidence, I find that this information would generally be within the knowledge of the deponent as a result of his employment with VAW, in the past and currently, and as such I decline to strike this evidence.

[31] The weight attributed to the evidence will be assessed in the context of all of the evidence before the court in this matter.

Are the restrictive covenants in the employment agreement valid and enforceable?

[32] The employment agreement in question includes the following clause:

> The employee agrees that in the event of his/her employment being terminated for any cause or reason, he/she will not thereafter, either directly or indirectly, either as a partner or as an officer, director, shareholder, or employee or agent or servant of any corporation or partnership, for a period of two (2) years after leaving the said employment, solicit orders from any customer of the employer for such products as are manufactured and/or sold by the employer and that he/she will similarly not engage in the business of the manufacture and sale of such products as are manufactured and/or sold by the employer within the same period.

[33] As set out by the Manitoba Court of Appeal in ***Winnipeg Livestock Sales Ltd. v. Plewman***, 2000 MBCA 60, 150 Man.R. (2d) 82 at para 15 ("***Winnipeg Livestock Sales***"), it is settled law that a restrictive covenant in an employment contract is a restraint of trade which is *prime facie* contrary to public policy and therefore void. In a contract of employment a restrictive covenant must be found to be reasonable, both as between the parties, and as it relates to the public interest in general, in order to be valid.

[34] Citing ***Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.***, [1967] 1 All E.R. 699, [1968] A.C. 269, [1967] 2 W.L.R. 871 in ***Winnipeg Livestock Sales*** (at para. 22), the court found that, in determining whether the restrictive covenant is reasonable, the court must consider what the legitimate interests were that the employer was entitled to protect, and whether the restraints were more than adequate for the purpose.

[35] Further, public policy considerations include protecting against an imbalance in bargaining power which is always present in employment contracts (citing ***Dynamex Canada Inc. v. Miller*** (1998), 161 Nfld. & P.E.I.R. 97, 1998 CanLII 18094 at para. 23 (Nfld. SCCA)), and protecting the right of the parties to contract.

[36] The court in ***Winnipeg Livestock Sales*** (at para. 27) stated that trade secrets, confidential information and customer lists are legitimate interests, as are trade connections and goodwill. They stated further, however, that the employer has no proprietary interest in the skill of an employee, even if the skill was acquired during his or her employment.

[37] The burden in these cases is on the plaintiff to establish a legitimate proprietary interest in customer connections, and they must prove that customer loyalty is a key component of its business, as opposed to price, service, product availability and other market considerations.

[38] The court in ***Winnipeg Livestock Sales*** went on to state that, in the absence of special circumstances, an employer has no proprietary interest that entitles it to protection from competition from a former employee (at para. 27).

[39] In this case the evidence weighs heavily in favour of a finding that the restrictive covenant, insofar as it prevents Letkemann from working for a company that operates in competition with the plaintiff, is unenforceable.

[40] In this case Letkemann has specialized training and experience in application engineering, particularly in the area of acoustic control devices

including silencers for industrial fans. The evidence suggests that his experience is so specialized that there are only about 10 companies competing in this field at the present time in Canada and parts of the United States. The impact upon Letkemann if he is bound by the covenant that he cannot work for any company providing these services is obvious. In this case, in addition to the power imbalance that the courts have found is inherent in any employer/employee relationship, there is evidence that there was a specific imbalance in this case prior to Letkemann terminating his employment. Letkemann deposed that, prior to terminating his employment, another employee of dB was attempting to pressure Letkemann to accept a salary reduction of $64,000 and that he was not happy under the supervision of a new manager. This evidence was not contradicted by the plaintiff. This is a good example of why the court must uphold restrictive covenants only when they are found to be reasonable. Policy considerations require that there must be an enforceable legal basis for an employee to have to choose between unsatisfactory employment conditions and being unable to work in their chosen field.

[41] In this case the broad wording of the non-compete portion of the restrictive covenant is not limited to providing services to the *plaintiff's* customers and is not limited in geographic location. If the covenant is enforceable then Letkemann could not work in his field for a period of two years after termination of his employment.

