Trim Trends Canada Ltd. v. Dieomatic Metal Products Ltd., [1967] O.J. No. 439

Ontario Judgments

Ontario Supreme Court - High Court of Justice
Non-Jury - Toronto, Ontario
Thompson J.
September 29, 1967.

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Between Trim Trends Canada Limited, plaintiff, and Dieomatic Metal Products Limited, Burton Pabst, Frank Strohsack, Anton Czapka, Arthur Petre and Jack Himebook, defendants

(33 pp.)

Counsel

Malcolm Robb, Q.C., and G. Duchart, for the plaintiff, appellants. W.J. Smith, Q.C., for the defendants.

THOMPSON J.

1 This action is in essence an action for damages for conspiracy to injure in trade. Certain other cumulative claims are asserted of which I shall have more to say later.

2 The plaintiff corporation, to which for the sake of brevity, I shall refer as "Trim Trends" is a subsidiary of its American parent, Trim Trends Incorporated of Detroit, Michigan, to which latter I shall refer as "Trim Trends Inc.". Apart from qualifying shares, the capital stock of Trim Trends is wholly owned by the parent company, which in turn is wholly owned by one George Walker, Junior, who, in 1961, purchased the interest in the company of his associate and co-owner Jack Judd.

3 Both companies are engaged in the manufacture, production and fabrication of metal products, largely confined to tool and die making and the production of automotive mouldings and exterior trim. The outlet market, though lucrative, is a restricted one and is limited almost entirely to the supply of the products named to the four leading automobile manufacturers, generally known as Ford, General Motors, Chrysler and American Motors. The market is competitive, but the plaintiff, prior to the events giving rise to the instant litigation, enjoyed a somewhat privileged position owing to the narrow field of competitors in Canada. Up to the time of trial, the effect or impact upon marketing of the Canada-United States Agreement, 1965, on Automotive Products had not yet been determined.

4 Trim Trends Inc. commenced business in the United States in 1948. Following the growth of the automotive industry in Canada, it promoted and incorporated Trim Trends in Ontario in 1954.

5 In June 1955 the defendant Burton Pabst, an employee of Trim Trends Inc. was dispatched to Ajax, Ontario, to take charge of the Canadian plant and to act as its general manager. He was engaged upon an indefinite contract of hiring which was and has remained a verbal contract.

6 Mr. Pabst was then 22 years of age, but was a particularly bright and competent man in his field of endeavour. After a limited general education and some short technical experience he was originally engaged by Mr. Judd as an engineering draughtsman. His duties as such were varied, but they included some roll forming design, a skill in which he had previously had some slight experience. He proved himself particularly efficient at this highly skilled line of the trade and is said to be the leader in the industry here.

7 I shall refer to him hereinafter as "Pabst"; and likewise shall refer to other of the individual defendants by surname only for the sake of convenience.

8 Pabst had other attributes which made him a most valuable servant. He was obviously able to attract business; for the gross sales of Trim Trends jumped from roughly $50,000.00 for the 1955 fiscal year to some $600,000.00 in 1957 and to about $1,387,000.00 in 1960.

9 In the early stages of his employment in Canada, he was given some supervision and counsel by Judd and Walker, but after the first year was left fairly well to his own resources. His principals were busy with their own problems in the United States; he was making them good profits in Canada and they were so pleased with the result that they left him substantially to himself. He received little or no help from them from that time on. For business accounting and office administration, of which he had little or no experience, he was forced to rely upon the auditors which the parent company had appointed for such purposes.

10 He had, however, the assistance of two experienced men in the operation of the plant; Mr. Arden R. Amweg, a toolmaker by trade, as chief engineer and assistant manager and Mr. Albert Urech, an expert toolmaker and particularly good upon the design, construction and operation of bending tools and machines. He came to the plaintiff in 1956.

11 The defendant Himebook, an old high school mate of Pabst, was employed by Trim Trends at Pabst's instance and with Judd's approval as a non-automotive salesman in the summer of 1960. Himebook was not too successful as a salesman, so Pabst took him off sales to replace the receptionist in the office who had left. He also was assigned some duties pertaining to bookkeeping and correspondence, a comparatively minor role.

