

**PROVINCE OF PRINCE EDWARD ISLAND  
IN THE SUPREME COURT - TRIAL DIVISION**

Citation: Diversified Metal v. Trivett  
2005 PESCTD 38

Date: 20050630  
Docket: S1-GS-20926  
Registry: Charlottetown

Between:

**Diversified Metal Engineering Limited**

Plaintiff

And:

**Andrew Trivett**

Defendant

Before: The Honourable Justice Gordon L. Campbell

John K. Mitchell, Q.C.	-	Solicitor for the Plaintiff
Murray L. Murphy	-	Solicitor for the Defendant

Place and Date of Hearing	-	Charlottetown, Prince Edward Island May 17, 2005
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Place and Date of Judgment	-	Charlottetown, Prince Edward Island June 30, 2005
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Supreme Court of Prince Edward Island - Trial Division  
Before: Campbell J.  
Heard: May 17, 2005  
Judgment: June 30, 2005  
(9 pages)

**INJUNCTION - Employment Contract - Restrictive Covenant - Injunction to restrain disclosure of confidential information.**

**CASES CONSIDERED:** *R.J.R. MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 (SCC); *Manitoba v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 (SCC); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504; *Doherty v. Allman* (1878), 3 App. Cas. 709 (H.L.); *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (SCC);

**TEXT CONSIDERED:** Sharpe, Robert J., **Injunctions and Specific Performance**, Looseleaf Edition, Canada Law Book Inc. (Aurora, Ontario).

John K. Mitchell, Q.C.  
Murray L. Murphy

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Solicitor for the Plaintiff  
Solicitor for the Defendant

**Campbell J.:**

[1] The plaintiff, Diversified Metal Engineering Limited (DME) is seeking an interlocutory injunction prohibiting the defendant, Andrew Trivett (Trivett) by himself, his agents, his servants or otherwise, from divulging any information or confidential information related to the business, products, process, know-how, trade secrets, inventions, developments, equipment used, developed or sold by the plaintiff, in particular, the EcoSilencer scrubbing technology, to any individual or company including Kyrstallon Limited, formerly EcoSilencer Ltd., Kittywake Developments Ltd., BP Marine Ltd., P&O Ferries Ltd. and W.S. Atkins Company Ltd.

[2] Prior to becoming involved with DME, the defendant, who has a degree in mechanical engineering and a PhD. in oceanographic engineering, worked with his father, Dr. Gordon Trivett, also an engineer, to design and build certain industrial (land based) exhaust scrubbing technology. In 1997, the defendant adapted this technology for use in marine applications. Trivett accepted a proposal from DME to build the prototype he had designed. It was called the i400 Exhaust Reactor and was installed on the CCGS Louis S. St. Laurent, one of the largest diesel powered icebreakers in the world. According to Trivett, this two month trial was widely seen to be a success. On April 7, 2000, an application was filed and on June 11, 2002 the defendant and his father were granted a patent in the United States (U.S. Patent 6,402,816 B1), hereinafter called the “Trivett Patent”, in respect of this technology.

[3] Following the building of the prototype in 1997, DME and Trivett had additional business links covering the period 1999 to 2003. Between 1999 and 2001 the defendant was involved with the plaintiff as a result of corporate agreements between the plaintiff corporation and corporations in which the defendant was a shareholder. Further, the defendant entered into an employment contract with the plaintiff for the two years from May 1<sup>st</sup>, 2001 to April 30<sup>th</sup>, 2003. DME hired Trivett to assist them in developing technology to be used in reducing sulphur and nitrogen oxide emissions from marine exhaust systems. As a result of new European emission regulations scheduled to take effect on January 1<sup>st</sup>, 2006, there are in excess of 40,000 ships worldwide that will be required either to shift from burning cheap, high-sulphur “Bunker C” fuel to burning very expensive low-sulphur refined fuel, or to install some sort of emission abatement technology such as exhaust gas scrubbers to reduce emissions to the newly prescribed acceptable levels.

