COURT OF APPEAL FOR ONTARIO

CITATION: Dr. C. Sims Dentistry Professional Corporation v. Cooke, 2024 ONCA 388
DATE: 20240516
DOCKET: COA-23-CV-0520

van Rensburg, Zarnett and George JJ.A.

BETWEEN

Dr. C. Sims Dentistry Professional Corporation

Plaintiff (Respondent)

and

Kevin Cooke*, 6326471 Canada Inc.*,
Dr. B. Zaricniak Dentistry Professional Corporation a.k.a. Stonehill Dental

Defendants (Appellants*)

Stephen F. Gleave and Cody Koblinksy, for the appellants

Barry L. Yellin and Brianne Powell, for the respondent

Heard: April 10, 2024

On appeal from the judgment of Justice Kim A. Carpenter-Gunn of the Superior Court of Justice, dated May 11, 2023.

van Rensburg J.A.:

[1] This appeal involves the enforceability of a restrictive covenant that was agreed to in the context of the purchase and sale of a dentistry practice.

[2] Pursuant to an agreement of purchase and sale (the “Share Purchase Agreement”), Dr. Sims, through his corporation Dr. C. Sims Professional Dentistry

Corporation, purchased all of the shares of the dentistry practice of the appellant Dr. Cooke (the "Practice") for $1.1 million in July 2017. Dr. Cooke had operated the Practice in Hamilton, Ontario since 1987. He had relocated the Practice in 2005 to its current address in Hamilton (the "Premises").

[3] As part of the sale, Dr. Cooke agreed to work in the Practice as an associate for a minimum period of two years, subject to termination of the association by either party on 90 days' notice. Dr. Cooke also agreed to a non-solicitation/non-competition provision (both as part of the Share Purchase Agreement and in the form of a stand-alone agreement in identical terms) that contained a clause prohibiting him from directly or indirectly engaging in the practice of dentistry, or permitting his name to be used in such a practice, for a period of five years following his association with the Practice within a radius of 15 km of the Premises (the "Non-competition Covenant"). Finally, the parties agreed that Dr. Sims would rent the Premises from Dr. Cooke's corporation, 6326471 Canada Inc., pursuant to a lease (the "Lease"), which contained an option to purchase and a right of first refusal in favour of Dr. Sims.

[4] On December 19, 2019, Dr. Sims gave 90 days' notice of termination of the parties' association, and Dr. Cooke stopped working in the Practice at that time. A few months later, through his counsel, Dr. Cooke communicated his intention to work at a dental practice 3.3 km away from the Premises (the "Stonehill Practice"), taking the position that the Non-competition Covenant was unenforceable. He

began working at that practice in November 2020. Dr. Sims objected and commenced an action in the Superior Court against Dr. Cooke and the Stonehill Practice. After an interlocutory injunction was issued, Dr. Cooke stopped working at the Stonehill Practice in April 2021[1]. From August 2021 until April 2022 Dr. Cooke worked in a dentistry practice in Simcoe.

[5] The issues at trial concerned the enforceability of the Non-competition Covenant, the 90-day termination clause (and whether Dr. Cooke's association with the Practice was as an employee or dependent or independent contractor and had been effectively terminated), and the option to purchase and right of first refusal in the Lease. All of the issues were decided in Dr. Sims' favour.

[6] The sole issue in the appeal is whether the trial judge made a reversible error in concluding that the Non-competition Covenant was reasonable as between the parties and therefore enforceable according to its terms.[2]

[7] For the reasons that follow I would dismiss the appeal.

Alleged Errors

[8] Dr. Cooke contends that, in concluding that the Non-competition Covenant was reasonable as between the parties (in terms of its territorial scope, duration

[1] The interlocutory injunction motion was heard on January 15, 2021, with the decision released on April 15, 2021. The action as against the Stonehill Practice was dismissed on consent on November 2, 2021.
[2] There was no issue in the court below, nor is there any issue on appeal, as to whether the Non-competition Covenant is unreasonable as a restraint of trade against public policy.

and the services covered), the trial judge erred in three ways: first, she reversed the burden of proof in suggesting that Dr. Cooke had the onus of proving that the Non-competition Covenant was unreasonable; second, in determining that the duration of the Non-competition Covenant was reasonable, she ignored evidence of the expectations of the parties that Dr. Sims would work for another three to five years and would retire with the transition of patients being complete; and third, in determining that the geographic scope of the Non-competition Covenant was reasonable, she ignored the valuation of the Practice that had been prepared by a professional valuator for the purpose of the sale and provided to Dr. Sims (the "Valuation").