12 Some insight into the operation of the plant and its processes of production is necessary for a due understanding of the evidence.

13 There were two principal phases of the plaintiff's operation. One was tooling or the production of tools for the making of metal parts and the other was the production of the metal parts themselves, more simply called "production".

14 The plaintiff's major operation was production. Frequently it made or manufactured its own

tools, but upon occasions, depending upon the pressure of business, some of the tooling was let out to other toolmakers.

15 There are two methods of production of metal parts of the type manufactured by Trim Trends; one is by stamping with presses, usually applicable to smaller parts, and the other is by roll forming in sections by rolling machines. The plaintiff made few, if any, stamped assemblies and confined its efforts almost entirely to the supply of rolled products.

16 A rolling machine consists of a number of heads or combinations of upper and lower spindles upon which the rolls are fitted. Between the heads are idler stands which produce side rolls and thus assist in forming the steel. In the process of cold rolling, the term "pass" is used to denote the combination of an upper and lower roll; two rolls constitute one pass.

17 The automobile manufacturers' model year commences in the month of August. Suppliers of the type of Trim Trends are invited to quote to the manufacturers upon metal parts about a year and a half before the commencement of the model year. For instance, Ford would ask for quotations from the various suppliers it chose for the 1962 automobile model in December of 1960 or early in January of 1961. Production of the 1962 model would start in August of 1961 and continue through until June of 1962.

18 The automobile manufacturers furnished their suppliers with descriptions and blue prints of the parts required. They called upon them, when quoting, to estimate the time required to make the tools to produce the parts and the time of the commencement of production after approving a supplied sample. They also asked for an appraisal of the daily production rate.

19 Mr. Walker compiled or designed a form of quotation sheet which was in general use by Trim Trends and which provided for the information sought by the manufacturer (Exhibit 39).

20 The automotive manufacturer purchased and became the owner of the necessary tool or tools and the supplier's quotation included the cost of the tool. If it was indicated that production of the part was to continue into the future the cost would usually be amortized. In addition to the cost of tooling the supplier's quotation embraced the remaining cost of production, including such factors as labour, overhead and profit.

21 Price was the dominant factor governing the acceptance of quotations by the manufacturer. Invariably the lowest price tendered was accepted. Only those whose plants, methods of operation, potential manufacturing capacity and stability had been surveyed and approved by the manufacturer, were invited to quote. Fairly rigid standards of quality were demanded by the automotive industry and products that were not wholly satisfactory were rejected and returned either for improvement or as cancellations. Engineering design changes from time to time, or others unforeseen events, sometimes resulted in the cancellation of orders, in which event, the manufacturer paid for the cost of the tooling to date and allowed the supplier a credit of the difference between the established price of the product and its value as scrap metal.

22 The Canadian manufacturers would invade the American market, if prices, including tariff costs, were lower than those procurable in Canada except upon items which were exclusively Canadian, such as a certain Ford Meteor model and a certain General Motors Pontiac model.

23 The defendants Strohsack and Czapka are Austrian tool and die makers, who came to Canada in 1954. In 1957 they became associated in partnership in a custom tooling enterprise

located on Dufferin Street in toronto.known as Accurate Tool and Die Works, to which I shall refer as "Accurate". Strohsack was the active partner and operated the business. Czapka, who was employed by the General Electric Company at Guelph as the inactive or silent partner and advanced the money to establish the business in return for a half interest therein. Czapka assisted Strohsack as a workman on weekends and at other times when called upon in his spare time.

24 In 1959 Accurate became a customer of Trim Trends and from time to time supplied it with dies or tooling. Through this connection Strohsack met Pabst.

25 He had also canvassed General Motors for stamping work and thus came in contact with the defendant Petre, one of its buyers, who until well on into 1959 had been one of the buyers of metal parts or mouldings. Petre had dealt with Pabst for some few years prior to that and got to know him well.