[42] The evidence is that both dB and VAW were providing services to many of the same customers at various times prior to Letkemann leaving his employment with dB. When I look at the evidence of the particular nature of the plaintiff's business I conclude that loyalty of clients is but one factor in obtaining and retaining customers. While there is evidence that Letkemann was involved in direct contact with many of dB's customers, and attended some tradeshows and marketing events, the bulk of his contact was in the form of receiving requisitions for quotes and providing the design and quoted price. The plaintiff also had other employees providing the same services, and there is no evidence that the customers perceived Letkemann, above other employees, to be the personification of the business. Based upon the evidence in fact it would seem that Praskey, who started the business and hired Letkemann and the other employees, would have been more likely seen as the face of the business. It is also not disputed that Praskey was the most experienced and knowledgeable person in the industry. Despite the fact that Praskey hired Letkemann, and was the person at dB that the terms of the contract were negotiated with, his evidence was not provided in this matter.

[43] Through the various affidavits that were filed on behalf of the plaintiff and the defendants, as well as read-ins from examination and evidence on cross-examinations, a number of factors were identified which businesses would consider when shopping for silencing equipment and solutions. These included a

prior business relationship, pricing, reliability and lead time, or how quickly the company could provide the service or the end product.

[44] Even Zipplinger, in his evidence on behalf of dB, identified the competition as very price sensitive. He agreed in cross-examination that with respect to individual customers such as Howden Covent, there was always a bidding war between dB and VAW. He described another customer, Twin City, as aggressively shopping prices and as being very price sensitive. Air Pro, another customer of dB, was described as being demanding with lead times. He stated that some customers became angry when dB refused to enter into an exclusivity agreement with them.

[45] The facts in this case are not, in my view, similar to cases such as ***Elsley v. J.G. Collins Ins. Agencies***, [1978] 2 S.C.R. 916 ("***Elsley***"), relied upon by the plaintiff. In ***Elsley***, the plaintiff was found to have a significant proprietary interest in the general insurance trade connection that required protection when the defendant, who had been running the plaintiff's insurance business, proposed to set up his own business in direct competition. The customers were easily identifiable as the plaintiff's customers, and it was found that the business would suffer significant loss if the defendant solicited their business or competed with the plaintiff for their repeat business.

[46] In the case at bar the nature of the business is much different. The plaintiff and the defendant VAW do not each have separate loyal customers who only or largely deal with them. The evidence suggests that this is a much more market-

based industry with potential new and former customers generally requisitioning a quote for proposed work, and companies such as dB and VAW quoting, tendering and/or bidding for sales. It is likely that whoever can offer the best service at the best price will most often get the job and when that same customer has another need the shopping for quotes will begin again. There is evidence from the defendants that some of their customers require multiple bids on every job. This evidence was not contradicted by the plaintiff. In fact, Zipplinger agreed that that was likely the case.

[47] While the plaintiff argued that the industry was such that trade loyalty and relationships were vital to the business the evidence suggested otherwise.

[48] Given these facts, which I find are supported by the evidence from both sides, the plaintiff has not met its onus of satisfying me that they have a significant proprietary interest in a loyal client base that requires the protection of a restrictive covenant.

[49] Further, even if they had established a proprietary interest requiring protection they would also have to establish that the covenant in the contract is the least restrictive means necessary to protect that interest.

[50] In this case, with respect to the temporal and spatial features of the covenant in question, it is for a two-year period and covers on unrestricted area. The plaintiff argued that two years is the appropriate industry standard, however, there is no evidence before the court with respect to what period of time would

reasonably be required to secure the plaintiff's customers, or replace the defendant employee, or what the standard in this industry is.

[51] Similarly, there is no evidence as to what geographic location is reasonable. The facts are undisputed that the plaintiff services clients primarily in Canada, but also in the United States. For that reason, the plaintiff argues that there should be no spatial limitations. The plaintiff agrees that this provision, if upheld, would effectively prevent Letkemann from working in his field of expertise anywhere in North America, or beyond, for a period of two years.

[52] The contract's broad terms are clearly contrary to the concept of free movement of employees within a free market. In order to be determined to be reasonable, the plaintiff would have to satisfy the court that a no less restrictive provision would protect its proprietary interests. As stated by the Supreme Court of Canada in ***Shafron v. KRG Insurance Brokers (Western) Inc.***, 2009 SCC 6, [2009] 1 S.C.R. 157 at para. 27 ("***Shafron***"), generally failure to define the applicable geographic location of the restriction is fatal to its validity.

[53] As I have outlined the plaintiff has failed to satisfy me, first that it has a propriety interest in a defined customer group, and second that the very broad non-compete covenant is reasonable and therefore valid. The purported non-competition provisions go far beyond an attempt to limit damage to the plaintiff's proprietary business relationships. It is so broad as to attempt to limit competition generally and that provision is therefore void.

