

THE GR COURT DOCKET

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Court sets aside non-competition injunction

By Stephen Thiele and Howard Wolch

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

Stephen Thiele

Partner
416.865.6651
sthiele@grllp.com

Howard Wolch

Partner
416.865.6669
hwolch@grllp.com

An injunction that prevents a person from competing with a former employer can be devastating to the party subject to the injunction. Accordingly, where such an injunction is granted at an interlocutory stage of a proceeding, the party who obtained the injunction has an obligation to ensure that the proceeding moves forward expeditiously. Where the party does not do so, there is a danger that the interlocutory non-competition injunction can be set aside.

In the recent case of *Kapur v. Konevic*, 2021 ONSC 7730 (not yet on CanLII), the court set aside an interlocutory non-competition and non-solicitation injunction that had been granted against the individual plaintiff, a defendant by counterclaim, MK, on September 4, 2020.

MK moved under [rule 59.06 of the Rules of Civil Procedure](#) to set aside the prohibitive injunction for multiple reasons. The court explained that while [r. 59.06](#) permits a motion to vary an order “on the ground of...facts arising or discovered after” the order was made, a motion to vary or set aside cannot be

presented in such way as to re-argue the merits of the injunction motion. A moving party must show that the evidence relied upon to set aside an order could not have been put forward through reasonable diligence at the time of the original motion and that the evidence, if known, might reasonably have altered the result.

MK argued two issues that fit into this framework.

First, although the injunction had been granted more than 15 months ago, the proceedings had not moved past the pleadings stage. As set out in *Bourganis v. Glarentzos* (1978), 19 O.R. (2d) 327 (H.C.J.), a party who obtains an interlocutory injunction must pursue his or her case with reasonable dispatch, or risk having the injunction dissolved.

Even though the court acknowledged that all parties have an obligation to move proceedings forward, it determined that the plaintiffs by counterclaim had created delay by seeking to add two new parties to the counterclaim after the

interlocutory injunction had been granted. The court determined that the 15 month delay could not have been in the contemplation of the court when the injunction was granted and accordingly the delay provided a meritorious ground to dissolve the injunction against MK.

Second, the Court reasoned that the interlocutory injunction against MK should be set aside because the contract that governed MK's relationship with the party in whose favour the injunction had been granted contained provisions which demonstrated the reasonable expectation of the parties in connection with non-competition and non-solicitation. The judge who heard the original injunction motion had found that certain conduct on MK's part was in violation of the non-competition provision found in the contract and that MK's breach of a negative covenant vitiated the need for the party seeking the injunction to prove damages. Accordingly, the interlocutory injunction was tied to the contract.

However with respect to non-competition, the contract only applied during its term. With respect to non-solicitation, the contract only applied six months after its termination. Those two periods had long expired and no consideration had been given to these dates.

While it was argued that the injunction should not be set aside because the claim of the plaintiffs by counterclaim was based on oppression and alleged breach of fiduciary duty, the court rejected these arguments. Neither oppression nor breach of fiduciary duty were mentioned in the analysis for supporting the interlocutory injunction and, at its core, the oppression remedy was designed to uphold the parties' reasonable expectations. Those reasonable expectations were guided by what the

parties had themselves agreed to in contracts and other legally binding documents.

The contract at issue had come to end in July 2020.

The setting aside of the interlocutory injunction now permits MK to once again work in a very specific industry that was covered by the interlocutory injunction and to have contact with persons or entities who might also be customers of the plaintiffs by counterclaim.

The court noted in its endorsement that the plaintiffs by counterclaim had had unimpeded market access in the industry at issue for 15 months and that any damages arising out of the setting aside of the injunction would be an adequate remedy.

Representation by Gardiner Roberts LLP

MK was represented by senior partner Howard Wolch, a lawyer in Gardiner Roberts LLP's dispute resolution group.

Mr. Wolch was assisted by Stephen Thiele, a partner and the firm's Director of Legal Research, in the preparation of the written argument used to support the motion to set aside the interlocutory injunction.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com or **Howard Wolch**, at 416.865.6669 or via email at hwolch@grllp.com

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