26 Strohsack is a clever and ambitious man. In late 1959, forced with the necessity of moving his plant, he began planning for expansion both in area and in business. He organized and incorporated the defendant corporation Dieomatic Metal Products Limited with a view to taking over Accurate and shortly thereafter solicited the participation of Pabst and Petre both by way of capital investment and talent. The original incorporators were Strohsack, Czapka and Mr. Ernest Roberts, Strohsack's accountant and financial adviser. The capital stock issued, valued at $12,000.00, was divided: one share to Roberts and the balance equally between Strohsack and Czapka. In December of 1959 Pabst deposited $2,000.00 with Accurate which went to Strohsack and was said to be in payment for shares in the new company, (to which I shall hereinafter refer as "Dieomatic"), to be issued or transferred to him after incorporation.

27 In the final analysis, the stock was divided as follows: 37 1/2 per centum to Strohsack; 37 1/2 per centum to Pabst; 15 per centum to Czapka and 10 per centum to Petre. For his shares, Petre issued a cheque to Strohsack for $1,200.00.

28 A little later Dieomatic moved its plant to Richmond Hill where a new building was erected. The title to this property became vested, not in the company, but in the individual shareholders in the proportions of their shareholdings. This was said to have been done upon the advice of Roberts.

29 Dieomatic took over the assets of Accurate at the price of $25,027.75 and assumed liabilities in the sum of $1,194.33. Dieomatic gave promissory notes for an aggregate total of $11,833.43 to Strohsack and Czapka. After incorporation, therefore, Dieomatic's assets, exclusive of goodwill, amounted to roughly $3,000.00.

30 Both Pabst and Petre actively assisted in the organization and development of Dieomatic. On numerous occasions each of them attended at the Dieomatic plant in the evening and Pabst on other occasions in his spare time. Each of them assisted with the administrative work at these times and Petre at times did some manual work. They both became directors of the company along with Strohsack and Czapka and Pabst was made president in February of 1961. Prior to that time, it is not clear whether the office of president had been filled or not, but Pabst had been for some time a bank signing officer and a guiding hand.

31 Petre's story as to the early discussions between himself, Strohsack and Pabst before his

participation in Dieomatic, as told on his examination for discovery, differs materially from the account given by him at trial.

32 Strohsack frankly acknowledges that apart from their investment value, Pabst and Petre by reason of their experience and connections were desirable men to have associated with him if his business was to grow. In the production field Accurate had been but a small stamping firm. In his plans for expansion, Strohsack set his sights a lot higher.

33 The duties, and generally speaking the responsibilities of Pabst and Petre to their employers were generally known to each other and to Strohsack.

34 Upon the evidence which I accept, I have no hesitation in concluding that these three men, at the instigation of Strohsack, set out and carefully planned to develop Dieomatic into a strong competitor in the special and limited Canadian field of automotive trim, including rolled products. That this was to be at the expense of Trim Trends is apparent, for it was one of the leaders in that field and one of the strong competitors at that time in rolled sections. Pabst was essential to the plan. He was the leading roll designer in the country and had the advantage of the knowledge and information he had acquired and would continue to acquire at Trim Trends.

35 I do not consider that Czapka had any part in the plan. He remained the silent participant. He was simply a dogged workman and a rubber stamp for his friend Strohsack. He was no party to any agreement and I do not think that he either knew or appreciated what the implications were. I believe him when he says he knew nothing about where Pabst came from or what business he was in until May of 1962 when he, Czapka, came to work full time for Dieomatic.

36 Pabst, Strohsack and Petre resolved to keep secret the participation of Pabst and Petre in Dieomatic and they were successful in so doing until shortly before Pabst left Trim Trends in the autumn of 1961 when he announced his departure to Judd.

37 The persons through whom disclosure might occur were warned against it. It was concealed even in an application for business insurance.

38 In the summer of 1960, Albert Urech, the lead hand in Trim Trends' tool room and who had had prior business contact with Strohsack was approached by the latter who solicited his participation in Dieomatic.

39 The result was that he purchased a ten per cent interest in that company and left Trim Trends to work full time at Dieomatic in August of that year. His contract of service with Trim Trends was properly terminated by due notice. However, prior to leaving, he had voluntarily worked at Dieomatic in his spare time and for the last two weeks worked there alternate days. Before deciding to invest in Dieomatic, Urech did not know of Pabst's connection with it although he had some suspicion of it.