[54] Turning now to the non-solicitation portion of the contract. The specific wording of the clause is that the employee shall not "for a period of two (2) years after leaving the said employment, solicit orders from any customer of the employer for any such products as are manufactured and/or sold by the employer."

[55] The covenant has two components, those being that the employee shall not "solicit orders" from any "customer of the employer".

[56] As quoted by the Ontario Superior Court in ***Camino Modular Systems Inc. v. Krandis,*** 2019 ONSC 7437 at para. 37, "a non-solicitation clause, to be valid, must clearly advise the former employee which customers are off limits to him or her" citing ***Stress-Crete Limited v. Harriman***, 2019 ONSC 2773 at para. 39; ***Mason v. Chem-Trend Limited Partnership***, 2011 ONCA 344, 280 O.A.C. 305 at para. 30.

[57] In that case "customer" was defined in the agreement but was found to be defined so broadly as to be unclear. In the present case, there is no definition of "customer" or "customer of the plaintiff" in the agreement.

[58] As determined by the Supreme Court in ***Shafron***, restrictive covenants are taken as written, and those that are too broad or ambiguous, are void at law.

[59] In this case, particularly given the nature of the industry as I have described above, the restrictions purported to be placed upon the defendant with respect to soliciting orders from "customers of the plaintiff" would be impossible to adhere to with any certainty. There is no way to determine whether a "customer of the plaintiff" was to relate to customers at the time that the contract was written, at

the time that the employment relationship is terminated, or at some, or all points in between. It could also encompass future customers of which the defendants would have no knowledge. There is also no indication whether the service received by the customer was to relate to the specific kinds of services provided by the defendants, or to all of the services offered by dB. And finally, there is no indication as to whether to be considered a "customer of the plaintiff" would require some amount of repeat business, or would include one-off transactions, and no indication as to the extent, kind, value, or location of services that would make one a "customer of the plaintiff".

[60] In my view the terms of this provision are so broad that Letkemann would be unable to determine when, or whether, he was in breach of same. This provision is sufficiently ambiguous that the only way to comply with it would be to refrain from providing any services that the plaintiff may also provide. Having found above that the contractual non-compete provision was not reasonable in the circumstances of this case, an ambiguous, and therefore overly broad non-solicitation covenant that has the same effect, is similarly unreasonable.

[61] Given the nature of this business, where customers contract with a variety of suppliers based upon factors such as price, availability and prior service, this entire clause is too broad and vague in my view to be enforceable without preventing Letkemann from working in his field altogether for the two year period.

[62] Having found that the non-solicitation provision is void, it is not necessary to provide a detailed analysis of the evidence as to whether solicitation has

occurred in this case. Having said that, I will address the plaintiff's argument in this regard in a general way.

[63] The plaintiff argues that there is evidence in the form of a draft e-mail between Letkemann and Sierens of VAW that Letkemann had the intention, upon moving to VAW, of attempting to solicit the plaintiff's vent silencer clients. There is, however, no evidence that those plans were ever communicated to Sierens, or carried out. Both Letkemann and Sierens provided consistent evidence that they were aware of the terms of Letkemann's employment agreement and that, after reviewing those provisions, efforts were made to ensure that Letkemann did not solicit clients of dB in breach of the agreement.

[64] In order to find a breach of the non-solicitation provisions the court would not only need to find, or infer, an intention to solicit orders, but also evidence that orders were actually solicited.

[65] The evidence here is that arrangements were made for the defendant Letkemann to provide application engineering services only and not to be involved in sales at VAW.

[66] There is one allegation that Letkemann was provided the name of a dB client representative in an e-mail from the VAW sales department and told that the customer had been provided information on how to contact Letkemann. There is no evidence that Letkemann was instructed to contact that client and solicit an order from him, or that Letkemann in fact initiated or ever had any contact with that customer. Letkemann denies ever speaking to that client.

[67] An opportunity to solicit business which is not acted upon, or responding to a customer looking for services, does not constitute reaching out to potential customers and soliciting orders or business.

[68] Having reviewed the evidence with respect to all customers who the plaintiff has identified as their customers who have stopped using dB, or who are known to have used VAW since Letkemann left, I find that there is no reliable evidence of solicitation of orders by Letkemann or by anyone at VAW on Letkemann's behalf.

[69] As outlined above, many of the customers have been customers of both dB and VAW at various times over the years. Looking at the evidence of where sales went up for VAW in some cases, and down in others, it is apparent that there is no pattern of movement of customers who did business mostly, or exclusively with dB prior to 2016, to now doing business mostly, or exclusively, with VAW. The evidence is simply not there as would be required to find evidence of solicitation.

