

Action No.: 1501-03776
E-File No.: CVQ16BEAUMONT2
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

BEAUMONT RESOURCES LTD.

Plaintiff

and

CARDINAL ENERGY LTD.

Defendant

P R O C E E D I N G S

Calgary, Alberta
September 27, 2016

Transcript Management Services, Calgary
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392 Fax: (403) 297-7034

TABLE OF CONTENTS

| Description | | Page |
|-------------------------------------|-------------------|------|
| September 27, 2016 | Afternoon Session | 1 |
| Decision | | 1 |
| Submissions by Mr. McDonald (Costs) | | 5 |
| Ruling (Costs) | | 5 |
| Certificate of Record | | 7 |
| Certificate of Transcript | | 8 |

1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3 _____
4 September 27, 2016 Afternoon Session

5
6 The Honourable Madam Court of Queen's Bench of Alberta
7 Justice Anderson

8
9 R.J. Hawkes, Q.C. For the Plaintiff
10 T.R. McDonald For the Defendant
11 P. Safadi Court Clerk

12 _____
13
14 THE COURT CLERK: Order in court, all rise.

15
16 THE COURT: Good afternoon.

17
18 MR. HAWKES: Good afternoon, My Lady.

19
20 MR. MCDONALD: Good afternoon.

21
22 **Decision**

23
24 THE COURT: Okay. This is an appeal of the Master's
25 decision granting the defendant's application for summary dismissal. I have reviewed the
26 Master's decision dated January 22nd, 2016, the transcripts of the proceedings dated
27 January 14, 2016, and the briefs, arguments, and material followed by both parties.

28
29 Standard of Review

30
31 The standard of review on an appeal from a Master's judgment or Order to Judge is
32 correctness (*Bahcheli v. Yorkton Securities Inc.*, 2012 ABCA). *Rule 6.14(3)* of the Rules
33 provides that an appeal of a master's decision is based on the record of the proceedings
34 before the master and may also be based on additional evidence that is relevant and
35 material. The result is that in effect an appeal from a master's decision is a de novo
36 application (*Gudzinski Estate v. Alliance Global Risks*, 2012 ABCA).

37
38 Summary Judgment

39
40 *Rule 7.3* of the Rules permits a party to apply to the Court for summary judgement if it
41 can be established that there is no merit to a claim or part of it. Our Court of Appeal

1 recently ruled that a modern summary judgment test requires the Court to determine
2 whether a fair and just disposition to both parties can be made on the existing record
3 without a trial. The relevant question is whether there is a genuine issue of merit requiring
4 a trial, and not merely that the evidence discloses a triable issue (*Windsor v. Canada*
5 *Canadian Pacific Railway*, 2014 ABCA).

6
7 An applicant need no longer demonstrate that it is plain and obvious or beyond doubt that
8 there is no genuine issue of material fact requiring trial. The evidentiary burden at all
9 times rests with the party seeking summary judgment to establish that there is no genuine
10 issue of merit for trial. Once the applicant establishes that there is no genuine issue
11 requiring trial, then it is left to the responding party, unless they choose to risk a
12 dismissal, to adduce sufficient evidence to establish that there remains a genuine issue of
13 merit for trial.

14
15 Each party is expected to put its best foot forward on a summary judgment application
16 and a motion must be judged on the basis of the pleadings and material actually before
17 the judge, not on suppositions about what might be pleaded or proved in the future
18 (*Milavsky v. Milavsky*, 2011 ABCA).

19
20 This action turns on an alleged breach of contract of a confidentiality agreement entered
21 into between the parties that contained a no contact provision. Many, or most of the facts
22 are not in dispute. On August 1st, 2012, the plaintiff Beaumont Resources and Felcom
23 Resources entered into a confidentiality agreement. Felcom agreed to provide certain
24 confidential information to Beaumont solely for the purposes of evaluating and facilitating
25 the negotiations of a potential transaction between Felcom and Beaumont. Paragraph 2(b)
26 of the agreement stated that the agreement or the disclosure of the confidentiality
27 agreement shall not be construed as granting any license or right in the confidential
28 information. Beaumont agreed not to disclose the confidential information to any person
29 or entity, except to its representatives or any bank.