40 Urech remained with Dieomatic until December 1961, when he returned to Trim Trends as tool room foreman, having sold his stock in Dieomatic to Pabst, Strohsack and Czapka.

41 Late in the year of 1960, the defendant Himebook desirous of augmenting his income, and, while still an employee of the plaintiff, at Pabst's suggestion, approached Strohsack asking for part-time work. Strohsack engaged him to do some clerical work in the evenings and on weekends for a period of some six months after which time he was replaced by a full time girl. In

late 1961 or early 1962 Himebook was discharged by Trim Trends and was again re-employed by Dieomatic for about a year, when, owing to dissatisfaction with his work, his services were terminated.

42 Dieomatic prospered. Its progress, like that of Trim Trends theretofore, was meteoric.

43 Its gross sales climbed from a mere $35,450.00 figure shown by Accurate for the year ending 31st December 1959 to about $1,400,228.00 in 1964. Hereunder is a statement of the gross sales through the years 19519 to 1964--

1959 -	$35,450.00
1960 -	105,811.11
1961 -	190,320.45
1962 -	497,361.73
1963 -	920,462.40
1964 -	1,400,228.58

44 The plaintiff pleads and alleges that from 1st June 1959 to 19th October 1962 the defendants, other than Dieomatic, and all defendants, from 22nd December 1959 to 19th October 1962, wrongfully, maliciously and with intent to injure the plaintiff conspired and agreed together to injure the plaintiff and its business or trade by means of a number of overt acts particularly set out in paragraphs 8 and 9 of the statement of claim. The plaintiff further pleads that the defendant Pabst stood in a fiduciary relationship to it by virtue of his employment, and that, by reason of his participation in the overt acts alleged as constituting an element of the conspiracy, breached his fiduciary duties.

45 The plaintiff claims against all defendants special damages of $200,000.00 which are not particularized, as required, nor proven, with the exception of some comparatively small sum for investigation; general and punitive damages and an accounting of any profits, moneys and benefits received as a result of the conspiracy or the acts done pursuant to it.

46 As against Pabst additional claims are made for damages for breach of fiduciary duties and punitive damages for such breach. Still additional claims are made which, from their nature, one must assume are made against all the defendants, for a declaration that the plaintiff is the owner of the goodwill, trade and undertaking of Dieomatic; a declaration that the plaintiff is the beneficial owner of all the shares of Dieomatic and a declaration that the plaintiff is the owner of all shares in Dieomatic held by the defendant Pabst.

47 All these claims are made cumulatively and not alternatively. It is patent that in some instances they are overlapping. For instance, damages are claimed against Pabst as a conspirator and damages are claimed against him for breach of trust resulting from the same acts as are alleged to constitute an element of the conspiracy.

48 The plaintiff has not asked to have any monies, property or profits impressed with a declaration of trust, although for some reason it seeks a declaration of ownership. Had such an impressment of trust been prayed, I would have refused it for reasons which I need not relate, as in view of the plaintiff's prayer, they now become merely academic.

49 The plaintiff is seeking both legal and equitable remedies, not alternatively, but cumulatively. It seeks both damages and an account of profits as well as the recovery of property. Had the

claims been alternative it would have been required that the plaintiff be put to its election as to remedy. But in the light of the pleading as it stands, and having regard to the trend of the evidence at trial, I conclude that the plaintiff's claim is essentially one for damages at law. Conspiracy can only sound in damages.

50 The principle underlying relief at law is that the plaintiff has suffered loss by a breach of contract or wrongful conduct of the defendant and damages are awarded for the purpose of making good his loss. The principle underlying relief in equity is that the defendant has improperly received or withheld property or profits from property (such property or profits belonging to the plaintiff) and he is required to restore the property or to account for the profits. In other words, at law the extent of the remedy is measured by the loss to the plaintiff, which is covered by damages; in equity the extent of the remedy is measured by the gain to the defendant which is ascertained by directing an account. Where his right of election has become unimpaired, a plaintiff has the option of either an account of profits or to have damages, but he cannot have both. If he takes an account of the profits he condones the wrong:- 14 Halsbury (3rd ed.) pp. 524-525.