[4] In January 2001, Trivett built a new experimental gas scrubber with a different interior design than the i400 Exhaust Reactor. Trivett refers to this new scrubber as the “Modified Design”. When he became employed by DME in May 2001, he gave all of his rights in the Modified Design to DME. With the assistance of Dr. Trivett and using the Modified Design, DME developed and patented (Canadian application filed November 30, 2001) a machine they called the EcoSilencer, which could be retrofitted to the exhaust system of the ship for the purpose of “scrubbing” the emissions to

reduce sulphur and other unwanted matter from the exhaust.

[5] In addition to DME having acquired all rights to the Modified Design, the employment contract the defendant signed gave exclusive ownership over any inventions or improvements made by Trivett during his employment to his employer, DME. The employment contract contains the following clause:

22. All inventions and improvements which the Employee may conceive of or make during the period of the Employee's employment by Employer relating to or connected with any of the matters which have been or are the subject of the Employee's investigations while the Employee is employed by Employer, shall be the sole and exclusive property of Employer, and the Employee will, whenever so requested by the Employer, whether during or after the Employee's employment, execute any or all applications, assignments, and other instruments which Employer shall deem necessary in order to apply for and obtain patent rights in Canada and other countries for the inventions or improvements. The foregoing obligations shall be binding upon the Employee's heirs, executors, successors and assigns.

[6] At some point during Trivett's employment with DME a question arose about any potential conflict between the gas scrubber technology that was the subject of the Trivett Patent and the EcoSilencer technology that was being developed for DME. As a result, Trivett executed a Release in which he declared that he "considers that the earlier Trivett's Patent Gas Scrubber operates on a different principle from the DME ECOSILENCER, and he does not consider that license or permission is required by DME from Drs. Trivett for the manufacture, use or sale of the DME ECOSILENCER".

[7] It appears to be common ground between the parties that the technology involved in the Trivett Patent Gas Scrubber is different than that involved in the EcoSilencer.

[8] The applicant is seeking an injunction to enforce paragraph 23 of the employment contract which requires the defendant to keep specified information "secret" or confidential both during and after his employment:

23. All information which the Employee obtains in the course of employment by Employer shall be held by the Employee as trustee for Employer. The Employee will keep secret all information relating to the business, products, processes, know-how, trade secrets, inventions, developments and equipment used, developed, or sold by Employer or any of its customers or any person, firm or corporation with whom Employer has business relations. Upon the termination of this Agreement, the Employee will promptly deliver to Employer any and all data, manuals, notes, records, plans or other documents held by the Employee concerning such business, products, processes, know-how, trade secrets, inventions, developments and equipment, and the Employee will continue to keep secret all such

information. The Employee shall not disclose any secret or confidential information or information which, in good faith and good conscience, ought to be treated as confidential, and of which the Employee became aware in the course of the Employee's employment by Employer relating to Employer, its affiliates, its employees or customers, and/or any person, firm or corporation with whom the Employer has business relations. The foregoing obligations regarding confidentiality and trade secrets shall continue beyond the end of the Employee's employment by Employer.

The employment contract was not renewed after April 30<sup>th</sup>, 2003.

[9] In 2003 while Trivett was still employed with DME, DME entered into a contract with BP Marine Limited (BPM), a subsidiary of British Petroleum LPC, and with P&O Ferries Ltd. (P&O) of Dover, England, whereby DME would build eight EcoSilencer units and deliver and install them onboard a ship owned by P&O called the "Pride of Kent", in return for which DME would be paid \$1,336,000. BPM is one of the world's largest suppliers of fuel for the shipping industry and P&O is a major international transport company and the leading ferry operator in the United Kingdom and a major consumer of BPM's fuel. Both BPM and P&O signed confidentially agreements with DME.