Discussion

A. The trial judge did not reverse the burden of proof

[9] First, in support of the argument that the trial judge reversed the burden of proof, Dr. Cooke points to a passage in the trial judge's reasons where she referred to the Supreme Court's decision in *Payette v. Guay inc.*, 2013 SCC 45, [2013] 3 S.C.R. 95 as authority that, "[i]n a commercial context, the restrictive covenant is deemed to be lawful unless it can be shown to be unreasonable" (see *Payette*, at para. 58).

[10] Dr. Cooke contends that the statement in *Payette* should not have been relied on because the case arose in the context of the *Civil Code of Québec*, S.Q.

1991, c. 64 (the "*Civil Code*"). He relies on the continued authority of decisions of the Supreme Court and this court to the effect that the onus is on the party seeking to enforce a restrictive covenant (whether in the context of employment or the sale of a business) to prove that it is reasonable as between the parties: see, for example, *Elsley v. J.G. Collins Ins. Agencies Ltd.* [1978] 2 S.C.R. 916, at p. 928; and *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.), at p. 226. Dr. Cooke notes that, after referring to the statement in *Payette*, the trial judge observed that he had not provided evidence that the Non-competition Covenant was unreasonable, and he submits that she therefore decided the case against him based on a reversal of the burden of proof.

[11] I do not agree with this submission. In my view the trial judge did not err in citing *Payette* as a relevant and binding authority. *Payette* has been followed by this court in *MEDIchair LP v. DME Medequip Inc.*, 2016 ONCA 168, 129 O.R. (3d) 161, where Feldman J.A., citing *Payette*, stated at para. 33 that, "courts will give more scrutiny to the reasonableness of a restrictive covenant in the employment context, while applying a presumption of validity to such clauses where they have been negotiated as part of the sale of a business". See also *Kerzner v. American Iron & Metal Company Inc.*, 2018 ONCA 989, 51 C.C.E.L. (4th) 1, at para. 56. In any event, the trial judge engaged in a comprehensive review of the reasonableness of the Non-competition Covenant, that did not depend for its determination on the burden of proof.

[12] The issue in *Payette* was whether a restrictive covenant was part of an employment contract, and therefore subject to article 2089 of the *Civil Code*, which specifically provides that the onus is on the employer to prove the reasonableness of a restrictive covenant contained in an employment contract, and article 2095, which precludes an employer from relying on a restrictive covenant in certain circumstances. In the course of his reasons, Wagner J. (as he then was) referred to *Elsley*, *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, and *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865 as recognizing that the rules applicable to restrictive covenants relating to employment differ depending on whether the covenants are linked to a contract for the sale of a business or to a contract of employment. He referred to the "cardinal rule" that parties negotiating the sale of assets have greater freedom of contract than parties negotiating a contract of employment, and that the common law rules for restrictive covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a commercial contract: at paras. 38-39. Wagner J. noted that, although *Elsley*, *Shafron* and *Doerner* were decided under the common law, the same principles apply in Québec civil law.

[13] The impugned comment by Wagner J. follows from the recognition that the parties to a commercial agreement for the purchase and sale of a business are best placed to determine what is reasonably required to protect the purchaser's

interest in the goodwill. This is consistent with statements that restrictive covenants in commercial transactions which are intended to protect a purchaser's interest in the goodwill of the acquired business attract less scrutiny than restrictive covenants in employment contracts: see *Shafron*, at para. 23; *Elsley*, at p. 924. See also *Tank Lining*, a case relied on by Dr. Cooke, where, while recognizing that the party seeking to enforce a restrictive covenant has the onus to establish it is reasonable in the interests of the parties, this court went on to state that, "[w]hen two competently advised parties with equal bargaining power enter into a business agreement, it is only in exceptional cases that the courts are justified in overruling their own judgment of what is reasonable in their respective interests": at p. 225.