51 That Pabst stood in a fiduciary relationship to the plaintiff is undoubted; and that by his conduct he breached. his fiduciary duties, I should think, is equally undoubted. That the defendants Strohsack, Petre and Dieomatic collaborated with him or assisted in that breach for their mutual benefit, I again have no doubt. In the view I have taken of the nature of the plaintiff's claim, however, it becomes unnecessary to equate the remedy.

52 It is an implied term of every contract of service in the absence of an express term, that the servant will be loyal to and faithfully serve his master. This rule is so fundamental that I need not cite authorities to support it. A master is certainly entitled to loyalty and fidelity from his servant. The measure and extent of the fidelity depends upon the circumstances of the employment. As between the plaintiff and the defendant Pabst the duty, of necessity, was a high one in the instant case. Pabst was in complete charge of the plaintiff's operations and at some considerable distance from the home base of the parent company and from those to whom he was immediately answerable and responsible. His secret participation in the organization and development of Dieomatic was a serious breach of his contract as well as, of course, of his fiduciary duties as a servant and an agent.

53 The defendants Strohsack, Petre and Dieomatic by their collaboration with Pabst in the development of Dieomatic were inducing and were actively facilitating and encouraging a breach of his contract with the plaintiff, which of necessity, would result and did result in injury to the plaintiff.

54 Many and voluminous particulars of the alleged overt acts forming the basis of the alleged conspiracy are pleaded, a good number of which are wholly unsupported by the evidence. The greater portion of the time consumed in this unusually long trial was devoted to the attempted proof of such allegations and the suggested loss to the plaintiff arising therefrom.

55 Of the many and varied issues raised in evidence, many of them were related to accusations of misconduct, incompetence and neglect on the part of Pabst. It was intimated that he deliberately slowed down production at Trim Trends and incurred risks of loss for the purpose of embarrassing and injuring the plaintiff.

56 He was accused, as was Petre, of improperly furnishing specific confidential information by

way of price quotations of his employer to Dieomatic to enable it to obtain contracts by under-bidding those prices. He was accused of theft of Trim Trends' equipment. It was said that he set about introducing employees and officers of Dieomatic to the plaintiff's customers for the purpose of stealing its business; for instance, the alleged introduction of Strohsack and Himebook to Mr. Wright of the Ford Company at a party at his house.

57 Specific issues of neglect and virtual sabotage raised related to certain contracts of Trim Trends such as Cap Mouldings for Ford, Roof Rails for General Motors, Grill Bars for Chrysler, Welded Nail Strips for General Motors, Welded Door Frames for Ford. It was suggested that Pabst was responsible for having the plaintiff submit excessive or inflated quotations so that Dieomatic might under-bid at normal prices. It was said that his plant lay-out was improper, that he maintained excessive scrap and that he was in many instances in default on production and delivery, with the result that customers cancelled orders. It was contended that these things were all part of a plan to injure Trim Trends and to advance Dieomatic.

58 In addition, evidence was adduced with a view to establishing that the defendants caused Dieomatic to inflate prices for work it was doing for Trim Trends.

59 I was unimpressed with a good deal of the evidence offered in support of these issues and allegations. To establish a good many of them the plaintiff was forced to rely upon the evidence of Urech. I place little reliance upon his evidence. It was apparent to me that his animosity towards Strohsack would lead him to do all that he could to injure him. His evidence is in direct conflict with a number of other witnesses and in face of the denials of Pabst and Strohsack and, while I entertain some scepticism with respect to portions of the evidence of some of those others including Pabst and Petre, I prefer them to Urech where they are in conflict.

60 Whatever Pabst's moral delinquency may otherwise have been, I am not prepared to hold that there was any deliberate attempt by him to injure the plaintiff by neglect in the performance of his duties in the operation of the plaintiff's plant. In fact there is no allegation of neglect in the plaintiff's pleading. Throughout, I am convinced that Pabst was competent and a good many of the plaintiff's complaints are with respect to recurring matters of long standing.

