

Ronald Woods v. Two-Tyme Recycling Inc. et al.
Date: 20090601

ENDORSEMENT

[1] The applicant seeks an injunction preventing the completion of an asset sale by a company of which he is a 31% shareholder to a third party. The transaction is scheduled to close today.

[2] The transaction was negotiated by another shareholder, Mr. Rotter, on behalf of all of the shareholders. Under the transaction, all of the shareholders, including the applicant, agreed to deliver a 5-year non-competition agreement and Mr. Rotter agreed to enter into a consulting agreement with the purchaser for compensation totaling \$17,500 to transition customers of the business being sold. The asset purchase agreement was signed on March 24, 2009.

[3] Since that date, it has become clear to the applicant that the remaining business of the Company is not viable and his position as president of the Company has no future. Therefore, he will have no income if he cannot obtain another position in the same industry. It is also clear that he will secure only approximately \$76,000 out of the sales proceeds because of the size of the outstanding liabilities of the Company.

[4] As he is bound by the non-competition agreement if the transaction closes, he seeks the injunction based on allegations of breach of fiduciary duty against Mr. Rotter, as well as the legal counsel who advised Mr. Rotter, and the Company itself.

[5] The injunction is denied for the following reasons.

[6] First, although the threshold is a low one, I am not satisfied that the applicant has established a serious issue to be tried. The applicant alleges that Mr. Rotter breached his fiduciary duty, as the applicant's agent, in negotiating a non-competition agreement without compensation to the applicant and in obtaining the consulting contract described above.

[7] However, both these details were set out in full in the asset purchase agreement that the applicant signed. There is no necessary reason why compensation should have been paid to the applicant. Indeed, he also did not attribute value to it at the time of execution of the agreement; it only became an issue when he realized later that he could not expect to continue employment with the Company. In any event, he had every opportunity to raise the issue with the other shareholders prior to executing the asset purchase agreement but chose not to do so. He also had access to counsel for the shareholders if he wished to obtain advice as to his own legal position. In summary, it is not the existence of the non-competition agreement but the unforeseen consequences of committing to the agreement to which he objects.

[8] In addition, there appears to be a good business reason for the consulting contract obtained by Mr. Rotter.

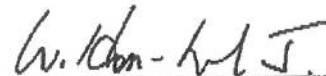
[9] Second, the applicant has not demonstrated a risk of irreparable harm that cannot be compensated for by damages. His claim is for breach of fiduciary duty in respect of two specific actions of Mr. Rotter. He does not allege that Mr. Rotter breached his fiduciary duty in negotiating a transaction that required all of the shareholders to sign a non-competition agreement. That appears to have been a necessary condition of any sale. The applicant's claims are damage claims for (1) the lack of compensation for his covenant, either from the purchaser or from the other shareholders, and (2) the applicant's *pro rata* share of the \$17,500 to be paid to Mr. Rotter.

[10] Third, the balance of convenience favours denial of the injunction. If the injunction were granted, the transaction would be enjoined pending trial. There is no suggestion that the sale price is improvident or that the transaction is not otherwise in the best interests of all of the shareholders, including the applicant. Given the Company's present financial situation, there is a serious risk of insolvency to the Company if the transaction does not close. Moreover, a failure to close the transaction would expose all of the shareholders to a damage claim by the purchaser if it chose to assert its rights under the indemnification provisions of the asset purchase agreement.

[11] On the other hand, completion of the transaction does not prevent the applicant from pursuing his claims for breach of fiduciary duty against Mr. Rotter, the legal counsel and the Company (although I have difficulty seeing the latter claim of breach of fiduciary duty). It is understood from the respondents' factum that the proceeds received on the sale are to be held in trust pending a determination of this claim.

[12] I have sympathy for the position in which the applicant finds himself. However, he signed the asset purchase agreement, including the commitment to deliver a non-competition agreement, with full knowledge that he was receiving no specific consideration for his covenant and with disclosure of Mr. Rotter's consulting agreement. His view of the financial consequences to him of that commitment has changed as a result of a better appreciation of the financial status of the Company. However, these facts do not satisfy requirements for an injunction preventing completion of the transaction.

[13] Accordingly, the requested relief is denied. The parties are at liberty to schedule a further hearing to speak to costs if they are unable to agree on this matter among themselves.



Wilton-Siegel J.

DATE: June 1, 2009