[14] Accordingly, the trial judge was correct to recognize the central importance of the commercial context for the Non-competition Covenant. Dr. Cooke provided Dr. Sims with the Valuation, which had been prepared for the benefit of prospective purchasers, that among other things, valued the goodwill of the Practice and anticipated a five-year restrictive covenant covering a reasonable radius. The parties' letter of intent specified that there would be a restrictive covenant of five-years for a 15 km radius, and the specifics of the non-solicitation/non-competition obligations of Dr. Cooke were set out in the Share Purchase Agreement and the standalone document he signed.

[15] The trial judge also properly considered as part of the commercial context the fact that the parties were represented by legal counsel and had equal

bargaining power when they negotiated the terms of the transaction, and the evidence of Dr. Cooke's solicitor that he had seen nothing wrong with the scope and duration of the Non-competition Covenant at the time the parties entered the transaction.

[16] In these circumstances, where the parties' agreement is the best and most reliable expression of their joint intention, it made sense to treat the Non-competition Covenant as presumptively legal. The trial judge's analysis did not however end there. As discussed in the balance of these reasons, the trial judge properly considered all of the evidence and arguments that were before her in determining whether the Non-competition Covenant was reasonable in terms of its geographic scope, its duration and the activities covered.[3]

B. The trial judge did not err in holding that the duration of the Non-competition Covenant was reasonable

[17] As his second argument Dr. Cooke asserts that, in determining that the duration of the Non-competition Covenant was reasonable, the trial judge ignored the evidence of the parties' intentions in entering the Share Purchase Agreement.

[3] In oral argument Dr. Cooke's counsel renewed an argument that was apparently made at first instance that the scope of the prohibited activities in the Non-competition Covenant was too broad and should have been limited to his working in a family dental practice. The trial judge did not address this argument directly in her reasons, for good reason. The description of the prohibited activities was not unreasonable in the circumstances. While competition might well have come from Dr. Cooke continuing to work as a dentist, the scope of prohibited activities reasonably captured those Dr. Cooke might engage in to trade on the goodwill of the Practice or to otherwise use its goodwill for the benefit of third parties.

In particular, Dr. Cooke points to his evidence that he expected to work in the Practice and then to retire in three to five years. He contends that, by that point the transition of patients of the Practice would have been complete, and that in the meantime the non-solicitation clause and the "patient fee" clause (that prohibited Dr. Sims from treating directly or indirectly any "active patient" of the Practice and imposed a fee of $750 for each patient treated in violation of the prohibition) were sufficient to protect Dr. Sims' interest in the goodwill.

[18] Again, I disagree. Although courts "regularly find" restrictive convents with a duration of five years to be reasonable, "[e]verything depends on the nature of the business, and each case must be assessed in light of its own circumstances": *Payette*, at para. 64. The trial judge accepted Dr. Sims' evidence that the five-year period reflected the reality that it takes several visits for a patient to build a trusting relationship with their dentist, and that for those who see their dentist annually, it will take a long time for the relationship to build.

[19] Whether or not Dr. Cooke expected to work in the Practice and to retire within three to five years, and whether or not Dr. Sims understood that this was his expectation, the deal that they concluded did not provide for any guaranteed period of association (as even the planned two-year period was subject to termination on notice) or for Dr. Sims to retire within a certain period of time. Nor am I persuaded that the other provisions of the Share Purchase Agreement would ensure that the patients of the Practice (who had been treated by Dr. Cooke) would be transitioned

to Dr. Sims' practice within the first two years or during the period of Dr. Cooke's association. Indeed, the trial judge referred to Dr. Cooke's evidence that, at the end of the two-year period, when his association was terminated, he knew that more than 100 patients intended to leave the Practice, and that if he moved nearby, it would be very easy for those patients to follow him because of the relationship that already existed.

