

Disloyalty Can Come With a Cost

I'll take fifty percent efficiency to get one hundred percent loyalty.

Samuel Goldwyn

Within the context of a contract of employment, an employee *inter alia* owes his employer an implied duty of loyalty. Such a duty, which is said to originate from a time when the employment relationship was perceived as one of master and servant, continues into our era where the employment relationship is arguably characterised as one between a mobiliser of capital and a provider of labour. Therefore, an employer is entitled to an employee's loyalty whether or not the contract of employment includes written clauses by which the employee promises not to facilitate activities that compete with the business of his employer; that poach the customers or employees of his employer; that use confidential information, gained during employment, to the detriment of his employer; etc.

Against the preceding backdrop, the case of *GasTOPS Ltd. v. Forsyth* 2012 ONCA 134 is instructive for business owners, directors, senior managers and persons holding responsibility for the human resources portfolio; since it highlights the legal ramifications that may ensue for employees (particularly managerial) who breach the non-compete, non-solicitation, confidentiality and notice of resignation clauses in their contracts of employment. The case also reveals that businesses, which subsequently benefit from the aforementioned fiduciary and contractual breaches, may be called upon to account for the associated financial gains.

The Employment Context

GasTOPS Ltd. ("GasTOPS") was an industry leader in the design, development and application of computer software products, which facilitated the assessment of machinery conditions and maintenance requirements by the operators of jet engines.

Bradley Forsyth, Douglas Brouse, Jeffrey Cass and Robert Vandenberg were considered the designers of GasTOPS' main programs and a key part of the company's senior management.

The Employees' Actions

In May 1996, Brouse and Cass attended a seminar on starting a software company, unbeknownst to GasTOPS. The two subsequently shared the material with Forsyth. On October 7, 1996, Forsyth and Brouse submitted separate, but identical, letters of resignation that gave two weeks' notice to GasTOPS. Interestingly, when compared to the subsequent chain of events, the letters stated that their future plans were somewhat uncertain; they would not solicit business from any of GasTOPS' existing or potential clients; they would not utilize or take away any confidential company information or property; they would not solicit any of GasTOPS' employees; they hoped that their departure would not be too disruptive to GasTOPS and that the company would find suitable replacements; and they were available to work on a subcontract basis if GasTOPS needed their services to assist in the transition.

On October 10, 1996, Cass and Vandenberg also resigned by giving two weeks' notice to GasTOPS. Quickly after their resignations Brouse, Forsyth and Cass informed GasTOPS employees of their plans to start up their own software development company focusing on aviation maintenance systems. By November 1996 a number of GasTOPS' employees left to join the new company, MxI which had been incorporated by Messrs. Forsyth, Brouse, Cass and Vandenberg on October 15, 1996.

Messrs. Forsyth, Brouse, Cass and Vandenberg then courted most of GasTOPS' existing and potential customers, by using the confidential and highly strategic business, marketing and technical information they had obtained while at GasTOPS to offer "a virtually seamless transition to MxI and its products". Resultantly, several existing clients of GasTOPS and prospects such as the U.S. Navy diverted their business to MxI. GasTOPS sought to enact damage control by negotiating an arrangement with MxI, however such negotiations eventually broke down. Ironically, during said negotiations, Forsyth articulated in correspondence that he, Brouse, Cass and Vandenberg recognised that they owed a fiduciary duty to GasTOPS as their former employer. As a result of the aforementioned events GasTOPS suffered considerable financial loss in the subsequent decade that followed; while MxI earned profits in excess of twelve (12) million dollars from military contracts.

The Legal Proceedings

GasTOPS initiated legal proceedings against Messrs. Brouse, Forsyth, Cass and Vandenberg for breach of fiduciary duty, breach of confidence and breach of contract; and against MxI for breach of confidence. The trial judge found as follows regarding the four personal Defendants and one juridical Defendant:

1. Messrs. Brouse, Forsyth, Cass and Vandenberg had been “fiduciary” employees of GasTOPS.
2. Messrs. Brouse, Forsyth, Cass and Vandenberg had breached their fiduciary duty by (a) leaving without giving reasonable notice knowing other employees would follow and knowing that it would leave GasTOPS unable to fulfill existing contracts or pursue the business opportunities it had been cultivating; (b) soliciting GasTOPS’ customers and prospective customers; and (c) using GasTOPS’ confidential information to compete unfairly with GasTOPS.
3. Messrs. Brouse, Forsyth, Cass and Vandenberg had breached their duty of confidence by acquiring confidential commercial and technical information and misusing that information to the detriment of GasTOPS and the benefit of MxI.
4. MxI had breached its duty of confidence by acquiring confidential commercial and technical information and misusing that information to the detriment of GasTOPS and the benefit of MxI.
5. Messrs. Brouse, Forsyth, Cass and Vandenberg had breached their employment contracts by resigning without giving reasonable notice.

The trial judge made the following orders:

1. MxI had to account to GasTOPS for the profits of \$12,306,495 it had made through GasTOPS’ confidential information over its first ten (10) years of operation and to disgorge the same.

2. Messrs. Brouse, Forsyth, Cass and Vandenberg pay damages equivalent to profits of MxI over its first ten (10) years of operation.
3. Messrs. Brouse, Forsyth, Cass and Vandenberg pay pre-judgment interest of \$3,039,944 and GasTOPS' full legal costs of \$4,252,920.24.
4. Messrs. Brouse, Forsyth, Cass and Vandenberg were jointly and severally liable to GasTOPS for the amounts ordered.

The Appeal

Messrs. Brouse, Forsyth, Cass and Vandenberg lodged an appeal against certain aspects of the trial judge's findings and his orders. GasTOPS lodged a cross-appeal against the trial judge's rejection of its request for permanent injunctive relief. However, the Court of Appeal dismissed the appeal and cross-appeal by upholding the trial judge's decisions regarding fiduciary duty; damages; joint and several liability; costs; and injunctive relief.

The appellate decision created the precedent that:

- ✓ Where an employee is found to have breached his/her fiduciary duties not to unfairly compete with his former employer, not to solicit the employees of his former employer, not to breach confidential information possessed by his former employer and to give adequate notice of resignation, he/she will be liable to pay damages to his former employer.
- ✓ Where a company is found to have been used as a mechanism to facilitate an employee's breach of his/her fiduciary duty not to unfairly compete with his former employer, the company will be ordered to account for the resulting profits and to disgorge the same to the former employer.

Even though we live in an era where employees are unlikely to work for one employer throughout their working lives, where the entrepreneurial spirit abounds and where fidelity is arguably a decreasingly prevalent sentiment; employees should be aware that being disloyal to their employers could come at a cost.

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