30
31 Paragraph 7 of the agreement provided that Beaumont shall not, unless approved by
32 Felcom, enter into any material contract which will in any way result in a deduction of
33 the value or transfer of the interest, beneficial or otherwise, of any of Felcom's assets.
34 Paragraph 9(d) confirms that Felcom would be free to conduct a transaction with any
35 other party without notice to Beaumont. Subsequently, without Felcom's knowledge,
36 Beaumont approached Cardinal hoping to put together a transaction to purchase Felcom or
37 broker it out for a fee.

38
39 On October 1st, 2012, Beaumont and Cardinal entered into a one-year confidentiality
40 agreement resulting in Beaumont disclosing Felcom's confidential information. This
41 confidentiality agreement is the subject of this lawsuit. It provided at paragraph 12 that

1 Cardinal shall not initiate or arrange directly or indirectly or maintain contact regarding
2 Felcom's business operations, prospects, or finances.

3
4 The information Beaumont disclosed to Cardinal was Felcom's 14-page package of
5 material prepared by Felcom. Master Farrington stated in his decision that in providing
6 this information Beaumont may well have breached its confidentiality agreement with
7 Felcom in several respects. Cardinal did not provide any financing to Beaumont and they
8 had no further communication after October 2nd, 2012, in relation to Felcom. In early
9 2013 the CEO of Beaumont formed a new company which offered to buy all outstanding
10 shares of Felcom. That offer was rejected.

11
12 These above facts are not in dispute between the parties. In April 2013, a lawyer at
13 Dentons sent an email to Cardinal's CEO with Felcom's business plan following up on
14 their discussion of the weekend. He offered to introduce the CEO of Cardinal to Felcom's
15 CEO. Beaumont submits that this email was the first breach of the no contact provision of
16 the parties' confidentiality agreement. Beaumont alleges three subsequent breaches.
17 Sometime in late summer 2013 there would have been a discussion between Felcom and
18 Cardinal because on September 3rd, 2013, a confidentiality agreement was entered into
19 between the two entities. This confidentiality agreement Beaumont submits is the third
20 breach.

21
22 The fourth breach was September 30th, 2013, the day the Beaumont/Cardinal
23 confidentiality agreement expired when the CEO of Felcom emailed Cardinal's CEO
24 inviting him for coffee to go over a few things. They met the following day, October 1st,
25 2013. The evidence is that neither CEO was aware at the time of the Beaumont/Cardinal
26 confidentiality agreement. Of course, by this time the Felcom/Beaumont confidentiality
27 agreement had expired.

28
29 At that October 1st meeting Felcom was selling or marketing all of its assets, which
30 Cardinal was not interested in buying. Felcom later changed its position in
31 November/December 2013 after the expiry of the Beaumont/Cardinal confidentiality
32 agreement. Cardinal began to seriously consider purchasing one of Felcom's assets. On
33 January 2nd, 2014, Cardinal and Felcom entered into a formal purchase and sale
34 agreement for Felcom's (INDISCERNIBLE) assets. Cardinal denies that the email from
35 DeJong, the lawyer, to Cardinal's CEO in April 2015 was a breach of the no contact
36 provisions of the confidentiality agreement. It further denies that the confidentiality
37 agreement between Cardinal and Felcom constituted a breach of the confidentiality
38 agreement between Beaumont and Cardinal, and finally, it denies that an email from
39 Felcom to Cardinal is a breach of the no contact provisions.

40
41 I accept that Cardinal has an argument that the evidence does not support a finding of a

1 breach, but for the purposes of this application for summary dismissal I will assume that
2 there was a breach. What flows from that alleged breach. Beaumont has framed its cause
3 of action in breach of contract, not breach of confidentiality. There is no doubt because
4 the confidential information shared by Beaumont belonged to Felcom, and Beaumont's
5 sharing of this information with Cardinal may have been a breach of its agreement with
6 Felcom, as Master Farrington states in his decision.