[10] Dr. Trivett was involved in the design and manufacture of the EcoSilencer and in the work leading to the installation and testing of the EcoSilencer in accordance with the BPM – P&O contract. During these times, Trivett met with personnel at BPM and P&O and was known to them as the "inventor" of the EcoSilencer, while DME was the owner of the invention. One of the persons with whom Trivett met was Donald Gregory, an engineer and the Director of Environment and Sustainability for BPM. Trivett had previously exchanged e-mail correspondence with Donald Gregory regarding technical issues, starting in September 2000, and met briefly with him in January 2001, near Heathrow Airport while in transit. Mr. Gregory told Trivett BPM was interested in pursuing a business relationship with him and participating in test projects in which Trivett might be involved.

[11] Negotiations between DME and BPM did not produce the desired results. According to DME, BPM appeared to be more interested in acquiring the EcoSilencer technology than in being a licensed user of DME's product. Negotiations ended with BPM indicating they would seek their "own solution".

[12] DME continued to pursue contracts with others and around April, 2004, DME representatives, including engineer Chris Skawinski, met with Dan Riis of the United Kingdom Ministry of Defence. DME personnel made a presentation to Riis on the features of DME's EcoSilencer system as it might be used by the Ministry of Defence.

[13] In July 2004, Trivett, the inventor of DME's EcoSilencer, became a contract

consultant with a British company called Kittiwake Developments Ltd. (Kittiwake) which was engaged in developing gas scrubbing technology. BPM. is also involved in this project, referred to as the “Kittiwake Project” as is another competitor of DME, namely W.S. Atkins, an international engineering firm designing a gas scrubber. Also in July 2004, the two directors of Kittiwake, including one Chris Leigh-Jones, incorporated another company which they called “EcoSilencer Limited”. They subsequently changed that company’s name to Krystallon Ltd. (Krystallon). DME later became aware (in February 2005) that Kittiwake had registered six domain names, including: EcoSilencer.com, EcoSilencer.net, EcoSilencer.org, EcoSilencer.co.uk, EcoSilencer.info, EcoSilencer.biz.

[14] In mid-April 2005, Skawinski (DME engineer) again met with Dan Riis. At this meeting, Riis made reference to the meeting that he (Riis) had four months earlier with “DME’s authorized agents” which included a further presentation on the EcoSilencer. Riis stated that the presentation was made by Krystallon (formerly EcoSilencer Ltd.) and that Trivett was part of the delegation. According to Peter Toombs’ affidavit of May 14, 2005, Riis was advised at this meeting that this joint venture (the Kittiwake Project) had purchased the rights to “redesign” and sell the gas scrubbing technology. DME had not granted any rights with respect to the EcoSilencer to any of those involved in the Kittiwake Project and none of those involved were authorized agents of DME.

[15] In mid-March 2005, Skawinski attended a European fuels conference in Paris. At that conference, Donald Gregory, BPM’s engineer, gave a power point presentation referring to the “first commercial scrubber installation” which occurred on the M.V. Pride of Kent (which was the EcoSilencer technology). According to DME, Donald Gregory led the audience to believe the technology was BPM’s and the installation was their project.

[16] As well, on April 21, 2005, DME received an e-mail from a Japanese company regarding possible solutions to environmental problems from marine exhaust gases. Part of the e-mail stated: “Last month we had small meeting with B.P. Marine and we were presented EcoSilencer by them.” Again, it appears that BPM may be holding itself out as agents authorized to market the EcoSilencer.

[17] It goes without saying that Trivett is not responsible for the actions of BPM, Kittiwake, Krystallon, Donald Gregory or Chris Leigh-Jones. However, Trivett does work for Kittiwake and DME is concerned that both Krystallon (with Trivett present) and BPM have made representations regarding what is in fact the EcoSilencer technology. They point out as well that BPM’s Gregory and Kittiwake’s and Krystallon’s Leigh Jones have both recently held executive positions in the Industrial Bunker Industry Association. Each of BPM, Kittiwake, and Krystallon have requested or engaged the services or presence of Trivett in their efforts to develop and market gas

scrubbing technology. DME's concern with respect to protection of confidential information relative to its EcoSilencer is understandable.