[70] Therefore, even if the non-solicitation provision of the agreement was valid, I would find that the plaintiff has not satisfied me that there is sufficient evidence to find that Letkemann was in fact soliciting orders from customers who have also done business with dB.

Is the confidentiality clause valid and, if so, did Letkemann breach the confidentiality clause?

[71] The employment agreement contains the following confidentiality clause:

> Employee shall not at any time, either during continuation of employment or after termination thereof, reproduce, use or disclose to anyone, any confidential information or trade secrets concerning the business or affairs or financial position of Company or its subsidiary or affiliated companies, including without limitation, computer software and software systems,

> whether owned or licensed by Company, customer data and lists, strategic plans, manufacturing processes, research and development data, product formulae and methods of operation, unless required by law or specifically instructed to do so by officers, directors, or employees of Company specifically designated to authorize such reproduction, use and/or disclosure.

[72] The defendants argued that similar to the restrictive covenants considered above, the confidentiality provisions of the agreement are void for uncertainty. They take the position that "confidential information" and "trade secrets" are not defined in the agreement, and that the scope of what is covered is impossibly broad given the wording "without limitation".

[73] They argue that the clause is overly broad, ambiguous and not limited to protection of a legitimate proprietary interests of dB, and as such, is unreasonable and unenforceable.

[74] I agree with the defendants' assertions with respect to the overly broad and ambiguous wording of the clause in this case. As with the non-solicitation provision, I am of the view that the provision is so vague and all-encompassing that the defendants would be unable to determine what confidential information exists and is to be protected.

[75] With respect to whether Letkemann has breached the agreement, the broad and ambiguous wording is also problematic from the court's perspective. It is not clear from the wording of the clause, or from the evidence provided by the plaintiff, what proprietary confidential information requires protection, and was intended to be protected by the clause in order to ascertain if a breach of his obligations has in fact occurred.

[76] While the plaintiff asserts that Letkemann had access to confidential customer information that was essential to the services provided by dB, I find that the evidence overall did not support that assertion. The uncontradicted evidence of Letkemann was that the solutions and quoting are relatively standard among the industry and between clients, and that not much information specific to a business of the customer is required to provide a quote. In each case the customer contacts the sales department or the application engineer with a problem piece of equipment requiring an acoustic control solution. The specifications for the problem equipment are obtained from the customer and then the parts required to provide a noise control solution, and the quote with respect to the cost of that solution, are produced by using application software. There was no evidence produced by the plaintiff that having prior knowledge of the customer requiring the quote, or that customer's particular business, was somehow necessary or preferable when providing a quote.

[77] Similarly, there are allegations that after Letkemann commenced employment with VAW, VAW acquired software similar to that used by dB, from the company that made dB's software. There is also evidence that VAW was producing very similar or identical quotes using its new software. There is no evidence that Letkemann or VAW are using the actual software that dB owned, or a copy of same. In fact, one would expect that if Letkemann had taken proprietary software of dB, VAW would have had no reason to purchase its own software.

[78] I can see no way that dB would have a proprietary interest in software created and sold by a third party, or that purchasing similar software, or even identical software, from a third party would be a breach of any duty Letkemann may have to dB.

[79] I see no evidence in this case that Letkemann took any information from dB upon leaving his employment, other than his knowledge, including his knowledge of many of the customers who did business with dB, and his cellular phone which he owned prior to his employment with dB, which likely contained customer contact information. The evidence suggests that contact information form many or all of the companies dB did business with would be readily and publicly available.

[80] As set out above, I see no evidence of any use of the plaintiff's confidential information to solicit work away from the plaintiff, or any evidence of misuse of confidential or proprietary information of the plaintiff's to their detriment.

Does Letkemann owe the plaintiff a fiduciary duty?

[81] The plaintiff argues that Letkemann also owes dB a fiduciary duty as an officer of the plaintiff corporation by virtue of the ***Business Corporations Act***, RSO 1990, c B.16.

[82] As argued by both defendants this provision was not pled by the plaintiff in its Statement of Claim. As well no leave to amend the claim to add this provision was sought. I agree with those concerns as to the procedural shortcomings of

this claim and would, therefore, be reluctant to find that there was a statutory fiduciary duty on Letkemann with respect to the business of dB on that basis.