61 Prior to Pabst's disclosure of his interest in Dieomatic there wasn't the slightest suggestion of any complaint to him by anyone connected with Trends with respect to his work or his duties. In the eyes of his principals he was everything that was good. It was only when they discovered his secret defection that he became everything that was bad and was said to be responsible for everything that everybody else did that was bad.

62 I do not in any way condone his conduct with relation to his defection, but I consider he would be unjustly treated were I to attribute to him the bulk of the many acts of misconduct or wrongdoing alleged.

63 I have no hesitation in finding that the plaintiff has established a conspiracy upon the part of the defendants Pabst, Strohsack (Stronach as he is no known) and Petre to injure it in its trade or business and that it has in consequence sustained substantial damage. I include the corporate defendant, because it, in law, is responsible for the tortious acts of its agents done with its authority. The state of mind of the company. I exclude from the conspiracy the defendant Czapka for reasons which I have already stated. I also exclude the defendant Himebook. I am not prepared to accept the evidence which might indicate that he was active in introducing Mr. Wright of Ford to the plant and operation of Dieomatic. I prefer the evidence of Mr. Wright

himself in that regard. I am unable to conclude that Himbook was a party to any agreement to injure the plaintiff, whatever else he may have done. He took part-time employment with Dieomatic in a minor role and in such merely performed routine duties which could have been as well performed by anyone unconnected with Trim Trends. There is no suggestion in the evidence that he conveyed any information entrusted him by the plaintiff to Dieomatic or any of its officers or employees. Even could it be said he was in breach of his contract of service with the plaintiff or of his fiduciary duties, I am unable to hold that such were as a result of agreement or combination with his co-defendants.

64 A tortious conspiracy consists of an agreement of two or more to do an unlawful act or to do an lawful act by unlawful means where the agreement is carried into execution and where damage results.

65 What the conspiring defendants in this case did was through their guidance and assistance and their active participation in its affairs to build the defendant corporation up from its inception and a mere nothing so to speak, to the stage where it became a competitor upon equal footing with the plaintiff; and this under the veil of secrecy. This was undoubtedly something which inevitably would inflict harm upon the plaintiff.

66 The plaintiff is not entitled to protection as against competition per se: Herbert Morris, Limited v. Saxelby, [1916] A.C. 688; Maguire v. Northland, Drug Company Limited, [1935] S.C.R. 412.

67 While a combination to injure in trade is an unlawful act and if damage results is actionable, yet if the real or predominant purpose of the combination is not to injure but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues: Crofter Hand Woven Harris Tweed Co. Limited v. Veitch, [1942] A.C. 435; Sorrell v. Smith, [1925] A.C. 700.

68 The distinction between the two classes of case is expressed by saying that in one there is just cause or excuse for the action taken and in the other there is not.

69 While at one time it was thought that a combination to injure was not actionable unless accompanied by malice or malevolence, the true proposition now appears to be that it is actionable unless there is justification. Such justification will be found if it is inspired by self interest or the pursuit of selfish ends: Crofter case (supra).

70 But even if the purpose or the predominant purpose is to advance the trade interest or interests of the combination, if unlawful means are used to effect such purposes and damage ensues, a good cause of action arises.

71 I conclude that the predominant purpose of this combination in the instant case was self interest of the participants and not the injury to the plaintiff.

72 However, to accomplish that purpose they have used unlawful means, in that they have wrongfully or unlawfully interfered with the contractual rights, of the plaintiff to the extent I have previously indicated. The unlawful means accompanying the conspiracy would of themselves afford an independent cause of action. See British Motor Trade Association v. Salvadori, [1949] 1 Ch. 556.