### **Analysis**

[18] The criteria to be applied in deciding whether to issue an injunction were set out by the Supreme Court of Canada in *R.J.R. MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, wherein the Court expanded on the statements in *Manitoba v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, which in turn had adopted the three part test set out in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504. In *R.J.R. MacDonald*, at paragraph 43, the Court said:

43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

#### **i) Serious issue to be tried**

[19] In addressing the first of the three tests, the Supreme Court of Canada has determined that the motions judge should not undertake a detailed assessment of the merits of the case, but need only be satisfied that the claim is not frivolous or vexatious in the sense that there is a serious issue to be tried. The threshold is a low one.

[20] The issue is whether the defendant ought to be restrained from divulging to anyone information or confidential information related to the plaintiff's business, products, processes, know-how, trade secrets, inventions, developments, or related to equipment used, developed or sold by the plaintiff. The issue is not, at this stage, whether such has indeed occurred. On the face of it, as a result of paragraph 23 of the contract between the plaintiff and the defendant (see paragraph 8 above) the defendant is obligated to keep confidential information secret. This is not a case where the applicant seeks a mandatory injunction and might be subject to showing that he has a "strong" prima facie case, before an injunction would be issued. However, if it was, I would be satisfied that such a case has been shown. This case does not seek to impose positive obligations on the defendant. It seeks to enforce a negative covenant regarding disclosure of confidential information. I adopt the words of Lord Cairns L.C. in the oft-quoted case *Doherty v. Allman* (1878), 3 App. Cas. 709 (H.L.) at 720, as cited in **Injunctions and Specific Performance - Looseleaf Edition**, Robert J. Sharpe, Canada Law Book Inc.(Aurora, Ontario), November 2004 at paragraph 9.10:

If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage of or injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.

[21] The facts disclose that the defendant is involved in an ongoing commercial relationship with one or more of the parties, with whom the plaintiff had a commercial relationship. The relationship involved similar or related technologies to those with respect to which the plaintiff engaged the defendant's services.

[22] It is acknowledged by the plaintiff and recognized by this Court that the defendant has pre-existing knowledge and expertise related to gas scrubbing or abatement technologies and indeed has a prior patent, none of which is the subject of this application. The defendant, however, goes beyond claiming pre-existing knowledge and argues that as a result of the plaintiff filing a patent application, all of the information relating to the EcoSilencer is now in the public domain and there is nothing to be held in confidence. While that may be true with respect to the contents of the patent application, it cannot be said to be true regarding, for example, all of the business, processes, or know-how related to such technology as was acquired by the defendant while the defendant was employed by the plaintiff.

[23] The evidence of the defendant discloses that, in his opinion, there are certain aspects of the EcoSilencer that do not work and for which additional modification or different testing would be required. Such information is clearly not part of the information provided in the patent application. Information of what further improvements or modifications would be required or beneficial in furthering this technology would fall into this category. Such information would constitute part of the "processes" or "know-how" gained during the defendant's EcoSilencer experience as an employee of DME. It appears the disclosure of such information would be prohibited by the employment contract between DME and Trivett. I am satisfied that, at minimum, the question of what information can and cannot be disclosed constitutes a serious issue to be tried. These questions are not frivolous or vexatious. The plaintiff has met the requirements of the first leg of the three part test.

## **ii) Irreparable Harm**

[24] In *R.J.R. MacDonald, supra*, the Supreme Court of Canada stated that the term "irreparable" refers to the nature of the harm suffered rather than its magnitude. It

assists the Court is assessing the “irreparable” nature of the harm to consider whether the applicant’s interest could be restored or remedied if the eventual decision on the merits went in favor of the applicant but, in the meantime, the injunction was denied. In this case we are dealing with information relating to technological advances which are highly sought after in order to comply, in the very near future, with significant regulatory changes relating to marine fuel emissions. Information giving one technology an advantage over another could be extremely valuable in creating a market advantage from which the “disadvantaged” technology might never recover. If the defendant, in reviewing any technology proposed by one of the plaintiff’s competitors, took into consideration the processes or know-how employed while working for the plaintiff, including knowledge of processes or know-how that did not succeed, then the competitor could gain an advantage from the disclosure of information which the defendant was contractually bound to keep secret.