[83] As to the substance of the position taken by the plaintiff, I am also of the view that the evidence does not satisfy me that the defendant Letkemann was ever appointed as an officer or a director of the corporation, or given the powers to manage the business and affairs of the corporation, as required for the statutory imposition of a fiduciary duty. The position of Vice-President of Sales was a title assigned to Letkemann at his suggestion to add legitimacy to his role in the eyes of the customers. Being assigned the job title of V.P. of Sales is not in and of itself sufficient to bring an employee under the fiduciary provisions of the ***Business Corporations Act***. Therefore, I find that the provisions of the legislation which impose fiduciary duties on officers do not apply to Letkemann.

[84] The plaintiff also argues that Letkemann owed a common-law fiduciary duty to dB as a "key employee" of the company. The Manitoba Court of Queen's Bench in ***M.E.P. Environmental Products Ltd. v. Hi Performance Coatings Company Limited et al.***, 2006 MBQB 119, 204 Man.R (2d) 40 at para. 18, set out the indicia for determining whether an employee is a "key employee". Applying those indicia to the present case, I find that Letkemann was not a key employee and did not owe a fiduciary duty to the plaintiff.

[85] The evidence is that Letkemann's duties were primarily application design and quoting. He also had some responsibility for sales, occasionally travelling to meet with customers or attend a conference.

[86] There is no evidence that Letkemann had control, discretion or influence over the direction or management of the company. The evidence suggests that such control and management duties fell to the President, Praskey, and eventually to Zipplinger and Salkhordeh.

[87] Letkemann was a paid employee who worked with some, but not all dB customers. There were other employees who also did sales and application design work at dB. The evidence does suggest that Letkemann was very experienced and qualified for his position, but he was neither the controlling mind, nor the face of the company.

[88] While Letkemann had access to customer information, and company pricing, he was not responsible for setting prices and he had no knowledge of overall finances or profitability of the company. He did not have access to the company financial statements, expenses, or profit and loss information.

[89] The only confidential proprietary information of the company which Letkemann had access to was customer information and software used to price and quote on projects.

[90] In my view, while Letkemann was certainly a valuable employee with years of knowledge and experience, and the respect of the customers in the industry, he was not a "key employee" in the sense that his role within the company, and in the eyes of its customers, was as the face of the company.

[91] This is not a similar situation to ***Evans v. The Sports Corporation***, 2013 ABCA 14, 72 Alta L.R. (5th) 413 relied upon by the plaintiff, where the employee

in question was a sports agent whose talent and connections were the product the clients were buying.

[92] In the sound control industry, as described above, there are many factors, including price and service, which attract the sales contracts, not the reputation of any one employee.

[93] Letkemann's role as an employee in this company was not as a key employee which would attract fiduciary obligations to act in the best interests of the corporation.

[94] Having found that Letkemann did not owe any fiduciary obligations to dB there is no need to consider the issue of a breach of that duty. However, if I was to do so I would find, based upon my findings in the above sections that the plaintiff has demonstrated no breach of any fiduciary obligations Letkemann could have toward dB.

Did Letkemann or VAW intentionally interfere with the contract and/or the economic interests of the plaintiff?

[95] As stated above I have found that the provisions of Letkemann's contract, which are the subject of this litigation, are void and unenforceable. I have further found that, even if they had been enforceable, the plaintiff has not established on a balance of probabilities that Letkemann breached any of the covenants.

[96] I have also found that, other than one piece of evidence to suggest that Letkemann considered trying to solicit orders or clients from the plaintiff, there was no evidence that those plans were ever discussed with, or considered in concert with Sierens of VAW.

[97] To the contrary, the evidence as a whole suggests that Sierens and Letkemann made efforts to structure Letkemann's employment with VAW in a manner that would not contravene the terms of the employment agreement.

[98] As I have found that there was no breach of the employment contract, VAW cannot be found responsible for inducing a breach.

[99] I also find no evidence that VAW intended to injure the plaintiff's economic interests, interfered with the plaintiff's economic interests by any illegal or unlawful means, or that the plaintiff has established that it suffered any economic harm or loss resulting from the actions of the Defendants.

CONCLUSION

[100] I am satisfied that there are no genuine issues before me on these motions which require a trial. Summary judgment is therefore granted to the defendants' and the plaintiff's claims are dismissed.

COSTS

[101] The defendants are entitled to the costs of this motion although the plaintiff had some very limited success on its motion to strike portions of Letkemann's affidavit material. If the parties are unable to agree upon costs the matter may be brought back before me for argument.

McCarthy J.