73 In civil conspiracy once pecuniary loss is proved the damages are at large:- Mayne and McGregor on Damages (12th ed.) p. 944. The main loss is usually based upon loss of profits in cases where contractual rights are involved. A proper heading of damage also is the expense involved in unravelling and detecting the unlawful machinations of the defendants. The nature of the overt acts may be such as to aggravate the damages. As previously intimated, a considerable volume of evidence was directed towards proof of loss of profits and some of it to a time beyond the time during which the plaintiff pleads the defendants conspired. Likewise, it was attempted to show that loss was incurred as a result of Pabst's neglect or refusal to perform his duties properly as manager. I am unable upon the evidence which I accept to accede to this latter contention and even were it tenable it could not be attributable to the conspiracy. Despite his defection, Pabst continued to perform his duties reasonably well and as he always had. When he notified Judd and Walker of his departure, he offered to continue on until such time as they procured a replacement and his continuation in office at Trim Trends after his participation in Dieomatic had commenced was not with a view to benefiting Dieomatic as the plaintiff suggests. Pabst's salary was a basic $10,000.00 annually or twenty per centum of the annual net profit whichever was greater after provision for income tax. This was resolved by the directors on the 15th of August 1957, (Exhibit 52). It was decidedly to his pecuniary advantage to strive for the best profits at Trim Trends that he could obtain.

74 After Pabst left Trim Trends at the end of December 1961 the plaintiff cried blue ruin, reorganized its plant and introduced new office, bookkeeping and accounting procedures. It waited however several months before completing them. Subsequent financial statements prepared by the plaintiff's American auditors show losses in operations for the years 1962 and 1963 and a substantial reduction in profit for the year 1961 over the year 1960. For these losses the plaintiff seeks to make the defendants liable.

75 Mr. Smith contends that the defendants are not liable for any losses in any event subsequent to December 1961 for he argues that if there was a conspiracy, it ended at that time and that by mutual arrangement the plaintiff terminated Pabst's services. I do not accede to that contention. The true position was that the plaintiff, faced with a situation where Pabst was continuing to act to its detriment and was of no more use to it would have little alternative but to let him go and in so doing, it did not waive any rights or claims against him. It was entitled, if it saw fit, to dismiss him summarily for cause. Although the conspiracy may have ended in 1961, its effect could continue and there could conceivably be continuing loss.

76 I am unable to escape the conclusion that the purported losses shown by the financial statements are to some extent simply accounting or bookkeeping losses. I think the true position as to loss attributable to the conspiracy is to be found in an examination of the annual gross sales of the plaintiff and to some extent in the gross, sales of the corporate defendant. I have already adverted to the latter and hereunder appears a statement of the gross sales of the plaintiff through the years 1955 to 1964. This reflects the annual volume of business and in my view is one of the true tests as to whether or not business was lost:

1955 (From May 26th 1954) -	$49,954.28
1956 -	564,761.99
1957 -	600,232.28
1958 -	860,842.77
1959 -	1,025,767.54
1960 -	1,387,798.23

1961 -	1,034,291.28
1962 -	1,022,395.78
1963 -	1,108,544.75
1964 (16 months - from April 1963 to August 31st 1964 - owing to alteration in fiscal year)	1,659,299.44

77 From this it will readily be seen that from the year 1959 on the volume of business was not diminishing and that the years 1960 and 1961, the periods during which it was urged that the conspiracy was most active, are two of the plaintiff's largest years for business. There is virtually no drop in the years 1962 and 1963 and a substantial increase in the year 1964. I have used the figures indicating the gross sales not the net sales, for the latter takes into account the deduction of goods returned as unfit. The former indicates the value of the orders placed.

78 It is significant to me that in the years 1962 and 1963 the plaintiff declined to quote on a number of contracts and sought cancellation of others. Problems of production arising from such factors as the welded nail strips, door frames, roof nails, cap mouldings and others earlier referred to continued on to some extent into the years 1962 and following.

79 Undoubtedly the plaintiff's damages should not include loss due to such items as economic and market changes, changes in operational and accounting systems, increases in administration costs refusals to quote and delayed production when the American organization was introduced.

80 That business in the trade increased generally during the years 1959 to 1964 is apparent, for despite the fact that the plaintiff's volume was maintained, undoubtedly Dieomatic's volume at the same time increased. It is sure that some portion of that increase or of Dieomatic's volume would have accrued to Trim Trends, had Dieomatic's competition been absent.

81 As part of its loss sustained the plaintiff seeks to recover the costs of audits and other services furnished by its auditor, amounting in the aggregate to $7,141.20. The auditors' account for these items appears as Exhibit 53. An examination of the items in conjunction with the evidence leads me to believe that this account which extends from March 1962 to April 1064 not only includes the routine annual audit but also services rendered to counsel in preparation for trial. I can place little reliance, in any event, upon it or upon the evidence of Mr. Donovan, who struck me as patently partisan.