[25] Given the importance of the potential market, the involvement of significant commercial entities and the time frame within which some sort of adjustment in operating practices is required (by January 1<sup>st</sup>, 2006), the potential harm from the disclosure of such information would, in my opinion, be irreparable.

### **iii) Balance of Convenience**

[26] The determination to be made regarding the third leg of the test is which of the parties would suffer the greater harm from the granting or refusal of the remedy pending a decision on the merits. It has been placed in evidence that the installation of three EcoSilencers on the *Pride of Kent* represented a contract value in excess of \$1.3 million. It has also been stated that there are some 40,000 ships, each potentially wanting one, two, three or more gas scrubbers in the very near future to avoid paying for very expensive low-sulphur fuel. The potential economic impact on the plaintiff is huge. The defendant is an associate professor of engineering at the University of Prince Edward Island. In addition, Dr. Trivett has developed an expertise in marine exhaust technology and has been contracted as a review consultant by Kittiwake which, in conjunction with BPM and W.S. Atkins, is developing its own marine scrubbing technology. It is the loss of this consulting contract that would impact the defendant.

[27] There is nothing to suggest that Dr. Trivett is other than an honourable and honest man interested in using his expertise to make a living and provide for his family.

[28] In weighing the balance of convenience it is appropriate to consider that, for financial gain, the defendant did sign a contract purporting to require him to keep information in confidence following his employment. If the contract stands, he is now, and has been since the commencement of his employment, compelled to retain such confidences. It is also appropriate to consider the capacity each party has to respond to

the requirement to compensate the other for losses determined to be owing following the eventual decision on the merits of the case. It would seem to be clear that the potential compensation payable to DME for any losses far exceed that payable to the defendant in respect of his consultancy contract. Finally, Dr. Trivett deposes that he has not and will not divulge any confidential information relating to DME. That being so, there would be no inconvenience whatsoever to Dr. Trivett if an injunction was issued.

[29] Having considered the foregoing, I am satisfied that the balance of convenience favors the plaintiff's position.

### **Arbitration Clause**

[30] The defendant refers to paragraph 24 of the Employment Contract, the so-called "arbitration clause" and submits that the plaintiff's action ought to be dismissed in compliance with that paragraph, which states:

24. The parties agree that they will use their best efforts to amicably resolve any dispute arising out of or relating to this Agreement. Any controversy, claim or dispute that cannot be so resolved shall be settled by final and binding arbitration in accordance with the Arbitration Act of Prince Edward Island. Any such arbitration shall be conducted in Prince Edward Island, or such other place as may be mutually agreed upon by the parties. Within fifteen (15) days after the commencement of the arbitration, each party shall select one person to act arbitrator, and the two arbitrators so selected shall select a third arbitrator within ten (10) days of their appointment. Each party shall bear its own costs and expenses and an equal share of the arbitrators expenses and administrative fees of arbitration.

[31] The defendant relies on *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 to support his proposition. In that case the majority of the Supreme Court of Canada held that, in accordance with section 45(1) of the *Ontario Labour Relations Act*, any dispute which expressly or inferentially arose out of the collective agreement were foreclosed to the courts. However, at paragraph 57, McLachlin, J. (as she then was) speaking for the majority stated:

It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. ...

[32] Neither an arbitrator nor an arbitration board can issue an injunction such as is requested in this case. It is therefore within this court's jurisdiction to entertain the current application.

### **Disposition**

[33] Having concluded that there is a serious issue to be tried, that the plaintiff would suffer irreparable harm if the injunction was not issued, and that the balance of convenience favors the plaintiff, I do hereby grant the plaintiff's motion for an injunction as requested except insofar as it applies to information clearly and unequivocally in the public domain from sources other than the defendant.

**Costs**

[34] The plaintiff shall have its costs on a partial indemnity basis. If the parties are unable to agree on costs, the plaintiff may, within 14 days of the date of this decision, submit to the court a bill of costs and brief argument. The defendant shall file a response within 10 days. I shall then fix the costs payable.

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Campbell J.

June 30, 2005