

ONTARIO  
SUPERIOR COURT OF JUSTICE

**B E T W E E N:**

W ONE HOLDINGS CORP., GARY WATKINS  
and VERGE TRANSPORTATION INC.

Plaintiffs

- and -

GLENN VERGE, PATRICIA VERGE, RONALD  
VERGE, G.M. VERGE INVESTMENTS INC.,  
THREE FLAGS TRANSPORTATION  
SERVICES INC., INTERCONTINENTAL VAN  
LINES INCORPORATED and TIMOTHY  
GARSIDE

Defendants

) Shanti Eva Barclay, for the Plaintiffs/  
) Defendants by Counterclaim

) Kevin L. MacDonald, for the  
) Defendants/Plaintiffs by Counterclaim

**A N D B E T W E E N:**

GLENN VERGE, and G.M. VERGE  
INVESTMENTS INC.

Plaintiffs by Counterclaim

- and -

W ONE HOLDINGS CORP., GARY WATKINS,  
2030300 ONTARIO INCORPORATED, VERGE  
TRANSPORTATION INC., CARMINE  
FERRARI and ARACEL ROSARIO FLORES  
DIAZ

Defendants by Counterclaim

) HEARD: October 20, 21, 2009

**REASONS FOR JUDGMENT**

**LAUWERS J.**

[1] This is a complicated case. In a nutshell, the plaintiffs allege that the defendants have breached a non-competition clause concerning a trucking company, have breached their

respective fiduciary duties and have engaged in tortious activity. The plaintiffs claim general and punitive damages and the disgorgement of profits along with other relief, and quite inconsistently, claim rescission.

[2] The defendants are plaintiffs by counterclaim. They say that they are the real plaintiffs, and claim an oppression remedy and consequential damages, on the basis that the plaintiffs ran the trucking company into the ground, stripped its assets and shut it down without regard to the interests of minority shareholders. The defendants are anxious that the matter proceed to trial at the November sittings as scheduled.

[3] The underlying transaction is that Verge Transportation Inc. was sold by its principal Glenn Verge either directly or indirectly by G.M. Verge Investments Inc. to W One Holdings Corp., whose principal is Gary Watkins. Glenn Verge remained involved in Verge Transportation Inc. through its minority shareholder G.M. Verge Investments Inc.

[4] The Share Purchase Agreement is dated January 2, 2002. There was a separate non-competition agreement which was to continue in force for three years after the final closing date as defined in the Share Purchase Agreement to be the date on which the purchaser has all of the purchased shares transferred to it. The plaintiff takes the position that the date has not yet arrived and the non-competition clause remains in full force and effect.

[5] The plaintiffs allege that Glenn Verge's son, Ronald Verge, the principal of Three Flags Transportation Services Inc., took the main clients of Verge Transportation Inc., being Nienkamper and Kruger. They were assisted, say the plaintiffs, by Intercontinental Van Lines Incorporated and its principal, Timothy Garside.

[6] Glenn Verge and G.M. Verge Investments Inc. state that Verge Transportation Inc. was stripped of its corporate assets by W One Holdings Corp. and its fleet was sold so that it effectively went out of business as of January 2004; the non-competition clause therefore expired at the end of 2006. While I am sympathetic to the argument that the non-competition clause lapsed at the end of 2006, I am reluctant to draw an arbitrary line that results in relevant information not being seen or produced; this is an issue for the trial judge to determine.

[7] Against that briefly described factual background, the plaintiffs allege that the defendants collectively have not met their production obligations under the Rules of Civil Procedure, request a production order, and also seek an adjournment of the trial on the basis that there is too much late-breaking information to be assimilated for there to be an effective trial.

### **Refusals and Adviseements**

#### **Timothy Garside and Intercontinental Van Lines Incorporated**

[8] In respect of Timothy Garside and Intercontinental Van Lines Incorporated, the plaintiffs seek the production of the minute book for Intercontinental Van Lines, and for the period from 2002 to the present, the financial statements for the company, its general ledger, its tax returns

and the working papers of its accountants. I refuse to order that Intercontinental Van Lines be required to produce tax returns or working papers of its accountants.

