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## Clear breach, but no injunctive relief: the irreparable harm hurdle

The late 2017 decision of Justice Bielby in *Nu Image v Seager* highlights the difficulties faced by litigants seeking to restrain breaches of non-solicitation obligations. The irreparable harm limb of the *RJR-MacDonald* test remains the primary stumbling block for such motions.

In that case, Nu Image operated a landscaping business on a season or annual contract basis. The Defendant Michael Seager was a key employee at Nu Image. His employment was terminated in November 2016 prior to which he incorporated the Defendant company Superb. After his termination, Seager used Nu Image's client list to send a mass solicitation email to the Plaintiffs' clients promoting Superb.

Nu Image alleged that it suffered a \$400,000 reduction in projected turnover for the fiscal year ending October 31, 2017 and that, unlike in previous years, business lost exceeded new business by \$140,000 – all as a result of the Defendants' breaches.

Nu Image sought an interim injunction restraining any solicitation of Nu Image's clients and an order requiring the abandonment of any live contracts Superb held with the Plaintiffs' past clients. Seager did not deny that he was a fiduciary nor that solicitation using Nu Image's client list occurred. The defence turned on the lack of foundation for an injunction.

The Plaintiffs were successful in showing there was a serious issue to be tried. The Court concluded there appeared "no doubt" that the Defendants took advantage of confidential information and property belonging to the Plaintiffs.

Despite this finding, the Plaintiffs failed to overcome the hurdle of irreparable harm. The Court held that the Plaintiffs failed to show that the Defendant caused Nu Image's loss. Relying heavily on *Counterforce Inc v Volpe*, the Court placed emphasis on the 'value and size' of the customer group. Nu Image failed to show that any loss was attributable to the Defendants. The company's own principal admitted on cross-examination that losses were estimated at only \$36,000 in the year following the Defendant's departure and that Superb was not amongst Nu Image's five major competitors. These admissions were fatal to Nu Image's argument that it would be

unjust and inadequate to confine the Plaintiffs to a remedy in damages and allow the Defendants to “succeed in their unlawful manner contrary to any conception of fairness”. Injunctive relief was denied.

*Seager* highlights three significant evidentiary challenges faced by Plaintiffs to successfully establishing irreparable harm. What *Seager* demonstrates is that even where Plaintiffs can show a clear breach of confidence and solicitation of their clients, there is no assurance that an injunction will be awarded by the Court. Plaintiffs seeking injunctive relief should be mindful of the following three challenges faced in *Seager*:

**1) Attribution:** *Seager* raises the important question of how Plaintiffs are to establish irreparable harm in a crowded and competitive market. In this case, there were five major competitors in the Guelph/Kitchener area and the Defendants were not considered one of them. *Seager* suggests that even if significant impact on earnings can be quantified and there is evidence of solicitation that is not denied, a company’s inability to attribute its losses directly to the Defendants’ activities in the market will be fatal to the injunction motion.

*Counterforce*, relied on by the Court in reaching its decision, demonstrates the evidentiary difficulties that arise in proving attribution: “there is no way to determine which customers leave because of the actions of the Defendant and which leave because of competition in the marketplace.” The issue of attribution is an evidentiary hurdle for Plaintiffs. To overcome this hurdle, *Seager* suggests Plaintiffs must demonstrate a direct link between the loss and the Defendants’ activities. Anything less will reduce a Plaintiff’s chances of obtaining injunctive relief.

**2) Delay:** *Seager* underscores the importance of a Plaintiff not sitting on its hands in the face of clear breaches of confidentiality and solicitation. Uniquely, *Seager* factors delay into the presumption of irreparable harm and not balance of convenience. *Seager* suggests that absent persuasive evidence justifying the failure to move expeditiously, an 11 month delay will negate irreparable harm.

**3) Quantum of Loss:** *Seager* makes clear that the actual loss must be one that is not easily quantified in monetary terms or cannot be cured. The evidence that the loss was estimated at only \$36,000 and was much less than claimed failed to meet the *RJR* threshold.

*Seager* exemplifies the challenges faced by litigants to establish irreparable harm, even in the face of clear solicitation of the Plaintiffs' clients.

*With notes from James Saunders.*