[20] In any event, irrespective of Dr. Cooke's retirement or other plans, he had sold the Practice, including its goodwill, to Dr. Sims. The issue was the reasonableness of the Non-competition Covenant in protecting the business that had been sold from competition by Dr. Cooke, both in his continuing to work as a dentist, and otherwise in engaging in activities that would trade on the goodwill of the business. The purpose of a restrictive covenant is to protect the goodwill of a business that is sold from being devalued by the vendor's own actions – in essence to ensure that the vendor does not derogate from his grant. Goodwill encompasses not only the existing customer base but also the ability to attract new patients from within the area served by the business or its "marketplace": see *Tank Lining*, at p. 226.

C. The trial judge did not err in finding that the geographic scope of the Non-competition Covenant was reasonable

[21] Third, I consider Dr. Cooke's argument that the trial judge erred in failing to consider the Valuation, which he suggests is determinative of whether the geographic scope of the Non-competition Covenant extends beyond what was required to protect the goodwill that was transferred.

[22] As a general rule, the territory to which a reasonable restrictive covenant applies is limited to that in which the business being sold carries on its trade or activities as of the date of the transaction: *Payette*, at para. 65. Dr. Cooke contends that the Valuation proves that the Non-competition Covenant is broader than is necessary to protect the legitimate interests of the respondent as the purchaser of the Practice. He points to the definition of the "trading area", which is described in the Valuation as "90% of patients from [the] Greater Hamilton [A]rea, Dundas, [and] Ancaster", and he contends that the 15 km radius, while excluding part of Hamilton serviced by the Practice, covers part of Burlington, Aldershot and Caledonia, which are markets unconnected to the "trading area".

[23] I do not agree with this argument. The trial judge was required to determine whether the geographic scope of the Non-competition Covenant was reasonable, not whether it mapped exactly to the trading area that was described in the Valuation. The Non-competition Covenant restricted where Dr. Cooke could locate

to practice dentistry. It is not uncommon for the territorial scope of such a restrictive covenant to be defined in terms of a radius, which reflects how far a customer might be willing to travel to access services. The trial judge noted that a 15 km radius had been considered appropriate in other cases involving dental practices, and that Dr. Cooke had signed a restrictive covenant with a 15 km radius when he worked in the Simcoe practice. In finding the scope of the Non-competition Covenant to be reasonable, the trial judge observed that it was necessary to include Stoney Creek (which is part of Hamilton) and Ancaster, which were areas served by the Practice.

[24] The Valuation does not, as Dr. Cooke asserts, make it clear that the scope of the Non-competition Covenant was unreasonable. The valuator assessed the value of the goodwill of the Practice (estimated at $741,455) as including the limitation of competition. He assumed there would be an association for a pre-determined period of time “to provide a smooth transition and ensure maximum patient retention”, and an agreement by the vendor not to carry on or be engaged in the practice of dentistry “within a reasonable radius of [the Practice] for a period of time of no less than five years”. In other words, the Valuation itself contemplated a five-year restrictive covenant over a “reasonable radius”.

[25] Nor would I accept the submission that the trial judge erred in finding that the 15 km radius was reasonable when it “swept in” the protection of Dr. Sims’ other businesses, including those he acquired after purchasing the Practice. In

determining whether the geographic scope of the Non-competition Covenant was reasonable, the trial judge focused on the marketplace of the Practice that was sold, not on Dr. Sims' other business interests. She correctly stated that "[i]t is clear that the reasonableness of the restricted area is determined by reference to the business sold not the business of the purchaser", and there is no indication that she departed from this principle. Indeed, toward the end of her reasons the trial judge specifically stated that the Non-competition Covenant was not protection against competition in general as suggested by Dr. Cooke, but that it was very specific, and that it was not relevant how many practices Dr. Sims had at the time the contract was entered into.

Disposition

[26] For these reasons, I would dismiss the appeal, with costs payable to the respondent in the agreed all-inclusive amount of $30,000.

Released: May 16, 2024 "K.M.v.R."

"K. van Rensburg J.A."
"I agree. B. Zarnett J.A."
"I agree. J. George J.A."