7
8 Under its claim for breach of contract Beaumont submits that as a result of this alleged
9 breach it was denied the opportunity to negotiate a broker's fee. Alternatively, had Felcom
10 been prevented from selling its assets to Cardinal, it may have returned to or reconsidered
11 the offer made by Beaumont's CEO company Alder Ridge. Finally, Beaumont seeks
12 punitive or exemplary damages to which it would be entitled it argues by virtue of
13 Cardinal's breaching the confidentiality agreement. A breach it is argued that should not
14 be condoned by this Court.

15
16 With respect to its lost opportunity to negotiate a broker fee, I adopt Master Farrington's
17 findings that Beaumont seeks to create a broker fee opportunity for itself for which it did
18 not negotiate. Further, the Master stated that Beaumont had negotiated at best the right to
19 use Felcom's confidential information for trying to put together its own purchase
20 transaction. Beaumont takes issue with the Master relying on the agreement between
21 Beaumont and Felcom in that it is not relevant to the issues between Beaumont and
22 Cardinal. I disagree and find that it is relevant, particularly to the extent that it informs the
23 Court as to Beaumont's likelihood to negotiate a brokerage fee.

24
25 In reviewing the evidence before this Court I agree with the Master's conclusions that the
26 probability of negotiating a broker fee then is the same as the probability of obtaining one
27 now; minimal. With respect to the argument that Felcom would have possibly returned to
28 Alder Ridge to negotiate a transaction, this argument is purely speculative and does not
29 meet the test set out by the Alberta Court of Appeal in *Windsor*. Nor does the argument
30 that questioning has not yet taken place and documentary exchange. Cross-examination
31 has been conducted and, of course, Beaumont could have put forward additional evidence
32 before this Court in this appeal.

33
34 Speculation that better evidence may be available is insufficient. It would be far more
35 likely that Felcom would have simply waited the short period of time -- either a month or
36 a day, depending on the event or alleged breach that one is looking at -- to initiate any
37 negotiations. There is no evidence of any urgency on Felcom's part. As such, on a
38 balance of probabilities it is not reasonable or likely that the plaintiff had a chance to
39 obtain a benefit or a fee here.

40
41 As for Beaumont's claim for punitive damages arising from the breach, this too seems

1 very remote given (1) the evidence before me that the CEO of Cardinal was not aware of
2 the Beaumont/Cardinal confidentiality agreement, (2) the CEO of Felcom was not aware
3 of it, (3) the reason and purpose Beaumont had Felcom's confidential information and the
4 likelihood that Beaumont was in breach of its agreement with Felcom, and (4) the
5 unlikelihood that Felcom or Cardinal would have negotiated any fee payable to Beaumont.
6

7 I agree with the Master's conclusions and findings. This is a case where a fair and just
8 adjudication can be made on the existing record I adopt as reasons and dismiss the appeal.
9

10 I am going to have to review the transcript before it's released to you because I may very
11 well have said Beaumont or Cardinal when I should have said the other, so I'll just
12 review it prior to its release.
13

14 MR. HAWKES: Certainly, My Lady. Thank you very much.
15

16 THE COURT: Thank you.
17

18 **Submissions by Mr. McDonald (Costs)**
19

20 MR. MCDONALD: My Lady, just the issue of costs. I would
21 submit that we were successful, we should be entitled -- my client should be entitled to
22 costs based on column 4, which is 500,000 to a million-five. The claim is for 1.3 million.
23 Just seeking the costs of a contested application with briefs for a half-day.
24

25 THE COURT: Okay, thank you.
26

27 MR. HAWKES: I believe that's fair, My Lady.
28

29 **Ruling (Costs)**
30

31 THE COURT: Okay, there will be costs then under column 4.
32

33 MR. MCDONALD: Thank you, My Lady.
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35 MR. HAWKES: Thank you.
36

37 THE COURT CLERK: Order in court, all rise.
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I, Elena Kay, certify that this recording is the record made of the evidence of the proceedings held in the Court of Queen's Bench, held in courtroom 1204 at Calgary, Alberta, on the 27th day of September, 2016, and that and I was the court official in charge of the sound recording machine during the proceedings.

1 **Certificate of Transcript**

2

3 I, Charlene Zaharia, certify that

4

5 (a) I transcribed the record, which was recorded by a sound recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of
7 the contents of the record and

8

9 (b) the Certificate of record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

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