82 Evidence of the value of Dieomatic ideas given on behalf of the plaintiff by Mr. Dale Harris of the firm of McDonald, Currie, Chartered Accountants, and on behalf of the defendants by Mr. Michael Wright of the Clarkson, Gordon firm. Mr. Dale Harris gave a valuation of $850,000.00 and Mr. Wright's figure was $300,000.00 to $350,000.00. That there should be such a vast difference in the valuation of this company by two reputable gentlemen of the same profession to me is incomprehensible. Mr. Donovan gives a figure of $790,000.00 which includes goodwill valued at $690,000.00. The goodwill estimate of Mr. Dale Harris is about $750,000.00. To me these higher figures are totally unrealistic. This company has four principal customers and few, if any, minor ones. Those customers place their business invariably and as a matter of practice with the supplier quoting the lowest price. If that consistently happened to be one other than Dieomatic, goodwill would evaporate into the thin air.

83 While it is apparent that the plaintiff has sustained some substantial loss, yet there has been a determined effort on its part to seek to attribute an importance to many things grossly out of proportion to their real consequence. To saddle the defendants with the total loss of the plaintiff's business whatever it may have been would be improper and unjust, for some of it, if not a large part of it, has been attributable to the other factors to which I have already referred.

84 The defendant company has secretly and clandestinely been nurtured and reared to a state of competition by the participants of the combination over a period of two years with the advantage to it and to them of the knowledge and confidential information gained by Pabst as the plaintiff's servant. While his personal skill, knowledge and experience even if gained in the employment of his master are his own and may be unrestrainedly used after the termination of his service, it is a breach of fiduciary duty or fidelity to disclose confidential information to a competitor during the term of employment. The machinery for quotation used and the prices quoted by Trim Trends was certainly confidential information of importance gained by Pabst as its servant. While as previously intimated there is no evidence which is acceptable to me which establishes the communication by Pabst of any specific confidential information, yet one must face reality and consider what the practical result may be. It is most unlikely that under the circumstances Mr. Pabst would at all times keep this confidential information locked up in some secret compartment of his mind.

85 Undoubtedly had Pabst terminated his services properly and by due notice, which I would hold should be six months notice, and then set out with his co-defendants to compete with the plaintiff all would have been legitimate. Mr. Robb contends that had that occurred Dieomatic could never have succeeded by reason of lack of capital. With that contention I do not agree. Any business venture can be a risk and I think that Pabst and Petre, both being men of acumen, realized this and were not prepared to give up the security of their positions with their employers until the success of Dieomatic was assured. At the same time each of them realized that if his participation was made known to his employer, he ran the risk of dismissal. I think moreover that these proceedings have resulted in Petre relinquishing his interest in Dieomatic in order to maintain his employment with General Motors.

86 In the final analysis Dieomatic has had two years head start so to speak, at the plaintiff's expense. Had the plaintiff been aware of what was brewing, it no doubt would have been able to take some measures to meet, fight or resist the competition.

87 To have one's trusted servant in a high position secretly combining with others to undermine one's business and enterprise is a particularly insidious thing and leaves one helpless in defence. This feature of the instant case to me is one which most certainly must aggravate the plaintiff's damage and which I accordingly take into account in making an award.

88 I do not consider that, within the principles established by Rookes v. Barnard, [1964] A.C. 1129, or otherwise, this is a case where punitive damages should be assessed.

89 All things considered, I assess the plaintiff's damages at the sum of $65,000.00.

90 In the result therefore there will be judgment accordingly for this sum against the defendants Dieomatic, Pabst, Strohsack and Petre. All claims other than damages, with the exception of costs, are disallowed. The plaintiff will have its costs of action against such defendants.

91 The action as against the defendants Czapka and Himebook will be dismissed without costs. These defendants appear by the same solicitors as all other defendants and are represented by counsel common to them all.

92 I might incidentally state that no claim is made by the plaintiff against Unimatic Limited, a recent subsidiary of Dieomatic.

THOMPSON J.

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