[9] The defendants argue that the relationship between Intercontinental Van Lines Incorporated and the Verges is arm's length. Mr. Garside admits that he sold a "shelf" corporation, Three Flags Transportation Services Inc., to run Verge for his use and has produced documents related to that transaction already. This is a matter for the trial judge to determine.

[10] As an alternative to production, Ms. Barclay suggested that she be given access to the documents. I agree with Mr. Macdonald that it would be inappropriate to give her access to the documentation. I direct Mr. MacDonald to review the other Intercontinental Van Lines information from 2002 to the present and produce any documents relevant to the claim.

### **Glenn Verge and G.M. Verge Investments Inc.**

[11] In respect of the examination for discovery of Glenn Verge, I direct Mr. MacDonald to review the general ledger of G.M. Verge Investments Inc. for the periods 2003 to the present, and to produce any relevant information.

[12] I direct Mr. MacDonald to advise what monies were received by G.M. Verge Investments Inc. from Ronald Verge or his two companies from July 21, 2003 to the present, and to produce all documents evidencing those payments.

[13] I direct Mr. MacDonald to review the banking records for G.M. Verge Investments Inc. and Glenn Verge for the period 2003, 2004 and 2005, including cancelled cheques, bank statements and deposit slips, and to produce any that are relevant.

[14] I refuse to order the production or access to the working papers of G.M. Verge Investments Inc.'s accountants and the tax returns for Glenn Verge and G.M. Verge Investments Inc.

### **Ronald Verge, Three Flags Transportation Service Inc and Verge Logistics**

[15] In respect of the examination for discovery of Ronald Verge, I direct Mr. MacDonald to review the bank statements and cancelled cheques of Three Flags for the years 2003 to the present and produce any that are relevant. I direct Mr. MacDonald to review the detailed general ledger of Three Flags for the years 2003 to 2006 and produce any documents that appear to be relevant.

[16] On the basis that Verge Logistics is providing services to Nienkamper, which was the main customer of Verge Transportation Inc, and that Mr. Verge controls the documentation for Verge Logistics, even though it is not yet a party to the action, I direct Mr. MacDonald to review the company's general ledger for the years 2003 to 2006 and produce any relevant documentation.

[17] I direct Mr. MacDonald to review Ronald Verge's personal bank statements from 2003 to 2008, to produce any cheques and other documentation relevant to this action including any cheques to Glenn Verge for consulting or other services.

[18] I require Verge Logistics to produce invoices with respect to any work for services provided to Nienkamper up to October 2006.

[19] I refuse to order the production of an electronic version of Three Flags' accounting records and production of the working papers of Three Flags accountant. I refuse to order the production of the corporate minute books for Verge Logistics, its electronic accounting records or working papers. I refuse to order the production of the working papers of Verge Logistics' accountant.

**Motion with respect to an adjournment of the trial of the action now scheduled for November 2009 sittings.**

[20] Mr. MacDonald notes that this is the third effort by the plaintiffs to secure an adjournment of the trial and he resists. There is no doubt, however, that he has not been diligent in answering undertakings, largely because of the pressure of other business, including trials that turned out to be longer than expected. This is, of course, an occupational hazard of litigators. Regrettably, Mr. MacDonald has not been prepared to delegate one of his associates to handle this matter in his absence leading to this last minute rush.

[21] The court is alive to two competing tensions. The first is to ensure trial fairness. The second is to ensure that one party or the other is not manipulating the process for strategic advantage.

[22] I am not able in these circumstances to conclude that either party is seeking a strategic advantage, so it ceases to be a concern for me. My major concern is trial fairness. Despite Ms. Barclay's able submissions, she has not yet persuaded me that the late answers to the undertakings will affect trial fairness adversely. Rather than dismiss her motion, however, I will adjourn it without prejudice to her right to appear before me prior to the trial, on notice, to renew the request, if a document or set of documents is produced by Mr. MacDonald that appears to affect trial fairness. In the circumstances, it would also be premature to deal with the costs issues related to the adjournment motion.

[23] There is no doubt, however, that the dilatoriness of Mr MacDonald required the plaintiffs to bring the production motion and they are entitled to their costs. The costs outline does not differentiate between the two motions so I am requesting submissions in writing within 7 days.

Justice P. Lauwers

**Released:** October 22, 2009